THE INTERPLAY OF JUDICIAL REVIEW AND FEDERALISM CHOICES IN BRAZIL AFTER THE REPUBLICAN CONSTITUTION OF 1988

BY

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DISSERTATION

Submitted in partial fulfillment of the requirements for the degree of Doctor of Science of Law in Law in the Graduate College of the University of Illinois at Urbana-Champaign, 2015

Urbana, Illinois

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This thesis investigates how federalism choices adopted by the Brazilian Constitution of 1988 impacts judicial review. In order to address this central question, this work was structured in three sub-questions designed to study specific federalism constitutional options pertinent to all distinct levels of Brazilian federalism, namely: federal union, states, and municipalities. The first sub-question targets the inclusion of local governments as autonomous constitutional agents. It considers annexation law as a proxy for local powers, comparing the decisions of the Brazilian Supreme Court (STF) to its U.S. counterpart (U.S.S.C.) in annexation cases. We conclude that the inclusion of municipalities in the Constitution of 1988, as of today, is not necessarily an example of successful design. We also find, counter-intuitively, that the USSC has been more active in the protection of rights than the STF. The second sub-question refers to the constitutional option granted to state supreme courts in creating specialized panels – and if differences across Brazilian state supreme courts when deciding cases of abstract review can be attributed to specialization. Using empirical methods, we find some evidence that the existence of specialized panels matters for the likelihood and rates of dissent as well as duration of procedures, but not for other variables. The final sub-question addresses the constitutional mechanisms of appointing justices to the Brazilian Supreme Court (which was transplanted from the U.S. Constitution) and its consequences for the adjudication of federative conflicts. Our research focuses on the alignment between revealed judicial preferences when adjudicating cases and presidential appointments in Brazil. We find some empirical evidence that judicial preferences do matter, but the patterns of politicization are weaker than in other similar courts. Our findings are sufficient to dismiss legalist accounts as well as accounts based on the Roman-Germanic tradition. Federal dynamics and constitutional politics are intrinsically related to the three sub-sets of problems proposed and are considered in light of political economy factors.

Key words: Brazil, Constitution of 1988, federalism, judicial review, constitutional review, political economy, federative conflicts, courts, Brazilian judiciary, court specialization, state supreme courts, abstract review, constitutional courts, constitutional politics, constitutional design, local government, municipalities, annexation law, comparative constitutional law, comparative law.
Bruno: this thesis is dedicated to you, wholeheartedly.
ACKNOWLEDGEMENTS

I am indebted to several people and institutions. I am particularly grateful to: my patient advisor, Professor Nuno Garoupa, for his important advice with this thesis and beyond, for challenging me to see the Law from a different perspective; Dean Charlotte Ku, whose efforts and incommensurable support made (and makes) all the difference; Professor Laurie Reynolds, for her valuable guidance and passion about local governments; Professor Ginsburg and Professor Cheibub: for the genuine interest in this project as well as for the precious comments; Dean Hamilton, Dean Lawless, and Professor Dharmapala: for pertinent insights about this work; Carlos Cesar Borromeu de Andrade, whose example of commitment will always be inspiring; Professor Murray Tabb, whose help made the task of reconciling the work in this thesis with teaching at the College of Law of the University of Oklahoma less difficult; Professor Antonio Porto, for receiving me at Fundação Getúlio Vargas in Rio de Janeiro, during my field research for the TINKER Graduate project; the dedicated members of the Office of Graduate and International Legal Studies: Christine Renshaw, Ann Perry, and Athena Newcomb.

I would like to acknowledge the financial support offered by the College of Law of the University of Illinois at Urbana-Champaign; the Graduate College, through the Research Travel Grant of this university; and the TINKER Graduate Summer Research, which was so instrumental in advancing chapters two and three of this thesis.

I also would like to distinguish and thank: my parents, Maria de Lourdes and Hercílio, for being supportive of my choices, for being strong, for overcoming the saudade; my brother, Alexandre, for cheering for me; Regina Yolanda, for shedding light beyond what was transitory; Luiza, for the text materials, for always being close, for the friendship and dreams shared; Eli, for the English review, for calming me down when the New York Bar, this thesis or life became too big, for the (many) exceptions granted to your no drama policy; Taisa and Ricardo: for the encouragement, for our unforgettable talks at Severino; Rayane, for the generous assistance that extrapolates research; Isabel and Adam, for being with me no matter how much snow was outside, how long my flights were delayed, and for whining (and laughing) about it with me. Finally, to my companions in this journey: Aisi, Romin, Carlos, and Kanok – many thanks.
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CHAPTER ONE
INTRODUCTION

This thesis investigates how federalism choices adopted by the Brazilian Constitution of 1988 impacts judicial review. In order to address this central question, this work was structured in three sub-questions designed to study specific federalism constitutional options pertinent to all distinct levels of Brazilian federalism (federal union, states, and municipalities). The first sub-question targets the inclusion of local governments as autonomous constitutional agents. It considers annexation law as a proxy for local powers, comparing the decisions of the Brazilian Supreme Court to its U.S. counterpart in annexation cases. The second one refers to the constitutional option granted to state supreme courts in creating specialized panels – and if differences across Brazilian state supreme courts when deciding cases of abstract review can be related to specialization. The final inquiry addresses the constitutional mechanisms of appointing justices to the Brazilian Supreme Court (which was transplanted from the U.S. Constitution) and its consequences for the adjudication of federative conflicts. Federal dynamics and constitutional politics are intrinsically related to the three sub-sets of problems proposed.

Two main motivations exist for studying the impact of the federalism choices adopted by the Constitution of 1988 to judicial review. First, there has been little research on the subject based on the interdisciplinary approach this thesis utilizes. Despite the influence of the U.S. model of federation and judicial review, the interaction between both are under-analyzed in Brazil. The second motivation considers that even when federalism and judicial review are specifically analyzed, the discussion tends to be limited to either topic. Even more problematic is the restriction of the debate to mere legalist accounts. This project departs from that tradition and concentrates in specific intersections motivated by the peculiar federal pact that currently exists in Brazil, with its hybrid system of judicial review (admitting both abstract and concrete review by state supreme courts as well as by the Brazilian Supreme Court).

This thesis unites theoretical and empirical legal methods. From a methodological standpoint, the empirical work based on social sciences developed in the United States is recent and rare in the still incipient quantitative legal research in Brazil. The first four
chapters establish the necessary foundation for the development of our investigation. Each of the remaining chapters targets one of the sub-questions above referred. Chapter five specifically uses the comparative method to study the Brazilian reality in light of the U.S. federalism and decisions of the U.S.S.C. Overall, this project considers the broad influence of the U.S. federal system to the Brazilian one. This influence is relevant because the United States was the main inspiration for Brazilian federalism. The U.S. conception of judicial review significantly affected Brazil, where every single judicial organ is authorized to exercise judicial review.

The principal interest is to answer our central question based on considerations of political economy and the interdisciplinary conceptions inherent to such field. It is commonplace to state that the paper accepts it all.\(^1\) Constitutional texts may have the same language and completely different interpretations. Culture, society, political organizations (including party systems), historical experiences, and institutions are relevant factors leading to such distinct understanding of what might be identical constitutional provisions. In this scenario, several factors (for instance: the Brazilian Portuguese colonization, different dictatorships, political conflicts, the influence of the German legal doctrines describing the neutrality of the judiciary) contribute to a culture of legalism. They also foster the general denial of politicization of courts.\(^2\)

Accounts based on political economy understand federalism choices in Brazil as being directly related to the concentration of powers in the federal union, which has been a distinct trait of the Brazilian experience. The democratic Constitution of 1988 tried to balance this scheme, but still displays a significant number of exclusive powers and competences attributed to the union. Those accounts, by considering political and economical forces, their impact on institutions, and historical experiences (such as the colonial administration and the transition from the military ruling), are instrumental to our assessment.

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\(^1\) As affirmed, in 1848, by Ferdinand Lassalle, *Qu’est-ce qu’une Constitution?* (Paris: Sulliver, 1999), at 61.

\(^2\) Theoretical studies emphasize the Brazilian system as an insufficiently autonomous social system or as an incompletely rational system. The systems’ failures, thus, have generally been attributed to “intentionally political misuse of institutions or to an institutional design incapable of providing the right incentives for people to comply with modernity’s requirement.” See: José Reinaldo de Lima Lopes and Roberto Freitas Filho, “Law and Society in Brazil at the Crossroads: A Review,” *Annual Review of Law and Social Science* 10 (2014): 91–103, at 96.
Political economy insights shed light on the uniqueness of the federal scheme designed by the current Constitution and their practical consequences. Among those: a Senate that is aligned with the President in office; state supreme courts which may determine, at their own discretion, if specialized panels should be created, providing some measure of autonomy to the state judiciary. Such accounts illuminate, in particular, why Brazil rejected the U.S. federal system of judicial review (concrete, in the vast majority of the cases) and the U.S. federalism (based on two distinct spheres of power, with states being very empowered). As the balance of powers shifted from the federal to regional and local forces during the writing of the Constitution of 1988, new constitutional provisions elevating local governments to federal actors (along the states and the federal union) were included.³ Political forces matter. At the same time, the Constitution extended the cases of abstract review, fostering democratic participation.

In such context, legal doctrines cannot be used as a proxy to political affiliations in Brazil. The demarcation of ideology, thus, is not evident – in a significantly different arrangement than the existing scenario in the U.S. The legal issues debated in Brazil are framed differently than along party lines, because Brazilian legal doctrines are nonpartisan. Moreover, the fact that Brazil has a multiparty system with high fragmentation and a strong Presidency contributes to additional difficulties in interpreting regressions – in a sharp contrast with the strong U.S. bipartisan system. In addition, Brazilian President and Congress are politically aligned, in the overwhelming majority of cases.⁴

The title of this project aims to define the scope of our research. It is no secret that judicial review and federalism are complex topics on their own, with each one easily being object of several dissertations, conceivably. Hence the need to limit our study to the interplay between federalism and judicial review, considering specific influences that one

³ For a recent study arguing that Presidents do not need to bargain on a case by case basis to approve legislation, and discussing evidence that governors cannot undermine the executive influence in Congress: José Antônio Cheibub, Argelina Figueiredo and Fernando Limongi, “Political Parties and Governors as Determinants of Legislative Behavior in Brazil’s Chamber of Deputies, 1988–2006,” Latin America Politics and Society 51 (2009): 1–30, at 23–25.

⁴ Despite the multiparty system, parties are disciplined, with the President having vast approval of the bills proposed: Argelina Cheibub Figueiredo and Fernando Limongi, “Presidential Power, Legislative Organization and Party Behavior in Brazil,” Comparative Politics 32, N. 2 (2000): 151–170, at 163.
may have on the other. Judicial review is conceptualized broadly in this research, encompassing the power of the judiciary to review the constitutionality of legislative acts, statutes, executive decrees, and regulations, among others. This review power is exclusively exercised by the judicial branch. Judicial review has been traditionally marked by the notion of potential encroachment with the political branches. It has also been embedded in federalism concerns, namely, vertical division of powers.

Chapter two addresses the federalism pact in the Brazilian constitutional order, concentrating in the relevant background for the main inquiries advanced in this thesis. It presents a historical account of Brazilian federalism, being centered on the division of powers between the federal union, the states, and municipalities, as implemented after the Constitution of 1988. It also confronts the general competences of the Senate and the pertinent constitutional provisions for nomination and approval of justices of the STF.

Chapter three discusses judicial review, focusing on the case law of the Supremo Tribunal Federal – the STF, i.e., the Brazilian Supreme Court – after the Constitution of 1988. It examines the general requirements for the constitutional actions that appear in the remaining chapters: direct action of unconstitutionality, declaratory action of constitutionality, and direct action of unconstitutionality by omission. Jurisdiction, standing, preliminary injunctions, and the composition of the docket of the STF are examined, considering the Court’s institutional role after the Constitution of 1988.

Chapter four provides an overview of the main topics concerning federal judicial review in the United States. It refers to similar legal issues addressed in chapter three, such as general jurisdiction of the U.S. Supreme Court, standing and justiciability doctrines. It surveys the different conception of separation of powers and the consequences for different models of judicial review. The chapter concludes with the most recurrent arguments for the existence of abstract review in the United States.

In chapter five, we venture in a comparative research about how the Brazilian Supreme Court and its U.S. counterpart decide annexation cases. Chapters two, three, and four of this thesis were instrumental in our understanding of both Supreme Courts. We examine the potential effects of the exclusion (or inclusion) of local governments in the Constitution, using annexation laws as proxy for local powers.
Our contribution was first to map the main issues decided by the STF as well as by the U.S. Supreme Court with regard to annexation. In general, we searched for potential common topics that might have existed. In particular, we consider how each Supreme Court used judicial review in light of the local powers attributed to each level of the federation in the context of annexation laws and related lawsuits judged by each Supreme Court. We survey the interactions among the relevant actors: each Supreme Court, the regional and local legislatives, local forces, and the national legislative. The historical, political and institutional contexts are also examined being mindful that the Brazilian Constitution of 1988 belongs to the third wave of democratization.5

Another contribution was the investigation referring to constitutional design, namely, if explicit provisions of powers and competences, as in the Brazilian case, were a successful experience. Finally, we compare how both Courts addressed the protection of fundamental rights – a protection that has been perceived as the core purpose of constitutionalism itself, and among the principal reasons of the current existence of constitutional review.

Chapter six was written in light of the theoretical assumptions of chapters two and three. The chapter in comment addresses Brazilian judicial review at the state level, exploring possible variations in terms of constitutional review across those courts. We do note the use, at this point, of the expression constitutional review, because our research was centered on the abstract review exercised by the state supreme court or by a specialized court panel.

Our study targets possible differences between decisions made by a nonspecialized court en banc or by a specialized court panel (órgão especial, i.e., special organ), the latter being frequent in the larger states. Importantly, the Brazilian Constitution of 1988 did not determine which states could have or not such specialized panels, granting discretion to each state supreme court to decide the best path in their own state.

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5 Noting that the U.S. Constitution was a pioneer in the concept of written constitutions and related concerns with institutional design, and emphasizing the third wave constitutions began after 1975: Tom Ginsburg and Rosalind Dixon, Comparative Constitutional Law (Northampton: Edward Elgar, 2011), at 2–3.
An original dataset was constructed to empirically test if there are significant variations in the decisions regarding abstract review across the Brazilian states. If so, our inquiry expands to include whether or not those variations can be attributed to the existence of specialized panels. The dataset comprises 630 cases of abstract review judged between January 1, 2006, and December 31, 2010, across twenty-five state supreme courts of the Brazilian federation.

In the view of the above, the main contributions of this study for the interplay between judicial review and federalism are threefold. First, we studied how different state courts in Brazil are exercising their abstract review power, and how distinguished such review is in practice. Second, the Constitution of 1988 has given a considerable discretion to states with regard to the creation of the órgãos especiais. The manner in which this option has been exercised, and where it has been exercised, is considered in light of the literature on court specialization. Third, we investigate the influence of the STF – particularly after the Constitutional Amendment 45 of December of 2004, with provisions of binding effects of STF decisions – on state supreme courts. Specifically, we analyze the number of citations made by state supreme courts to the STF, and among other courts.

Chapter seven was also developed considering the foundation established in chapters two and three, specifically. It studies the decisions of the Brazilian Supreme Court from 1988 to 2010 when a potential federal conflict was judged. We test the extent to which political variables can explain judicial behavior in the Brazilian Supreme Court (STF), when dealing with conflicts between the federal government (namely, the union) and the states. One view argues that we should expect some alignment between the political preferences of the justices and the success of the union primarily due to the appointment mechanism. The opposite view suggests that there should be no systematic alignment between the political preferences of the justices and the success of the union as a consequence of political insulation.

In this scenario, we investigate the interaction between federalism and judicial review. The judicial review exercised by the Brazilian Supreme Court (STF) was expected to “police” the states, while controlling the union only occasionally. Furthermore, judicial review is, arguably, a way to reach equilibrium between state and federal spheres of powers. Therefore, our search was restricted to cases about potential
federative conflicts. We built an original dataset encompassing different types of constitutional actions judged between 1988 up to 2010 by the STF. Our research focuses fundamentally on the alignment between revealed judicial preferences when adjudicating cases and presidential appointments in Brazil.

With regard to this last sub-question, this thesis offers three main contributions. First, we constructed a dataset that encompasses abstract and concrete actions in light of potential federative conflicts. Second, we found some evidence that judicial preferences do matter, contradicting previous findings grounded on mostly abstract review. Nevertheless, the patterns of politicization observed are weaker than in other similar courts. Third, from a theoretical standpoint, the fact that politicization was verified is an important contribution to the deconstruction of judges as completely impartial actors. This is innovative in the Brazilian legal literature, due to the dogma of judicial neutrality. This neutrality is based on the Roman-Germanic tradition, more specifically, in the Austrian-Germanic dogmatic as influenced by Kelsen. It generally contends that judges merely apply the law (the manifestation of the will of the people through the legislative branch) to a concrete case, with constitutional judges acting as negative legislators. Accordingly, our findings do not validate the traditional understanding of the judicial activity as dissociated from the political sphere.
Chapter Two

Relevant Brazilian Federative Choices

I. Introduction

The present chapter provides an overview about the relevant constitutional provisions for our study about the impact of federalism choices implemented by the Constitution of 1988 to judicial review. Our study is based on the notion that federalism choices have changed during Brazilian history. Specific power dynamics exist and, from time to time, there is discontinuity with the previous arrangement.\(^6\) Notwithstanding this notion, there is and has always been a strong concentration of powers in the federal union.

The Brazilian Constitution of 1988 defines Brazil as a democratic republic founded on the rule of law and divided in states, municipalities and the federal district.\(^7\) It determines that all powers (executive, legislative, and judiciary) are independent and harmonic.\(^8\) The Brazilian federation is divided in twenty-seven states and the federal district. Brazil, as the United States, has a dual system of jurisdiction, encompassing state and federal courts. There are no local courts in Brazil, however, unlike in the United States.

Due to the concentration of powers and competences in the federal union, state and federal systems deal mainly with the same laws, which are national laws. Criminal law and criminal procedure law, civil law and civil procedural law, national code of taxes, traffic law, labor law, commercial law, maritime law, military law, immigration law, and energy law—among others—are all legislative monopoly of the federal union.\(^9\) Usually, the distinction between a crime being prosecuted in federal courts or state courts revolves around the person or the affects involved. Along those lines, the distinction

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\(^6\) For the importance of federalism and its impact in shaping the Brazilian political system, see, e.g.: Leandro Piquet Carneiro and Maria Herminia Tavares de Almeida, *Shaping the Local Political Arena in Federalist Brazil*, May 28, 2007, paper available for download at SSRN: http://ssrn.com/abstract=1411486, last accessed September of 2011.

\(^7\) Article 1 of the Constitution of 1988.

\(^8\) Article 2 of the Constitution of 1988.

between federal and state jurisdiction falls either on the nature of the revenue, the public officials or public enterprises litigating. Thus, the Brazilian Supreme Court (the STF) sits at the apex of pyramid that encompasses federal and state courts. Each state in the federation has its own state supreme court (also referred as state court of appeals).

This chapter addresses the constitutional provisions that were created with the goal of reducing inequalities among the Brazilian states. The chapter also explains the unbalanced representation of the states in the Senate, and the lack of such representation from municipalities. All of those issues are pertinent to the annexation of municipalities and our comparison with the U.S. constitutional design, both topics developed at chapter five.

The division of powers and the creation of the STF as a Supreme Court in Brazil are examined in this chapter. This study contributes to our understanding of chapter six, which discusses the existence of variation measures across Brazilian state supreme courts, focusing on whether or not those differences can be related to the existence of specialized panels. Accordingly, chapter six is grounded on the assumption that the existence of specialized panels (and the constitutional discretionary choice left to the state supreme court in creating such panels) is a direct consequence of the self-determination principle assured to the state judiciary, as a result of the federal choice that allocated those competences to the states.

The current chapter specifies the divisions of powers between the union and the states, providing the necessary background for the understanding of the cases litigated as federative conflicts. Those conflicts and how the Brazilian Supreme Court decided them, from 1988 to 2010, are addressed in chapter seven.

This chapter starts with a historical perspective of federalism in Brazil, followed by the federalism clause in the Constitution of 1988, which is further detailed in Part IV, when the competences of each of the federative spheres is addressed. Part V surveys the main federalism choices relevant for this thesis.

II. HISTORICAL PERSPECTIVE

We start with the colonial period, during which Brazil was part of the ultra-centralized Portuguese administration. Further, we examine the loose federalist
arrangement that followed in the Republic and the alternation between democracy and dictatorships.

The constitutional history of Brazil has been traditionally divided in three periods: Colonialism (1500-1808), Imperial (1808-1889), and Republic (1889-1988). After 1988, we have the current phase: the Modern Republic. From 1822 until 1889, there has been the so-called federalist sentiment. Federalism was an ideal that was on the verge of becoming concrete during several legislative and political conflicts. Since the “capitanias hereditárias” – with its autonomous interests of power, their customary law and autonomy of the municipalities – it was possible to verify federalism ambitions. There were several federalist revolts, the most intense among them being the Revolta dos Farrapos, when the Piratini Republic in the South of Brazil (1835-1845) was founded.

Nevertheless, those federalist ambitions have been severely punished by the Empire, due to its centralized power. Thus, the fall of the Empire was a result, in large extent, of the federalism movement that took place due to the economic development of the provinces that were anxious for more autonomy. The adhesion of Rui Barbosa (the main contributor of the Brazilian Constitution of 1891, and admirer of the American constitutional paradigm) was crucial to the end of Monarchy.

By the end of the 1880s, the U.S. federal experience seemed to be very successful for a country with vast geographical dimensions like Brazil. The federalism debate was the center of the discussions at the time prior to the Constitution proclamation (1890-1988).

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10 Idem, at 410.

11 This was the case, despite the fact that municipalities were instrumental for collecting revenues for the Crown, as noted by: Raymundo Faoro, Os Donos do Poder: Formação do Patronato Político Brasileiro (São Paulo: Globo, 2001), at 170.

12 José Afonso da Silva, Constitucionalismo Federal no Brasil nos Últimos Setenta Anos, last accessed February, 2011, and available online at: http://www.biblio juridical.org/ libros/ 2/648/21.pdf , at 411, cites the speech of one of the main leaders of this revolution: Bento Gonçalves. In his speech, he urged that it was time for the king to be banished from the lands of Santa Cruz, in order to allow the South to strengthen the federal relation with the Brazilian nation. Importantly, our findings in chapter six (with the State Supreme Court of Rio Grande do Sul being among the most cited) and the rising of the “Direito Alternativo” movement can be attributed to this remarkable historical experience by people in the South.

13 Rui Barbosa admitted that the Brazilian Constitution was inspired by the American federalism – although, in his view, the Constitution of 1891 did his own adaptations to the Brazilian reality, considering distinct geographic conditions, and the freedom of slaves. In this direction and for references used in this paragraph: Silva, Constitucionalismo federal no Brasil nos últimos setenta anos, at 411-413.
1891). The Brazilian Constitution of 1891 had the U.S. federalism as a model, despite the unclear division of competences adopted by the Brazilian Constitution – which ultimately led to conflicts, such as those arising out of tax powers.\textsuperscript{14}

The federalism model then adopted benefited from and contributed to the existence of centers of interests in the region. The creation of those centers was a legacy of the “capitania hereditárias” and was maintained for centuries by the governors of the provinces. These provinces were powerful, but not enough to achieve a total separation as in the Spanish America.\textsuperscript{15} Therefore, the strength of the central power – particularly the way it was exercised by the Moderator branch, i.e., the Emperor\textsuperscript{16} – enabled to foster a national unity in Brazil in contrast to the fragmentation that occurred in the non-Portuguese colonization in South America.

With regard to colonization, a digression should be made. In 1807, Napoleon declared that he would invade Portugal. The Portuguese Emperor and several members of the Portuguese elite moved to Brazil. In this context, Brazil was raised to Imperial status – no longer being an ordinary colony.\textsuperscript{17} By 1808, the monarch, D. João VI, the royal family, and the bureaucracy – including members of the Portuguese Judiciary – were already in Rio de Janeiro, which became the new capital of the Brazilian-Portuguese Empire.\textsuperscript{18} Had D. João VI decided to stay in Portugal, the Brazilian territory would be doomed to a similar fate of the Spanish colonies, where monarchs were in exile and the

\textsuperscript{14} Celso Antônio Bandeira de Mello, \textit{Curso de Direito Administrativo} (São Paulo: Malheiros, 2009), at 1017, where the author informs that article second of the Constitution of 1891 stated that the new Republic shall be called United States of Brazil; that its third article authorized each state to promulgate its own Constitution; and, finally, that its article 67 guaranteed the autonomy of municipalities in everything that touched the peculiar local interest. A clarifying note: municipalities were not entitled to autonomy, back then.

\textsuperscript{15} Silva, \textit{Constitucionalismo federal no Brasil nos últimos setenta anos}, at 414.


\textsuperscript{17} Although D. João VI and the royal family only arrived in Rio de Janeiro in 1808: José Luis Cardoso, \textit{The Transfer of the Court to Brazil, 200 years afterwards}, at 7, last accessed November, 2011, and available online at: http://www.brown.edu/Departments/Portuguese_Brazilian_Studies/ejph/html/issue13/pdf/jcardoso.pdf

\textsuperscript{18} \textit{Idem}, at 8.
Imperial organization collapsed with the division of the territories of the former Spanish colonies in several countries.\textsuperscript{19}

The centralization in the Brazilian-Portuguese Empire also led to differences among several provinces. On the one hand, Rio de Janeiro became much more developed, hosting the elite of all bureaucrats. On the other hand, other provinces were suffering with severe taxation to support the Court that has moved to Brazil, reducing the local power of the remaining provinces.\textsuperscript{20} Hence, the existence of a strong central power, first, because Brazil was the capital of the Portuguese Empire; and then, with the moderator power of the Imperial Constitution of 1824, were significant factors contributing towards the solid formation of a centralized and strong federal union.

The Brazilian Constitution of February 24, 1891 inaugurated the Republic and consolidated the federalist system proclaimed under the Executive Order (Decree) Number 1, from November 15, 1889.\textsuperscript{21} It had as paradigm the U.S. federalism, introducing the federalism clause that would be constantly contained in the future Brazilian Constitutions.\textsuperscript{22}

With the Brazilian proclamation of the Republic (and its approach to federalism), there was a need for a new balance of powers that avoided the mistakes experienced in previous years. In practice, that appropriate balance lied on the union and on the “politics of governors” (“política dos governadores,” a manner of state politics). This “politics” was led by the states of Minas Gerais and São Paulo, both defending the autonomy of the other states, although allowing the use of federal intervention in states based on article 6


\textsuperscript{20} Noting that, for some authors, there is little to celebrate about D. João VI: \textit{Idem}, at 557–558.

\textsuperscript{21} For constitutional history: Silva, \textit{Constitucionalismo Federal no Brasil nos Últimos Setenta Anos}, at 408.

\textsuperscript{22} The Constitution of 1891 named the new Republic as the United States of Brazil. For criticism toward the process that incorporated the federalism, among others: Luis Roberto Barroso, \textit{O Direito Constitucional e a efetividade de suas normas: Limites e possibilidades da Constituição Brasileira} (Rio de Janeiro: Renovar, 2003), at 15. When commenting the federalism model adopted by the Constitution of 1891, Professor Barroso concludes that it ignored the previous Brazilian experience of centralization. For a discussion of how the regional oligarchies were able to control national elections in 1891 and until 1985: James Holston, \textit{Insurgent Citizenship: Disjunction of Democracy and Modernity in Brazil} (New Jersey: Princeton University Press, 2008), at 102–103.
of the Constitution of 1891. In reality, such arrangement was a deterioration of federalism because Minas Gerais and São Paulo altered in power protecting solely their own interests.

A common classification of the Brazilian federalism experience understands it as being centrifugal (from the centralized unity of the Portuguese crown to the “capitanias hereditárias,” then provinces, which later became the states, in a “top-down” movement). In the United States, however, the federation departed from the states toward the federal union.

The founding states were already organized, with the central union being created as a government with “limited power, in a scheme where residual and police powers were reserved to the states.” In Brazil, member states still had to be created, departing from the provinces. Hence, the U.S. federalism occurred as a centripetal movement – from the borders to the center; whereas the Brazilian experience resulted from a centrifugal movement. Regardless of the inception of the federation (if centrifugal or centripetal), the federal government that is formed is a constitutional one, because it originated from a constitutional pact.

23 Silva, Constitucionalismo Federal no Brasil nos Últimos Setenta Anos, at 409.


25 The power of the states was clear even before 1774, which is to say: even before the movements toward the Independence from Great Britain became more intense. During the First Continental Congress, when fifty-five delegates representing all the states except Georgia wrote “the Declaration and Resolves of October 14, 1774,” stating that Parliament has the power to regulate the foreign affairs of the colonies, “but nevertheless set forth the essential American constitutional position,” as stated in Kermit L. Hall, Paul Finkelman, James W. Elly, Jr., American Legal History (New York: Oxford University Press, 2005), at 86–87.

26 The Articles of Confederation (1781), known as the first American national constitution, was a “hybrid document (…) clearly establishing a federalism more than a nation, (…) clearly being more a league organized for defense than a true nation-state.” The Articles gave each state a vote in the Senate, which was a major problem for the interests of the bigger states. The Constitution of 1787 tried to solve this problem with the provision of the three-fifths compromise about the slaves’ population, as the debates on the Philadelphia Convention (1787) shows: Hall, Finkelman and Elly, Jr., American Legal History, at 108–115.


28 Noting that even in the United States, the federation was created by the people: Cristiano Franco Martins, Princípio Federativo e Mudança Constitucional: Limites e Possibilidades da Constituição Brasileira de 1988 (Rio de Janeiro: Lumen Juris, 2003), at 61–62.
Brazilian constitutional pacts have been marked by different degrees of federalism after the Republic. The Constitution of 1891 experienced federalism based on states power. The Constitutions of 1934 and 1946 had federalism based on cooperation, and nominal federalism, as under the Constitutions of 1937, 1967 and its Amendment 1, of 1969.

Such nominal federalism is a reference to the ultra-centralized administration in the federal Union during the military dictatorship that started in 1964 and lasted – in our view – until the Constitution of 1988.

The first directly elected President – Fernando Collor de Mello, in 1989 – assumed the presidency after more than two decades of military ruling. It is worth mentioning that Tancredo Neves (1985) and José Sarney (from 1985 until 1990) were indirectly elected President and Vice-President, respectively, and despite not being considered military members, both belong to a transition phase from the military ruling to the Republican Constitution of 1988.

III. FEDERALISM CLAUSE IN THE CONSTITUTION OF 1988

The Constitution of 1988 adopts the republican form of government, the presidentialism as a system of government, and the federation as a form for organizing

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29 The Senate was a “mere collaborating organ,” as remarked by Cole, *Comparative Constitutional Law: Brazil and the United States*, at 29.

30 Silva, *Constitucionalismo federal no Brasil nos últimos setenta anos*, at 410, contends that the Constitution of 1937 established a federalism of cooperation. The doctrine, however, splits about the classification of the federalism of the Constitution of 1937 (imposed during the presidency of Getúlio Vargas and also known as “Polish Constitution”). For other constitutionalists it may also be classified as a nominal federalism, such as the Constitutions of 1967 and 1969. The latter trend, in our view, is the most appropriate, given the fact that the Constitution of 1937 had powers deeply concentrated in the President, as pointed out by: Cole, *Comparative Constitutional Law: Brazil and the United States*, at 30.

31 Different dates have been generally pointed to the end of military ruling. The indirect election of Tancredo Neves in 1985 is one of them. Nevertheless, this work considers the Constitution of 1988 as the actual ending of the military ruling, because for the first time since 1967 a constitution was not imposed by a military coup, but enacted with popular participation.

32 Despite not being sworn in, Tancredo is deemed as President for legal effects. His Vice-President was José Sarney, who became President after Tancredo’s death. Information available at the official website of the Brazilian Presidency, last accessed September, 2011: http://www.biblioteca.presidencia.gov.br/ex-presidentes/jose-sarney

33 We relied on the English translation of the Brazilian Constitution in the instances that we thought that having the actual text of the Constitution of 1988 would contribute to our work. We implemented the
the state.\textsuperscript{34} The Federative Republic of Brazil\textsuperscript{35} is the sovereign entity in the international level, whereas the federal union, the states, the federal district, and the municipalities are autonomous among themselves in the domestic scenario.

Federalism refers to the projection of powers inside the territorial sphere, considering as criteria: the existence, the intensity, and the contents of political and administrative decentralizations of each member.\textsuperscript{36} Along those lines, there is a triple order for structuring the government in Brazil: the federal order (central), the states order (regional), and the municipalities order (local). Interestingly, the Constitution of 1988 created a second degree of federalism because municipalities have to obey the national degree, the Republic Constitution, as well as the Constitution of the states.\textsuperscript{37}

The principle of indissolubility of the federative pact has been presented in the totality of the republican constitutions of Brazil.\textsuperscript{38} It has a dual role: it confers the national unity and it accommodates the necessary decentralization. According to this essential principle, the secession of member states, federal district, and municipalities

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\textsuperscript{34} Constitution of 1988, article 18: The political and administrative organization of the Federative Republic of Brazil comprises the Union, the States, the Federal District and the Municipalities, all of them autonomous, as this Constitution provides: Paragraph one: Brasília is the federal capital. Paragraph two: The federal territories are part of the Union and their establishment, transformation into States or reintegration into the State of origin shall be regulated by a supplementary law. Paragraph three: The States may merge into each other, subdivide or dismember to be annexed to others or to form new states or federal territories, subject to the approval of the population directly concerned, by means of a plebiscite, and of the National Congress, by means of a supplementary law. Paragraph four: The establishment, merger, fusion and dismemberment of municipalities shall be effected through state law, within the period set forth by complementary federal law, and shall depend on prior consultation, by means of a plebiscite, of the population of the municipalities concerned, after the publication of Municipal Feasibility Studies, presented and published as set forth by law.

\textsuperscript{35} Constitution of 1988, article first: The Federative Republic of Brazil, formed by the indissoluble union of the states and municipalities and of the Federal District, is a legal democratic state and is founded on: I - sovereignty; II – citizenship; III - the dignity of the human person; IV - the social values of labor and of the free enterprise; V - political pluralism. Sole paragraph: All power emanates from the people, who exercise it by means of elected representatives or directly, as provided by this Constitution.

\textsuperscript{36} Manoel Gonçalves Ferreira Filho, \textit{Curso de Direito Constitucional} (São Paulo: Saraiva, 1999), at 57, for instance.

\textsuperscript{37} The formulation of those distinguished degrees is referred by Ferreira Filho, \textit{Curso de Direito Constitucional}, at 60.

\textsuperscript{38} \textit{Idem}, at 58.
from the federal union is impermissible, and the mere attempt of a given state to pursue a separation from the Union is included among the very limited hypotheses of federal intervention.\textsuperscript{39}

The federal district first appeared in the Republican Constitution of 1891.\textsuperscript{40} The Constitution of 1988 determined that Brasilia is the capital, that the Federal District is the federative member where the capital is situated, and that it cannot be divided into municipalities.\textsuperscript{41} The political and administrative organization of the states is not absolute.\textsuperscript{42} The Brazilian Constitution determines that states may be modified through incorporation, subdivision, or dismemberment, if three requirements are met. Those requirements are the approval by the National Congress of the new organization through Complementary Law,\textsuperscript{43} the previously acquiescence of the direct involved population of the states, and the agreement (mere opinion) to the new organizational structure by each of the legislative assembly of the involved states.\textsuperscript{44}

\textsuperscript{39} Constitution of 1988, article 34: The Union shall not intervene in the States or in the Federal District, except: I - to maintain national integrity.

\textsuperscript{40} Alexandre de Moraes, \textit{Direito Constitucional} (São Paulo: Atlas, 2012), at 273, stresses that the constitutional text expressly determined the particular area of fourteen thousand and four hundred square kilometers to be delimited as the federal capital.

\textsuperscript{41} Article 32, \textit{caput}, of the Constitution of 1988 states: The Federal District, which may not be divided into municipalities, shall be governed by an organic law, voted in two readings, with a minimum interval of ten days, and approved by two-thirds of the Legislative Chamber, which shall enact it, in accordance with this Constitution.

\textsuperscript{42} Moraes, \textit{Direito Constitucional}, at 292.

\textsuperscript{43} Article 18 of the Constitution of 1988 determines: The political and administrative organization of the Federative Republic of Brazil comprises the Union, the States, the Federal District and the Municipalities, all of them autonomous, as this Constitution provides: (...) Paragraph three: The States may merge into each other, subdivide or dismember to be annexed to others or to form new states or federal territories, subject to the approval of the population directly concerned, by means of a plebiscite, and of the National Congress, by means of a Complementary Law.

\textsuperscript{44} Article 48 of the Constitution of 1988 affirms: The National Congress shall have the power, with the sanction of the President of the Republic (...) to provide for all the matters within the competence of the Union and especially on: (...) VI- incorporation, subdivision or dismemberment of areas of territories or states, after consulting with the respective State Legislative Assembly.
IV. FEDERALISM IN THE CONSTITUTION OF 1988: UNION, STATES, AND MUNICIPALITIES

At this stage, we turn our attention to the division of competences between the federal union, states, and municipalities as developed by the Constitution of 1988. Starting with the material, i.e., non-legislative competences of the federal union, the Constitution determines that exclusive competences cannot be delegated. The non-legislative competences that can be delegated are named common competences and may be exercised by states and municipalities in cooperation with all the three levels as determined by Complementary Law. If the cooperation process is not successful, the preponderance criteria shall determine who is authorized to act. Despite the absence of hierarchy among municipalities, states, and the union, it is worth noting that the Constitution of 1988 located municipalities at the same level of the states, not as inferior. Notwithstanding this arrangement, the Constitution also determined that the municipalities shall obey the state Constitution.

45 The exclusive non-legislative competences of the Union are found in article 21 of the Constitution, that states: The Union shall have the power to: I - maintain relations with foreign states and participate in international organizations; II - declare war and make peace; III - ensure national defense; IV - allow foreign forces, in the cases provided for in a complementary law, to pass through the national territory or to remain therein temporarily; V - declare a state of siege, a state of defense and federal intervention; VI - authorize and control the production and trade of military material; VII - issue currency; VIII - manage the foreign exchange reserves of the country and control financial operations, especially those of credit, exchange and capitalization, as well as insurance and private security; IX - prepare and implement national and regional plans for the ordaining of the territory and for economic and social development; X - maintain the postal service, (...).

46 The common non-legislative competences of the Union are found at article 23 of the Constitution: The Union, the States, the Federal District and the municipalities, in common, have the power: I - to ensure that the Constitution, the laws and the democratic institutions are respected and that public property is preserved; II - to provide for health and public assistance, for the protection and safeguard of handicapped persons; III - to protect the documents, works and other assets of historical, artistic or cultural value, the monuments, the remarkable landscapes and the archaeological sites; IV - to prevent works of art and other assets of historical, artistic and cultural value from being taken out of the country, destroyed or from being deprived of their original characteristics; V - to provide the means of access to culture, education and science; VI - to protect the environment and to fight pollution in any of its forms; VII - to preserve the forests, fauna and flora; (...) X - to fight the causes of poverty and the factors leading to substandard living conditions, promoting the social integration of the unprivileged sectors of the population; etc. Sole paragraph: Complementary Law shall establish rules for the cooperation among the Union and the States, the Federal District and the municipalities aiming the achievement of balanced development and well-being on a nationwide scope.

47 Franco Martins, Princípio Federativo e Mudança Constitucional: Limites e Possibilidades da Constituição Brasileira de 1988, at 151. Arguing that they have different and autonomous spheres, and stating that member states have to respect the powers and competences established in the federative pact:
Considering the non-legislative competences of the municipalities, besides the common competences, municipalities have privative competences to tax in the specific cases authorized by the Constitution and to provide public services of local interest. Regarding the non-legislative competences of the member states, they may exercise the common competences as well as the residual competences. The residual competences of the states are the administrative competences that are not prohibited and the remaining residual competences that does not belong to the union nor to the municipalities, and that are not common competences.

We briefly turn our focus to the legislative competences. Among the legislative competences of the Union – i.e., authorizing the union to promulgate laws – there are the so-called privative competences.

48 The privative non-legislative competences of the municipalities are found at article 30, III to IX of the Constitution. For a more detailed discussion about the competences and their modalities: Moraes, Direito Constitucional, at 315–333.

49 The non-legislative (material or administrative) competences of the states are located at article 25, paragraph one: of the Constitution: Article 25: The States are organized and governed by the Constitutions and laws they may adopt, in accordance with the principles of this Constitution. Paragraph one: All powers that this Constitution does not prohibit the States from exercising shall be conferred upon them.

50 Article 22 of the Constitution: The Union has the exclusive power to legislate on: I - civil, commercial, criminal, procedural, electoral, agrarian, maritime, aeronautical, space and labor law; II - expropriation; III - civil and military requisitioning, in case of imminent danger or in times of war; IV - waters, energy, informatics, telecommunications and radio broadcasting; V - the postal service; VI - the monetary and measures systems, metal certificates and guarantees; VII - policies for credit, foreign exchange, insurance and transfer of values; VIII - foreign and interstate trade; IX - guidelines for the national transportation policy; X - the regime of the ports and lake, river, ocean, air and aerospace navigation; XI - traffic and transportation; XII - mines, other mineral resources and metallurgy; XIII - nationality, citizenship and naturalization; XIV - Indian populations; XV - emigration, immigration, entry, extradition and expulsion of foreigners; XVI - the organization of the national employment system and conditions for the practice of professions; XVII - the judicial organization of the Public Prosecution and of the Public Legal Defense of the Federal District and of the territories, as well as their administrative organization; (...) XX - consortium and lottery systems; (...) XXIV - directives and basis of public education; XXV - public registers; XXVI - nuclear activities of any nature; XXVII - general rules for all types of bidding and contracting, with observance of the art. 37, XXI, in the case of the direct public administration, autarchies and foundations of the Union, States, Federal District and municipalities, and of the art. 173, paragraph 1, III, in the case of public companies and public corporations; XXVIII - territorial defense, aerospace defense, maritime defense, civil defense, and national mobilization; XXIX - commercial advertising. Sole paragraph: Complementary Law may authorize the States to legislate upon specific questions that are related to the matters listed in this article.
The legislative competences of the union may also be concurrent, which is to say that they are simultaneously exercised with the states and federal district, but the union shall limited its power to edit general rules. It is worth noticing that in the absence of general rules edited by the union, states, and federal district shall be able to enact laws in their full competence.\textsuperscript{51} However, this legislation shall loose effect as soon as the union legislates about the matter. Additionally, articles 153 and 154 deal with the cases of tax competences that are exclusive of the union. For our purposes, we should note that the residual competence to create taxes that are not established in the Constitution belongs to the federal union, and not to the states.

In this scenario, the legislative competences of the states can be express (with its self-organization and state constitutions), residual, or reserved.\textsuperscript{52} It may also be delegated from the union, as discussed above, requiring Complementary Law.\textsuperscript{53} The legislative competences of the states are also concurrent, when the union legislates about general laws, and the states, at the same, enact specific norms.\textsuperscript{54} The state’s legislative competence may be also supplementary, if the union has not yet edited the general rules, or even if the union enacted those general rules, states are authorized to legislate regarding the precise discipline of the topic whose general rules were set by the union.

\textsuperscript{51} Article 24 of the Constitution proclaims that: The Union, the States and the Federal District have the power to legislate concurrently on: I - tax, financial, penitentiary, economic and urbanistic law; II - budget; (…) XV - protection of childhood and youth; XVI – organization, guarantees, rights and duties of the civil policies. Paragraph one: Within the scope of concurrent legislation, the competence of the Union shall be limited to the establishment of general rules. Paragraph two: The competence of the Union to legislate upon general rules does not exclude the supplementary competence of the States. Paragraph three: If there is no federal law or general rules, the States shall exercise full legislative competence to provide for their peculiarities. Paragraph four: The supervenience of a federal law over general rules suspends the effectiveness of a state law to the extent that the two are contrary to each other.

\textsuperscript{52} Express competences are located in article 25 and the residual competences are located at its paragraph first. Please note that those are the same of the states non-legislative competences that we have already stated in our footnote supra.

\textsuperscript{53} According to article 22 of the Constitution, as cited in footnote 50, supra. This delegation is extremely rare.

\textsuperscript{54} This is quite complex and the distinction of general and specific rules is made on a case by case basis by the Court. This discussion resembles the American constitutional law discussion about preemption.
The federal district has hybrid competences of states and municipalities. In contrast with states and territories, the Federal District is not authorized to be divided in municipalities, due to express constitutional prohibition.\(^{55}\)

The legislative competences of the municipalities can be express,\(^{56}\) with their self-organization capacity\(^{57}\) based on the local interest,\(^{58}\) or supplementary.\(^{59}\) We also should note that the local interest is not a clear guideline, due to the abstract nature intrinsic to this concept.\(^{60}\)

Finally, it is worth stressing the broad scope of powers concentrated in the federal union, including its legislative and non-legislative competences. The current Constitution was quite generous with the municipalities. Competences of the states, however, face substantial challenges, and states tend to struggle with the federal union and municipalities.\(^{61}\) In addition, a distinction between the United States and Brazil is the fact that the presidency in Brazil has a vast scope of powers as compared to the United

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55 Article 32: The Federal District, which may not be divided into municipalities, shall be governed by an organic law (...) Paragraph one: The legislative powers reserved to the States and municipalities are attributed to the Federal District.

56 Article 29: Municipalities shall be governed by organic law, voted in two readings, with a minimum interval of ten days between the readings, and approved by two-thirds of the members of the Municipal Chamber, which shall promulgate it, observing the principles established in this Constitution, in the Constitution of the respective state and the following precepts: election of the Mayor, etc.

57 The self-organization and the related competence of enacting its own law are direct consequences of the municipality being listed as federal actor: Souza Neto and Sarmento, Direito Constitucional: Teoria, História e Métodos de Trabalho, at 337.

58 Article 30, I, of the Constitution: The municipalities have the power to: I - legislate upon matters of local interest.

59 Under the combination of constitutional article 24, already cited supra, with the constitutional article: 30, II: The municipalities have the power to: (...) II - supplement federal and state legislations where pertinent.

60 Criticizing the broad aspect of “local interest”: Franco Martins, Princípio Federativo e Mudança Constitucional: Limites e Possibilidades da Constituição Brasileira de 1988, at 152.

61 This struggle is a complex one, particularly in tax matters, as occurs, for instance, when a given state disputes the taxable event that might be considered as service – which is relevant for ICMS purposes. Another example refers to the division of the income levied by the state that must be shared with its municipalities, as determined by the content of article 158, III and IV, establishing fifty and twenty five percent, respectively, of transfers of the total amount levied by particular state taxes to its municipalities. Article 159, paragraph three: also determines the transfer of the amount levied by the union to the states, whose mandatory transfers to the municipality must also be of twenty five percent.
The Brazilian presidency, thus, encompasses a broad scope of legislative powers, including decree powers.

V. FEDERALISM CHOICES UNDER THE CONSTITUTION OF 1988

A. General Disparities and the Senate

Brazilian federalism is marked by social and economic distinctions among the states. Those lead to an unbalanced federation, with states located at the Southeast and South regions contributing more significantly to the gross domestic product (GDP), while states located at the remaining regions – particularly, the North – contributing the least.

The current Constitution mentions the reduction of inequalities among regions and the national development among the fundamental goals of Brazilian Republic. The reduction of economic and social disparities among the national regions of the country, in

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62 Although the extremely limited legislative powers of the American Presidency are the exception, not the rule worldwide: José Antônio Cheibub, Presidentialism, Parlamentarism and Democracy (Cambridge: Cambridge University Press, 2007), at 100–124.

63 For an analysis of the presidency in Latin America taking into account the American influence and concluding that that presidency tends to be different from the original model based on an empirical study of José Antônio Cheibub, Zachary Elkins, Tom Ginsburg, “Latin American Presidentialism in Comparative and Historical Perspective,” Texas Law Review 89, N. 7 (2011): 1707–1740. The Professors analyze particular features of the Executive lawmaking power in Latin American presidencies, such as: emergency powers; decree powers; Constitutional Amendment, and initiation of legislation: at 1722–1728, specifically.

64 Here, we can also broadly include the so-called “provisory measures” of Article 62, caput, of the Brazilian Constitution of 1988, determining that: “In important and urgent cases, the President of the Republic may adopt provisory measures with the force of law and shall submit them to the National Congress immediately.” For a study encompassing such provisional decrees between 1989 and 1997 and concluding that only three percent were rejected – with these rejections having occurred during the government of Sarney and Collor: Argelina Cheibub Figueiredo and Fernando Limongi, “Presidential Power, Legislative Organization and Party Behavior in Brazil,” Comparative Politics 32, No. 2 (2000): 151–170, at 155.

65 For general information about each federative state, reference is made to the website of the Brazilian Institute for Geographic and Statistics: IBGE, last accessed: November, 2013, and available online at: http://www.ibge.gov.br/home/

66 Article 3 of the Brazilian Constitution of 1988 determines that: The fundamental objectives of the Federative Republic of Brazil are: (...) II - to guarantee national development; III - to eradicate poverty and substandard living conditions and to reduce social and regional inequalities.
conjunction with the general determinations for the economic order,\(^{67}\) embraces the constitutional duty to build a more balanced and equal federation.\(^{68}\) In light of this duty, the Senate participation in acting jointly with the Presidency and the House of Representatives in order to achieve the appropriate policies was expected to be more effective.

Traditionally, the representation of states in the Senate has not been disputed because, as the argument goes, the Senate represents the states, with the House of Representatives – whose members are elected proportionally\(^{69}\) – representing the people. In fact, the bicameralism of the federal legislature is a consequence of the federation,\(^{70}\) having the Senate as the representative of the member states and Federal District (hence, the equilibrium and the same number of Senators\(^{71}\) representing each state and the Federal District).\(^{72}\) It is worth noting that the paradigm for Brazil, which was the U.S.

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\(^{67}\) Article 170 of the Brazilian Constitution of 1988 affirms that: The economical order (…) shall observe the following principles: (…) VII- reduction of social and regional inequalities.

\(^{68}\) Technically, the principle of reduction of regional inequalities is also the founding principle of the economical order, as mentioned in article 170 of the Constitution. Therefore, it demands that public policies are target toward this goal of a more equal society. In this direction: Eros Roberto Grau, *A Ordem Econômica na Constituição de 1988* (São Paulo: Malheiros, 2004), at 208–209.

\(^{69}\) The Constitution did not adopt the pure proportionality principle in the House of Representatives, since territories are entitled to a fixed number of four representatives – regardless of its population. Article 45 determines that: The House of Representatives is composed of representatives of the people, elected, by the proportional system, in each state, territory and in the Federal District. Paragraph one: The total number of representatives, as well as the representation of the States and of the Federal District shall be established by a supplementary law, in proportion to the population, and the necessary adjustments shall be made in the year preceding the elections, so that none of those units of the Federation has less than eight or more than seventy Deputies. Paragraph second: Each territory shall elect four representatives.

\(^{70}\) Moraes, *Direito Constitucional*, at 420.

\(^{71}\) The composition of the Senate, having a total of eighty one members elected by majoritarian system, is determined in article 46 of the Republican Constitution: The Federal Senate is composed of representatives of the states and of the Federal District, elected by a majority vote. Paragraph one: Each state and the Federal District shall elect three Senators for a term of office of eight years. Paragraph two: One-third and two-thirds of the representation of each state and of the Federal District shall be renewed every four years, alternately. Paragraph three: Each Senator shall be elected with two substitutes.

\(^{72}\) This is not the case in comparative experience. The federal system of Germany, for instance, considers the representation of each state in their Senate (*Bundesrat*) according to the state’s size of population. According to article 51, paragraph two, of the Basic Law, each Land has at least three votes; Länder with more than six million inhabitants five, and Länder with more than seven million inhabitants six votes. For this updated information in English, see, among other sources, the official website of the *Bundesrat*: http://www.bundesrat.de/cln_320/nn_11596/EN/organisation-en/stimmenverteilung-en/stimmenverteilung-en-node.html?__mnn=true
Constitution, also determines that each state should have the same number of Senators in the Senate.

Notwithstanding this traditional understanding, we emphasize that federalism would admit a different scheme of representation because it shall not be mandatory that all the states have the same number of representative members in the Senate, in our view. This is so, to the extent that the political interests in the Brazilian Senate became galvanized by political parties.

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73 According to article One, Section Five of the Constitution of the United States.

74 It has been remarked that also in the United States there is disparity with regard to the number of constituencies per each Senator: e.g., Robert C. Cooter, The Strategic Constitution (New Jersey: Princeton University Press, 2002), at 175. Illustrating his view, the Professor states that California, with much more than thirty million inhabitants, has the same number of senators as North Dakota, that has fewer than one million or so. Agreeing with this criticism, emphasizing the overrepresentation in the United States Senate by less populous states, such as Wyoming, noting that such overrepresentation violates the democratic principle of “one-person one vote,” and citing the Germany and Indian models as more attractive than the American one: Arend Lijphart, “Constitutional Design for Divided Societies,” Journal of Democracy 15 (2004): 96–109, at 105. Addressing that equal representation in the Senate among the undemocratic features of the American Constitution – along with slavery, for example: Robert Dahl, How Democratic is the American Constitution? (New Haven: Yale University Press, 2001), at 17–18. Agreeing with all the criticism above and adding that small states as North Dakota, South Dakota, Vermont, Delaware, Alaska, Montana and Wyoming have one Senator more than their number in the House: Sanford Levinson, Our Undemocratic Constitution (New York: Oxford University Press, 2006) at 6, 29, and 50, respectively.

75 Germany is a federation and it does not have the same number of state representatives across the nation – despite being a much more uniform nation than Brazil today. This is the case, albeit the former division of the German territory.

76 In this direction and stressing that the Brazilian Constitution of 1891 did not have the same number of representatives in the Senate per state: Direito Constitucional: Teoria, História e Métodos de Trabalho, at 302.

77 Pointing out that political parties have captured political interests: Gilmar Ferreira Mendes and Paulo Gustavo Gonet Branco, Curso de Direito Constitucional (São Paulo: Saraiva, 2013), at 783.

78 The constitutional regime of political parties are located at article 17 of the Republican Constitution: The creation, merger and extinction of political parties is free, with due regard for national sovereignty, the democratic regime, the plurality of political parties, the fundamental rights of the individual, and must be observant of the following precepts: I - national character; II - prohibition from receiving financial assistance from a foreign entity or government or from subordination to that foreign government; III - rendering of accounts to the Electoral Courts; IV - operation in the National Congress in accordance with the law. Paragraph one: Political parties are ensured of autonomy to define their internal structure, organization and operation, and to adopt the criteria of selection and regime of their electoral coalitions, without obligation of repetition between the candidacies in national, State, Federal District or municipal levels, and their by-laws shall establish rules of party loyalty and discipline. Paragraph two. After acquiring corporate legal status under civil law, political parties shall register their by-laws at the Superior Electoral Court. Paragraph three: Political parties are entitled to monies from the party fund and to free-of-charge access to radio and television, as established by law. Paragraph four: Political parties are forbidden to use paramilitary organizations.
Because these political parties are national, the argument of equal representation in the Senate loses its main justification.

In practice, the Brazilian Senate does little to represent the interests of the states working as second Chamber of popular representation. Senators are elected based on political parties, exactly as the House of Representatives (Chamber), and a candidate to the Senate can be against the governor of a state – with this opposition being quite common in the Brazilian reality. In this scenario, a senator can approve a law that is not necessarily coincident with the interest of the Governor of his or her State. The general assumption that both governors and senators ought to be jointly protecting state interests simply leads to more questions. If the Governor chooses to challenge the federal law in courts, the judiciary has to decide the dispute in light of the current constitutional pact.

Despite the fact that the Constitution of 1988 considers municipalities, the union, and states as federal actors, only the states are represented at the senate. Accordingly, there has been authorized legal doctrine arguing that municipalities should also be represented in the Senate. In this scenario, although the Constitution of 1988 granted significant strength to states and municipalities under the federal principle, it lacks the decentralization that is necessary to achieve balance in a federation that is so unequal.

79 The Republican Constitution determines that political parties must be of national character, being concerned with the country, and not with particular social segments. Along those lines, representation of political parties that did not match a minimum threshold of votes shall not be denied. With this scheme, the minorities can indicate their own candidates to the highest offices, including the Presidency.


81 Note that it is not argued here that presidentialism reduces party discipline, since such understanding did not survive empirical testing: Cheibub, Presidentialism, Parlamentarism and Democracy, at 118–125, in particular.

82 Lammêgo Bulos, Curso de Direito Constitucional, at 1084.

83 This may be done, for instance, through a Direct Action of Unconstitutionality (Adin), if the Governor opts for the abstract review in the federal level.

The representation in the Senate is relevant, due to several reasons related to the specific powers exercised by this upper house. Among the main powers exercised by the Senate and that are directly related to this thesis: approval of the justices of the STF; determination of the general debt ceiling of the union, member states, and municipalities (including authorizing the increase of that debt or not), in accordance with the initiative of the President of the Republic; periodically evaluation of the structure and performance of the national tributary system, also considering the revenues levied by the federal union, states, and municipal administrations; decisions regarding the global limits of external and internal credit operations of the union, states, and municipalities, their public entities and government-owned or controlled entities by the federal government; approval and dismissal of the Attorney General of the Republic.

B. Federalism and the Brazilian Supreme Court

The idea of a particular court at the top of the hierarchy of the judiciary power is not new in Brazil, dating back to the Casa de Suplicação do Brasil of 1808. The denomination of Supremo Tribunal Federal (STF) is more recent, as it appeared in the provisory Constitution published with the Decree no. 510, of June 22, 1890, and later reappearing in the Decree no. 848, of October 11, 1890. The Constitution of 1891 – the one that created judicial review in Brazil – also designated the court as “Supremo.”

The Brazilian Constitution of 1988 allows autonomy to the federal union, to states, and to its municipalities. Sovereignty belongs to the Brazilian Republic. Most of

85 For a complete list of the competences of the Senate: article 52, I to XV, of the Republican Constitution.

86 For the historic information about the STF in this paragraph and for further details, including its previous denominations as Supremo Tribunal de Justiça: http://www.stf.jus.br/ portal/cms/ verTexto.asp?servico=sobreStfConhecaStfHistorico, last accessed: February, 2012.

87 Noting that the Constitution of 1891 adopted the incidental and diffuse control of constitutionality in Brazil, because any judge was able to declare the unconstitutionality of the norm and to solve the conflict: Gustavo Binenbojm, A Nova Jurisdição Constitucional Brasileira: Legitimidade Democrática e Instrumentos de Realização (Rio de Janeiro: Renovar, 2004), at 123–124.

88 Constitution of the Brazilian Republic, article first: The Federative Republic of Brazil, formed by the indissoluble union of the states and municipalities and of the Federal District, is a legal democratic state and is founded on: I - sovereignty; II – citizenship; III - the dignity of the human person; IV - the social
the powers are centralized in the federal union.\(^{89}\) States are entitled to self-organization, being governed by their own state constitution.\(^{90}\) States also have self-government, because they have the power to set the rules for the division of powers in their own territory.\(^{91}\) Municipalities – although very empowered after the Constitution of 1988, because they were mentioned along with the states and the federal union in its article first – still have to be organized in accordance with the state constitution of the state where they are located.\(^{92}\) States are also entitled to political representation in the Senate, which does not occur with the municipalities, as earlier explained.

Despite the current federal pact, the case law of the STF has been consistent toward the non-inclusion of municipalities\(^ {93}\) as federal independent members to attract the jurisdiction of the Court with regard to federative conflicts strictly determined. The Brazilian Constitution of 1988 determines the STF as the guardian of the federation.\(^{94}\)
According to the reiterative jurisprudence of the Court, whenever a potential conflict among federation members may happen, the STF shall have exclusive jurisdiction to decide.

The Brazilian federalism is quite particular because powers tend to be concentrated in the federal union, as emphasized previously. The cooperative mechanism of appointment for justices of the Supremo includes Senate’s approval, due to federalism constitutional choices. The cooperation in these appointments includes the participation of the President and the Senate. This cooperation is being associated with more independent courts. Our next chapter examines related questions concerning judicial review, while chapter seven addresses political influences under the current constitutional design.

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95 As exemplified by the following cases of the jurisprudence of the STF: RCL 2769, of 09.23.2010; PET 3388, of 03.19.2009; AC 2032 (QO): 05.15.2008; ADI 2832, of 05.07.2008. All decisions are available online at: www.stf.jus.br.

CHAPTER THREE

JUDICIAL REVIEW IN BRAZIL

This chapter focuses on the development of judicial review in Brazil at the federal level, while also addressing the state judicial review in general. This chapter is divided in four parts. It starts with the historical constitutional background of judicial review. Part II further develops it in light of specific provisions of the Constitution of 1988. Part III provides an overview of judicial review in Brazil, and Part IV details the main constitutional actions that the remaining chapters of this thesis focus on.

I. HISTORICAL EXPERIENCE OF JUDICIAL REVIEW IN BRAZIL

Judicial review was not present in the text of the Imperial Constitution of 1824. Under the Constitution of 1824, the Emperor perceived it as an actual limitation of his powers in a semi-absolute ruling. The parliamentary form of state – despite not present in the constitutional text – depended more on the Emperor than on Parliament. This was the case, due to the adoption of the principle of separation of powers based on a peculiar interpretation of the theory of Benjamin Constant and his conception of four branches of government: the executive, legislative, judiciary, and moderator. The moderator power was exercised solely by the Emperor who was, in practice, the one responsible for

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97 The present section limits itself to the Constitution of 1988, and to the most recurrent topics of constitutional issues that appeared in the three original datasets developed for this thesis. Appointments to the STF are detailed in chapter five. State courts appointments and state judicial review are addressed in chapter six.

98 Firly Nascimento Filho, Da Ação Direta de Declaração de Inconstitucionalidade (Rio de Janeiro: Lumen Juris, 1996), at 16–17, where the author remarks that the review was generally attributed to the legislative branch. The Supremo Tribunal de Justiça – then the highest organ of the judicial branch in the Brazilian Empire – did not have the power to refuse the applications of laws that were contrary to the constitutional text.

99 Luís Roberto Barroso, O Direito Constitucional e a Efetividade de suas Normas: Limites e Possibilidades da Constituição Brasileira (Rio de Janeiro: Renovar, 2004), at 9–10. For an important survey of all the Brazilian Constitutions: Idem, at 7–45. Note that here and after, all the references are made to the Constitution of the Brazilian Republic of October, the fifth of 1988, unless stated otherwise.

promoting the harmony among all the branches of government. This scheme of separation of powers had significant impact in reducing regional and local powers.\textsuperscript{101}

Judicial review was inaugurated in Brazil with the Republic’s proclamation,\textsuperscript{102} being expressly determined in articles 59 and 60 of the Constitution of 1891.\textsuperscript{103} The U.S. model was adopted, with federal and state judges able to exercise judicial review in the incidental, concrete, and diffuse forms,\textsuperscript{104} despite controversial understandings that would argue that solely the federal justice would have jurisdiction to exercise such review.\textsuperscript{105}

In that sense, the inception of judicial review in Brazil was embedded with the federalism concerns, namely, if state supreme courts would also have jurisdiction to review the constitutionality of laws or normative acts. Rui Barbosa famously defended the jurisdiction of the federal justice as well as of the states in exercising the diffuse, concrete and incidental review of norms that were arguably in violation of the Constitution of 1891.\textsuperscript{106} He also enumerated the potential violations to the principle of separation of powers, while considering the possibility of judicial review in direct actions, ultimately concluding that only the incidental form was authorized in the Brazilian constitutional scheme at that time.\textsuperscript{107}

\begin{footnotes}


\footnote{102}{The proclamation of the Republic in Brazil did not count with popular support, as José Murilo de Carvalho notes. According to the professor, there were several “proclamations”, since elites tried to construe narratives and myths surrounding the event of November 15, 1889: José Murilo de Carvalho, \textit{A Formação das Almas: o Imaginário da República no Brasil} (São Paulo: Cia das Letras, 1990), at 22–59.}

\footnote{103}{Luís Roberto Barroso, \textit{O Controle de Constitucionalidade no Direito Brasileiro} (Rio de Janeiro: Saraiva, 2012), at 85, where the author informs that there were judicial review provisions in the Provisory Constitution of 1890, article 58, first paragraph, \textit{a} and \textit{b}, – that was not proclaimed; and the Decree 848, of October 11, 1890, article 9, sole paragraph, \textit{a} and \textit{b}.}

\footnote{104}{Noting that the Constitution of 1891 brought three significant transformations inspired by the U.S. model: the form of government – from monarchy to republic; the system of government – from parliamentary to presidential; and the form of organizing the State – from unitary to federal: Barroso, \textit{O Direito Constitucional e a Efetividade de suas Normas: Limites e Possibilidades da Constituição Brasileira}, at 13.}

\footnote{105}{Barroso, \textit{O Controle de Constitucionalidade no Direito Brasileiro}, at 85.}

\footnote{106}{Rui Barbosa, \textit{Os Actos Inconstitucionaes do Congresso e do Executivo ante a Justiça Federal} (1893), at 56–59, last accessed September 2013, available online at: http://www2.senado.leg.br/bdsf/item/id/224197}

\footnote{107}{\textit{Idem}, at 99–101.}

\end{footnotes}
In Brazil, judicial review was inaugurated by legal norms, whereas in the United States, it was created by the case law of the Supreme Court. The Brazilian Decree 848, of October 11, 1890, article 387 declared that: “the laws of the knowledgeable people, in particular those applicable in United States of the North America, the common law cases and equity shall be subsidies of our case law and federal procedure.” Likewise, the judicial review admitted so far was the exercised incidentally and in a concrete case because abstract review was perceived as a violation of the separation of powers.

It is necessary to clarify that this thesis generally uses the following terms as synonyms: “judicial review,” “constitutional review,” and “control of constitutionality,” unless differently emphasized.

The Constitution of 1934 introduced the intervention representation, a specific case of principal and concentrate control. It was under the exclusive jurisdiction of the Brazilian Supreme Court – hereinafter STF. The law that decreed the intervention of the federal Union in a given state due to a violation of one of the so-called sensitive principles (constitutional principles whose observance are mandatory for the states) had to be previously submitted to the STF by the Attorney General of the Republic. This was

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108 Nascimento Filho, Da Ação Direta de Declaração de Inconstitucionalidade, at 18.

109 Most famously in the case Marbury v. Madison, 5 U.S. (1 Cranch) 137, (1803), as further discussed in chapter four.

110 Barbosa, Os Actos Inconstitucionaes do Congresso e do Executivo ante a Justiça Federal, at 16.

111 Noting the existence of attempts to introduce judicial review through direct actions in the Constitutional Commission of the Congress and how those attempts were dismissed on the grounds of arguable violation of the principle of separation of powers: Nascimento Filho, Da Ação Direta de Declaração de Inconstitucionalidade, at 19.

112 Control of constitutionality is a common translation from Portuguese to judicial review – with the term control being attributed to the presence of a superior court. Regarding the distinction between judicial review and constitutional review, Professor Tom Ginsburg remarks that: “Technically, there is a distinction between judicial review, in which ordinary judges play the role of constitutional check, and constitutional review, in which the function is given to specialized judges or political actors”, in Tom Ginsburg, Judicial Review in New Democracies: Constitutional Courts in Asian Cases (Cambridge: Cambridge University Press, 2003) at 15. We use the terms interchangeably in this thesis, unless distinguished otherwise.

113 Barroso, O Controle de Constitucionalidade no Direito Brasileiro, at 85.
the single procedure available for the constitutionality to be pronounced if arising out of an intervention action.\textsuperscript{114}

Regarding the incidental and diffuse controls, the Constitution of 1934 inaugurated the requirement of the absolute majority of the tribunals or courts (the so-called principle of reserve of plenary)\textsuperscript{115} as well as the suspension ordered by the Senate of the law or normative act judged unconstitutional by the STF.\textsuperscript{116} Deeper alterations in the system of control of constitutionality occurred only during the dictatorship ruling through the Constitutional Amendment no. 16, of November 26, 1965, that modified the Constitution of 1946. This Constitutional Amendment, hereinafter CA, introduced the generic action of unconstitutionality, on its article 101, I, \textit{k}, according to which the STF had jurisdiction to rule state or federal laws that were deemed as unconstitutional, through representation commenced by the Attorney General of the Republic. It also authorized the state supreme courts (\textit{Tribunais de Justiça}) to judge the potential unconstitutionality of municipal law or normative acts arguably conflicting with the state constitution.\textsuperscript{117} Thus, the dictatorship built a system to control the local acts.

In this scenario, the Constitution of 1946 presented a control of constitutionality that was similar to the one of the Continental European tradition, i.e., exercised in a principal action, that was direct, with the review being exercised in light of the abstract norm and concentrated in the STF. The diffuse control, meanwhile, did not suffer modifications, so both types of review coexisted in the Brazilian legal order.\textsuperscript{118} It is noteworthy that the introduction of the abstract model of judicial review was done

\textsuperscript{114} \textit{Idem}, at 86.

\textsuperscript{115} The requirement of plenary was – and remains today – a constitutional command determining that only the absolute majority of all the judges of a given court can declare the unconstitutionality of a law or normative act. Thus, only the full bench or the court en banc can declare the unconstitutionality. Details about this principle and its current applicability are developed in chapter six.

\textsuperscript{116} Barroso, \textit{O Controle de Constitucionalidade no Direito Brasileiro}, at 86.

\textsuperscript{117} Idem.

\textsuperscript{118} Idem.
without any modification, contributing to a permanent dialectic tension between the two foreign matrixes of review.\footnote{In this direction and criticizing article 52, X, of the current Constitution, which determines the suspension by the Senate of a law declared unconstitutional by the STF: Gustavo Binenbojm, A Nova Jurisdição Constitucional Brasileira: Legitimidade Democrática e Instrumentos de Realização (Rio de Janeiro: Renovar, 2004), at 127. This suspension is only pertinent in systems without precedents and should, at most, be applicable within the scope of the diffuse control exercised by the STF. After the súmula vinculante, there has been positions of the STF considering that the article 52, X, as of being of limited applicability, despite the official comments to Constitution, edited by the STF itself, still determines the complete applicability of the suspension by the Senate – as long as the unconstitutionality is declared through incidental review. For an example of applicability of article 52, X, even after the introduction of súmula vinculante, see: AI 677.191- AgR, Rapporteur Min. Ellen Gracie, judged in June 8, of 2010; Second Panel, and published in June 25, 2010. It is worth noting that Justice Gilmar Mendes understands article 52, X, as currently obsolete, in light of the most updated interpretation of the principle of separation of powers: Gilmar Ferreira Mendes and Paulo Gustavo Gonet Branco, Curso de Direito Constitucional (São Paulo: Saraiva, 2013), at 1091. The modern interpretation is not deferential to the legislative branch that acted in violation of constitutionality.}

The Constitution of 1967 removed the provision of direct action of unconstitutionality at the state level, which was present in the Constitutional Amendment no. 16 of 1965. By contrast, the Constitution of 1969 had a special provision authorizing the action of intervention of the state in its municipality.\footnote{Barroso, O Controle de Constitucionalidade no Direito Brasileiro, at 87.}

The Constitutional Amendment no. 7, of April 13, 1977 explicitly authorized the possibility of in limine decisions by the STF, when exercising the review of representations commenced by the Attorney General of the Republic, thus ending a significant controversy.\footnote{Idem, where he remarks that the Constitution of 1988 suppressed that possibility.} That amendment introduced the provision of representation toward the interpretation of federal or state law or normative act. In light of such representation the STF, through provocation of the Attorney General, was authorized to determine in theory and with binding effect the interpretation of the norm.

II. JUDICIAL REVIEW IN THE CONSTITUTION OF 1988

The Republican Constitution of October 5, 1988 maintained the hybrid system of judicial review, combining mechanisms inherently associated with the European constitutional control (principal and concentrate forms of review) and the U.S. model.
(incidental and diffuse forms). The Constitution of 1988 brought several innovations. Among the most relevant modifications, this work highlights five of them. The first refers to the extension of the legitimate people and bodies to have standing in the direct action of unconstitutionality – as stated in article 103. The second innovation was the review of omission, which can occur either in a direct action of unconstitutionality by omission or lack of a required measure – article 103, paragraph 2; or in the mandamus of injunction – _mandado de injunção_, in article 5, LXXI. The other relevant alteration was the re-inclusion of the direct action of unconstitutionality in the state level. The fourth innovation refers to the so-called action of noncompliance with a fundamental precept (Ação de Descumprimento de Preceito Fundamental: ADPF, in article 102, paragraph first, with its current infra-constitutional requirements at federal law no. 9882, of December 3, 1999). The final innovation was the restriction of the extraordinary appeals to constitutional questions, only (article 102, III).

The Republican Constitution determines the judicial review in concentrate and diffuse modalities indirectly in the text of the Constitution. The principal control – namely the one exercised through direct actions – occurs in two forms. In the first one, the direct action is commenced in the STF, when the unconstitutionality refers to federal

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122 *Idem*. In Brazil, an act that violates the Constitution is void and invalid – despite being existent. The question of the declaration of unconstitutionality as nullity instead of being potentially voidable was among the distinctions between the U.S. judicial review – where the norm contrary to the Constitution does not produce valid effects, thus being _ex tunc_; and the Kelsenian review, understanding that the unconstitutional act was merely voidable, hence _ex nunc_, i.e., without retroactive effects. For a detailed study and justifications of the Kelsenian theory, in Portuguese, see: Hans Kelsen, _Teoria Pura do Direito_ (São Paulo: Martins Fontes, 1997), at 296–297. For discussions in the light of the Brazilian system: Barroso, _O Controle de Constitucionalidade no Direito Brasileiro_, at 39–41.

123 This work analyses each of the innovations when discussing the constitutional actions, with the pertinent constitutional text being quoted at that particular section. Hence, at this stage, this work limits itself to cite the provisions that will be further considered.

124 For references about those innovations, see, generally: Barroso, _O Controle de Constitucionalidade no Direito Brasileiro_, at 87–88.

125 Article 102 of the Brazilian Constitution of 1988: The Supremo Tribunal Federal is responsible, essentially, for safeguarding the Constitution, and it is within its jurisdiction: III - to judge, on extraordinary appeal, cases decided in a sole or last instance, when the decision appealed: a) is contrary to a provision of this Constitution; b) declares a treaty or a federal law unconstitutional; c) considers valid a law or act of a local government contested in the light of this Constitution; d) considers valid local law contested in the light of federal law.

126 Barroso, _O Controle de Constitucionalidade no Direito Brasileiro_, at 88.
or state laws (or normative acts) arguably in conflict with the Republican Constitution. The second form refers to direct actions commenced in state supreme courts, having as objects the unconstitutionality of state or municipal laws (or normative acts) that are potentially contrary to the Constitution of a given federative state.

The Constitution of 1988 significantly enlarged the judicial review in Brazil, in particular the abstract form of review. It ended the monopoly of the Attorney General of the Republic to commence and to have standing in the direct actions of unconstitutionality, which, as stressed earlier, is among the most important innovations of the current Constitution.

According to article 103 of the Constitution of 1988, the list of people and bodies authorized to have standing to sue has been extended to include: (1) the President of the Republic; (2) the Directing Board of the Federal Senate; (3) the Directing Board of the Chamber of Deputies; (4) the Directing Board of a State Legislative Assembly or of the Legislative Chamber of the Federal District; (5) a State Governor or the Governor of the Federal District; (6) the Attorney-General of the Republic; (7) the Federal Council of the Brazilian Bar Association; (8) a political party represented in the National Congress; (9) a

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127 Article 102 of the Brazilian Constitution of 1988: The Supremo Tribunal Federal is responsible, essentially, for safeguarding the Constitution, and it is within its jurisdiction: I - to institute legal proceeding and trial, in the first instance, of: a) direct actions of unconstitutionality of a federal or state law or normative act, and declaratory actions of constitutionality of a federal law or normative act; (With the final writing modified by CA 3, March 17, 1993, that created the declaratory actions of constitutionality). Article 103, paragraph two: When the unconstitutionality is declared on account of lack of a measure to render a constitutional provision effective (by omission), the competent power shall be notified for the adoption of the necessary actions and, in the case of an administrative body, must do so within thirty days.

128 Article 25 of the Brazilian Constitution: The states are organized and governed by the Constitutions and laws they may adopt, in accordance with the principles of this Constitution. Paragraph one - All powers that this Constitution does not prohibit the states from exercising shall be conferred upon them. Article 125 of the Brazilian Constitution of 1988: The states shall organize their judicial system, observing the principles established in this Constitution. (…) Paragraph two - The states have the competence to institute actions of unconstitutionality of state or municipal laws or normative acts in the light of the Constitution of the state, it being forbidden to attribute legitimation to act (standing) to a sole body.

129 We translated Procurador Geral da República as Attorney General of the Republic, who is in charge of the federal public prosecution in Brazil. By contrast, we translated Advogado Geral da União as Advocate General of the Union, who is the chief responsible for the unified legal defense of the federal union, nationally.

130 Barroso, O Controle de Constitucionalidade no Direito Brasileiro, at 88.
confederation of labor unions or a professional association of a nationwide nature. The infra-constitutional legislation referring to the lawsuit started in the STF of direct action of unconstitutionality as well as of declaratory actions of constitutionality is determined in the federal law no. 9868, of November 10, 1999.

The Constitution of 1988 maintained the action of intervention as a concrete form of judicial review – not abstract, as in the generic action of unconstitutionality. This is the case because the direct action of intervention of article 36, III, of the Constitution has the main goal of solving a federative problem, without judgment in abstract of a particular norm.

Hence, in Brazil, there is the incidental control, exercised for all the judges and courts; and the main control, exercised through direct action, whose jurisdiction is concentrate in the STF, encompassing the following actions: direct action of unconstitutionality (generic, under article 102, I, a, of the Constitution); direct action of unconstitutionality by omission (lack of particular measure, in article 103, paragraph second, of the Constitution); declaratory action of constitutionality (article 102, I, a, of the Constitution); direct action of intervention (article 36, III, of the Constitution) and action of noncompliance with a fundamental precept (ação de descumprimento de preceito fundamental: ADPF, in article 102, paragraph 1). From this list, we should emphasize, once again, that the enlargement of the direct and abstract review in Brazil,

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131 Originally, the constitutional text did not have the Declaratory Action of Constitutionality. After its first inclusion in the text with the Constitutional Amendment 03, of March 18, 1993, the former writing of paragraph four of article 103 included a limited number of people authorized to commence the Declaratory Action of Constitutionality: only the Attorney General of the Republic, the President of the Republic, and the Direct Board of the House or of the Senate were authorized to commence such action and to have standing. The Constitutional Amendment 45, of December 8, 2004 leveled the Declaratory Action of Constitutionality to the Direct Action of Unconstitutionality, by authorizing the same actors (persons and bodies) to commence and to have standing in both actions.

132 Article 36, III, of the Constitution of 1988: The decree of intervention shall be depended upon: (...) III- on the granting of a petition from the Attorney General of the Republic by the STF, in the case of article 34, VII (violation of the so-called sensitive principles), and in the case of refusal of the enforcement of federal law.

133 Barroso, O Controle de Constitucionalidade no Direito Brasileiro, at 89. Also classifying such action as concrete: Clémerson Merlin Clève, A Fiscalização Abstrata da Constitucionalidade no Direito Brasileiro (São Paulo: Editora Revista dos Tribunais, 2000), at 76. Other authors, however, do not classify such action as concrete, but as abstract, as contended by Rodrigo Lopes Lourenço, Controle da Constitucionalidade 'a Luz da Jurisprudência do STF (Rio de Janeiro: Forense, 1998), at 13.
with the newly authorized actors to file the direct actions; the inclusion of the declaratory action of constitutionality and the action of noncompliance with a fundamental precept of the Constitution.  

It is important to contextualize the constitutional provisions concerning the judiciary in Brazil. The Constitution Assembly that met from 1986 to 1988 was particular focused on securing the political independence of the judicial branch, after the recently ended military regime.

Consequently, the final text guaranteed independent budget for the judiciary and provided that state and federal judges – except those in the highest ranking hierarchy – must be admitted to the career through a civil service entrance examination consisting on written or written and oral tests.

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134 Barroso, *O Controle de Constitucionalidade no Direito Brasileiro*, at 89–90.

135 There is a significant effort in making the judicial function as neutral and as dissociated from politics as possible. In Brazil, for instance, magistrates shall not be engaged in partisan activities, in light of the prohibition of article 95, sole paragraph, III, combined with the exigency of Complementary Law of article 93, both from the Constitution. The current Complementary Law is LC 60/89 (commonly named “Estatuto da Magistratura”).

136 The provision conferring financial and administrative independence to the judiciary is basically determined at article 99 of the Constitution, that states: The judicial power is ensured of administrative and financial autonomy. §1 - The courts shall prepare their budget proposals, within the limits stipulated jointly with the other Powers in the law of budgetary directives. §2 - The proposal shall, after hearing the other interested courts, be forwarded: I - at the federal level, by the presidents of the Supreme Federal Court and of the Superior Courts, with the approval of the respective courts; II - at the level of the states and of the Federal District and the territories, by the presidents of the Courts of Justice, with the approval of the respective courts. §3 - If the bodies mentioned in paragraph 2 do not forward the respective budgetary proposals within the time established by the law of budgetary directives, the executive power shall consider, for the consolidation of the annual budgetary law, the amounts authorized for the current budgetary law, adjusted in accordance with the limits set forth in the manner prescribed by the paragraph 1 of the present article. §4. If the budgetary proposals are forwarded in disobedience with the limits set forth in the manner prescribed by paragraph 1, the executive power shall perform the necessary adjustments in order to consolidate the annual budgetary law. §5. During the execution of the budget, there shall not be realization of expenditures or assumption of commitments which exceed the limits established by the law of budgetary directives, except if previously authorized, by means of creation of special or supplementary credits.

137 Political appointments are the only access to the STF.

138 According to article 93 of the Constitution: A Complementary Law, proposed by the Supremo Tribunal Federal, shall provide for the Statute of the Judicature, observing the following principles: I - admission into the career, with the initial post of substitute judge, by means of a civil service entrance examination of tests and presentation of academic and professional credentials, with the participation of the Brazilian Bar Association in all phases, it being required for the law bachelors a minimum of three years experience in juridical activities, obeying the order of classification for appointments; II - promotion from level to level, based on seniority and merit alternately (...). Article 96 complements the system of independence, stating
It is noteworthy that those exams are highly competitive, but the prospects of future tenure are very attractive. After two years, judges are entitled to such tenure, coupled with irreducibility of their payments, and irremovability.\textsuperscript{139}

The mechanism of appointments for justices of the STF was transplanted from the U.S. Constitution. Although the STF counts with eleven justices that are subject to mandatory retirement at the age of seventy years old, the remaining provisions are similar to the U.S. Constitution. Thus, in Brazil, as in the United States, justices of the Supreme Court are entitled to life tenure; and they are appointed by the President subject to approval by the Senate.\textsuperscript{140}

In Brazil, however, the constitutional requirements for members of the Supreme Court refer solely to the age of the justice being between thirty-five and sixty-five; notorious legal knowledge and spotless reputation; in addition to solely Brazilian born

\begin{itemize}
  \item Those guarantees are explicitly determined in article 95 of the current Constitution: judges enjoy the following guarantees: I - life tenure, which, at first instance, shall only be acquired after two years in office, loss of office being dependent, during this period, on deliberation of the court to which the judge is subject, and, in other cases, on a final and non appealable judicial decision; II - irremovability, save for reason of public interest, under the terms of article 93, VIII; III - irreducibility of pay, observing, as regards remuneration, the provisions of articles 37, X and XI, 39, paragraph 4, 150, II, 153, III, and 153, paragraph 2, I. Sole paragraph - Judges are forbidden to: I - hold, even when on paid availability, another office or position, except for a teaching position; II - receive, on any account or for any reason, court costs or participation in a lawsuit; III - engage in political or party activities; IV - receive, on any account or for any reason, payments or contributions from persons, public or private entities, with exception of the cases determined by law; V - exercise lawyer activities in the jurisdiction or court in which they had worked, before the elapsing of three years of leaving office by retirement or dismissal.

\textsuperscript{139} Those guarantees are explicitly determined in article 95 of the current Constitution: judges enjoy the following guarantees: I - life tenure, which, at first instance, shall only be acquired after two years in office, loss of office being dependent, during this period, on deliberation of the court to which the judge is subject, and, in other cases, on a final and non appealable judicial decision; II - irremovability, save for reason of public interest, under the terms of article 93, VIII; III - irreducibility of pay, observing, as regards remuneration, the provisions of articles 37, X and XI, 39, paragraph 4, 150, II, 153, III, and 153, paragraph 2, I. Sole paragraph - Judges are forbidden to: I - hold, even when on paid availability, another office or position, except for a teaching position; II - receive, on any account or for any reason, court costs or participation in a lawsuit; III - engage in political or party activities; IV - receive, on any account or for any reason, payments or contributions from persons, public or private entities, with exception of the cases determined by law; V - exercise lawyer activities in the jurisdiction or court in which they had worked, before the elapsing of three years of leaving office by retirement or dismissal.

\textsuperscript{140} In the United States, mere simple majority in the Senate is required. The Brazilian scheme formally demands more for justices to be approved, because an absolute majority in the Senate is required.
citizens being allowed to be appointed for the Supreme Court. Therefore, the Brazilian Supreme Court tends to have important features of the archetypal recognition judiciary. Regarding the approval of presidential appointments for the Supreme Court, the Brazilian Senate is not as active as the U.S. one. In Brazil, the Senate is very deferential toward the candidate soon to be justice because the Senate tends to avoid political controversies.

In a related perspective, this study is relevant for the interplay between federalism and judicial review because in Brazil all the states must follow the same procedure and method regarding how one becomes a state judge. There is no substantive distinction between the procedures. It is all unified under the above-referred constitutional provisions.

At the opposite spectrum of federal choices we have the U.S. experience, where states have different mechanisms for allowing judges to sit in their state supreme courts – also named Court of Appeals in some states – by election or by appointment. In Brazil, by contrast, only those approved in a public civil service entrance examination are allowed to become state judges, and judiciary members are never directly elected. The mechanisms of appointment of justices of the Brazilian Supreme Court are an exception

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141 Article 101 of the Constitution determines that: The Supremo Tribunal Federal is composed of eleven justices, chosen from among citizens older than thirty-five and younger than sixty-five years of age, of notorious legal knowledge and spotless reputation. Sole paragraph: The justices of the Supremo Tribunal Federal shall be appointed by the President of the Republic, after their nomination has been approved by the absolute majority of the federal Senate. Article 12, 1 of the Constitution determines as being Brazilian by birth: a) those born in the Federative Republic of Brazil, even if of foreign parents, provided that they are not at the service of their country; b) those born abroad, of a Brazilian father or a Brazilian mother, provided that either of them is at the service of the Federative Republic of Brazil; c) those born abroad, of a Brazilian father or a Brazilian mother, provided that they come to reside in the Federative Republic of Brazil and opt for the Brazilian nationality at any time; (...) paragraph third: The following offices are exclusive of born Brazilians: (...) IV - that of justice of the Supremo Tribunal Federal.

142 We use the term as defined by Professor Georgakopoulos, for whom the archetypal career judiciary has members appointed in an early age, starting in lower courts and with expectation of promotion conditioned on performing properly. In contrast, members of the archetypal recognition judiciary have already had a previous career in law, and once nominated to the bench, have the possibility of promotion quite reduced. Nicholas L. Georgakopoulos, “Discretion in the Career and Recognition Judiciary,” Chicago Law School Roundtable 7 (2000): 205–225, at 208–210.

143 Maria Angela Jardim de Santa Cruz Oliveira and Nuno Garoupa, “Choosing Judges in Brazil: Reassessing Legal Transplants from the United States,” The American Journal of Comparative Law 59 (2010): 529–561, at 547–548. The authors emphasize, at 547, that: “no presidential nominee in Brazil has been forced to withdraw or has been formally rejected by the Senate since the end of the military dictatorship.”
to the general rule of public examination entrance criterion and those mechanisms are quite similar to those adopted in the United States.

In Brazil, no an external body – i.e., outside the judicial branch monitoring the judicial decisions – exists.\(^{144}\) Hence, concerns were raised in terms of the political impact of the legitimacy of the judiciary decisions in Brazil. This research argues, however, that this legitimacy is derived from the public entrance examination itself, stressing that accountability of the judiciary is required.\(^{145}\) Overall, there is a sense that the Constitution guaranteed the independence of the judiciary: “By any standard, the Brazilian judiciary enjoys extraordinary levels of independence. Judicial independence is both nominal, enshrined in extensive constitutional guarantees, and substantive, in terms of the powers granted to the courts and the willingness of judges to exercise them.”\(^{146}\)

III. OVERVIEW OF JUDICIAL REVIEW IN BRAZIL

The control of constitutionality – or judicial review – in Brazil is classified considering two main criteria: subjective and procedural.\(^{147}\) The first criterion is called

\(^{144}\) The Constitutional Amendment 45, of 2004, recently implemented the National Council of Justice: Conselho Nacional de Justiça - CNJ, that is not outside the judiciary itself, since members of this power integrate the majority of the composition of the CNJ, as determined by article 103-B, of the Republican Constitution. Thus, out of the fifteen members of the CNJ, only four are not members of the Public Prosecution nor career magistrates; and out of those four, two must be lawyers appointed by the National Bar Association; and the remaining two must have remarkable legal knowledge, being one appointed by the Senate, the other one by the House.

\(^{145}\) For this idea in the Brazilian case, as well as an important question if the Brazilian Judiciary was so “autonomous that it has become devoid of all accountability, a ‘power above the law’”: Carlos Santiso, “Economic Reform and Judicial Governance in Brazil: Balancing Independence with Accountability,” Democratization and the Judiciary, ed. Siri Gloppen, Roberto Gargarella and Elin Skaar (London: Frank Cass Publishers, 2004), at 177.

\(^{146}\) Idem, at 164. Even when executive federal ministers visit the STF building, which is rare, it is not perceived as an offense of the Court’s legitimacy: Diana Kapiszewski, High Courts Economic Governance in Argentina and Brazil (Cambridge: Cambridge University Press, 2012), at 172.

\(^{147}\) There are different uses, depending on the constitutionalist one follows. For instance, Justice Gilmar Mendes uses the nomenclature incidental and concrete as synonyms: Mendes and Branco, Curso de Direito Constitucional, at 1063. Professor Alexandre de Moraes, on the other hand, confines his writings to the distinction between concentrate and diffuse: Alexandre de Moraes, Direito Constitucional (São Paulo: Atlas, 2012), at 744–776. Others differentiate judicial review between diffuse and incidental – and the related concentrate and principal – emphasizing that the diffuse and incidental are often coincident in Brazil, despite not being the same, as explained in Barroso, O Controle de Constitucionalidade no Direito Brasileiro, at 72–73. According to this Professor, the ação de descumprimento de preceito fundamental: ADPF should be understood as a hypothesis of incidental and concentrate controls – as opposed to the
subjective because it refers to the judicial organs that exercise the control and is divided in diffuse or concentrate. The judicial review is named diffuse when any judge or tribunal – provided that the actor has the jurisdiction power – can pronounce the unconstitutionality, as it happens in the United States. By contrast, in the concentrate modality, judicial review is restricted to a strictly limited number of organs with original jurisdictional power and, as addressed earlier, has its origins generally attributed to the Kelsenian conception of review.

The second criterion for judicial review is procedural and it centers in the form under which the control is exercised. It occurs in an incidental form, focusing on the concrete case, as in the United States; as opposed to occurring in a principal form. In the latter one, there is not a specific concrete case, and the court has to rule considering abstract arguments and possible effects of the arguable unconstitutional act. In the incidental form, the Court has to rule on the constitutionality of an incidental question of the merits of the case. In the principal form, however, the judgment on the constitutionality is core and exclusive merit of the case.

The judicial review model adopted by the Brazilian Constitution of 1988 is hybrid, combining the incidental and diffuse models (also known as the U.S. system)

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148 In Brazil, the diffuse form is frequently exercised concretely, i.e., within a lawsuit with proper conflicting parties. In the extraordinary appeal to the STF (recurso extraordinário), we have the most common example of diffuse review exercised concretely – thus, the application of the general requirement that such award must be notified by the STF to the Senate. This occurs in order to allow the former to authorize the suspension of the norm judged unconstitutional by STF: art. 52, X, of the Republican Constitution. For details about this procedure: Fredie Didier Jr., Paula Sarno Braga and Rafael Oliveira, Ações Constitucionais (Rio de Janeiro: Jus Podium, 2009), at 409–486. In addition, there have been mistakes with regard to the scope of the STF’s decision, and whether or not the Senate had expanded the scope of the unconstitutionality as ruled by the STF, as justice Gilmar Mendes notes in Mendes and Branco, Curso de Direito Constitucional, at 1090–1091.

149 Barroso, O Controle de Constitucionalidade no Direito Brasileiro, at 69–71.

150 As previously noted, Justice Gilmar Mendes uses the control incidental and concrete as synonyms: Mendes and Branco, Curso de Direito Constitucional, at 1063.

151 Barroso, O Controle de Constitucionalidade no Direito Brasileiro, at 72.
with the principal and concentrate forms (continental European model). Judicial review in Brazil under the principal control – namely, the one exercised through direct actions – and concentrate occurs in two forms. In the first one, the direct action is commenced in the STF when the unconstitutionality refers to federal or state laws (or normative acts) arguably in conflict with the Republican Constitution.

The second form is the focus of chapter five and refers to direct actions commenced in state supreme courts, and having as objects the unconstitutionality of state or municipal laws (or normative acts) that are potentially violating the Constitution of a given state. The jurisdiction of state supreme courts is perceived as a manifestation of the federalism pact established in the Brazilian Constitution of October 5, 1988. This federalism is deeply protected in the Republican Constitution, being among the subject matters forbidden to be abolished or reduced by Constitutional Amendments. This protection is located at article 60, § 4, I, of the Constitution, among the exclusive hypotheses referring to the perennial or immutable clauses of the constitutional pact.

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152 Idem, at 87. The author also emphasizes that, in Brazil, the principal control is associated with concentrate and abstract reviews; while the incidental control is associated with diffuse and concrete: at 73. Noting that in some European countries there is the possibility of the diffuse control to be exercised in the concentrate form by a Constitutional Court: Clève, A Fiscalização Abstrata da Constitucionalidade no Direito Brasileiro, at 76.

153 Arguing that the Brazilian system of judicial review is vastly decentralized – particularly in comparison to other civil law jurisdictions: Matthew M. Taylor, Judging Policy: Courts and Policy Reform in Democratic Brazil (Stanford: Stanford University Press, 2008), at 15.

154 Barroso, O Controle de Constitucionalidade no Direito Brasileiro, at 88.

155 Article 102 of the Brazilian Constitution of 1988: The Supremo Tribunal Federal is responsible, essentially, for safeguarding the Constitution, and it is within its jurisdiction: I- I - to institute legal proceeding and trial, in the first instance, of: a) direct actions of unconstitutionality of a federal or state law or normative act, and declaratory actions of constitutionality of a federal law or normative act. (…) Article 103, paragraph two: When unconstitutionality is declared on account of lack of a measure to render a constitutional provision effective (by omission), the competent power shall be notified for the adoption of the necessary actions and, in the case of an administrative body, to do so within thirty days.

156 For reference to Article 25 of the Brazilian Constitution and its text: footnote 128, supra.

157 Noting that the self-govern is protected in article 125 of the Republican Constitution: Moraes, Direito Constitucional, at 291.

158 Article 60 of the Brazilian Constitution of 1988: The Constitution may be amended on the proposal of: (…) § 4 - No proposal of amendment shall be considered which is aimed or aimed at abolishing: I- the federative form of state.
IV. GENERAL REQUIREMENTS CONCERNING THE CONSTITUTIONAL ACTIONS

At this point, we introduce the main classifications referring to the judicial review system in Brazil in order to further analyze each of the general requirements of particular constitutional actions in the federal level. We analyze with the concentrate, principal, and abstract control, encompassing the direct action of unconstitutionality, the declaratory action of constitutionality, and the direct action of unconstitutionality by omission.

The control of constitutionality under the principal form is exercised through direct actions commenced in the STF (or in state supreme courts, if the norm is arguably offending the state constitution). This control is said to occur in abstract because there is no requirement of case or controversy; within an objective lawsuit, technically without interested parties. Along those lines, this control occurs without having the protection of subjective rights as the main objective of the lawsuit. The direct action aims to protect the legal order – including its hierarchy, by voiding an act that is conflicting with the Constitution. Even in the case of the direct action of unconstitutionality by omission, the final decision occurs in abstract, with the determination acknowledging the illegitimate inertia of the organ that was supposed to enact the legal measure, according to the Constitution.159

In the direct action, it is mandatory for plaintiffs to indicate the infra-constitutional act that are arguably in violation of the Constitution, specifying the constitutional norms that are allegedly being offended. Generally, the STF understands that it shall not extend the declaration of unconstitutionality to articles that were not mentioned by the plaintiff – even when the legal reasoning would be the same. The traditional understanding of the STF is that the Court shall only act as a negative legislator, by paralyzing the efficacy of an existing rule but not as positive legislator, innovating in the legal order by creating a norm previously nonexistent. Nevertheless, the prohibition for the STF to act as a negative legislator was moderated by the Court itself in the cases that the constitutional norms are particularly open.160

159 Barroso, O Controle de Constitucionalidade no Direito Brasileiro, at 180.

A. Direct Action of Unconstitutionality

The jurisdiction to decide direct actions of unconstitutionality that are potentially conflicting with the Republican Constitution belongs to the STF, which acts analogously to the original conception of Kelsenian constitutional court when exercising such abstract control.

The Brazilian federative system also contains provisions securing the abstract and principal control of constitutionality to be exercised at the state level. Despite the lack of express determination, it is embedded within the logic of the constitutional system that state supreme courts have jurisdiction to decide the direct actions of unconstitutionality arising out of state or municipal laws and normative acts potentially in conflict with the state Constitution. The Brazilian constitutional system accepts the simultaneously filing of direct actions in the state and federal spheres having the same state law or state normative act: one filed in the STF, under the assumption of violation of norms of the Republican Constitution. The other action is filed in the state level, and is arguably conflicting a given norm of the state Constitution. Thus, when two direct actions are filed contemporaneously in state and federal levels, with the state constitutional provision deemed as one of mandatory reproduction from the Republican Constitution, the state action is suspended, until the STF rules on the constitutionality of the state law or based

161 This overview is limited to the special claims that appear significantly in all the specific chapters relating to this thesis: the decisions of the STF regarding potential conflicts involving federalism, specialized panels in state courts, and the rulings of the STF addressing the constitutionality or unconstitutionality in cases referring to the annexation of municipalities.

162 Brazilian Constitution of 1988: article 102, I, a: The Supremo Tribunal Federal is responsible, essentially, for safeguarding the Constitution, and it is within its jurisdiction: I - to institute legal proceeding and trial, in the first instance, of: a) direct actions of unconstitutionality of a federal or state law or normative act, and declaratory actions of constitutionality of a federal law or normative act.

163 Barroso, O Controle de Constitucionalidade no Direito Brasileiro, at 183.

164 Brazilian Constitution of 1988: article 125: The states shall organize their judicial system, observing the principles established in this Constitution. Paragraph second: The states have the competence to institute actions of unconstitutionality of state or municipal laws or normative acts in the light of the Constitution of the state, it being forbidden to attribute legitimation to act to a sole body.

165 Barroso, O Controle de Constitucionalidade no Direito Brasileiro, at 183.
on the Republican Constitution.\textsuperscript{166} The rationale here is that the STF’s decision is binding on the state supreme court. This occurs because the state constitutional norm, which is also object of direct action on the state level based on the state constitution, is the same as the norm contained in the Republican Constitution.\textsuperscript{167}

There was some controversy regarding the admission of review of municipal law that presented as parameter of control state Constitution norms that were deemed as norms of mandatory repetition of the Republican Constitution. The STF solved the controversy, deciding that such review is admissible to be exercised in abstract control by the state supreme courts. Nevertheless, the STF might review those judgments, if an extraordinary appeal is filed.\textsuperscript{168} Therefore, the STF examines such norm in the concrete control.

Next, we proceed to the determination of who is capable of being plaintiff and defendant in the direct action of unconstitutionality. It is worth reiterating that, strictly in a technical sense, there is no defendant, as it is generally understood as the party against the lawsuit is proposed. This is the case because direct actions do not have the protection of subjective rights as their main objective. In a related note, only those who are the organs and authorities from which the unconstitutional norm emanated can figure as defendants. Accordingly, solely organs of the public administration – no private persons or private entities – are allowed to be included as defendant. The defense of the allegedly unconstitutional law or normative act – regardless of its state or federal nature – belongs to the Advocate General of the Union.\textsuperscript{169} The rationale for this provision is the fact that the Advocate General is viewed as a protector of the general legal assumption of

\textsuperscript{166} Hely Lopes Meirelles, Arnoldo Wald and Gilmar Ferreira Mendes, \textit{Mandado de Segurança e Ações Constitucionais} (São Paulo: Malheiros, 2010), at 429.

\textsuperscript{167} Barroso, \textit{O Controle de Constitucionalidade no Direito Brasileiro}, at 184.

\textsuperscript{168} Idem, at 185.

\textsuperscript{169} Brazilian Constitution of 1988: article 103, paragraph third: When the Supremo Tribunal Federal examines the unconstitutionality in abstract of a legal provision or normative act it shall first summon the Advocate General of the Union, (\textit{Advogado Geral da União}), who shall defend the impugned act or text.
constitutionality of the norms. After all, any public act carries the presumption of validity.\textsuperscript{170}

Since the inception of the generic direct action of unconstitutionality, dating back to 1965, until the Constitution of 1988, the exercise of the abstract and principal control on the federal level was a monopoly of the Attorney General of the Republic. The jurisprudence of the STF understood that the act of filing a direct action – or abstention to do so – by the Attorney General was at his or her complete and exclusive discretion. Importantly, the position of Attorney General was subject to free dismissal by the President.\textsuperscript{171}

The exclusive prerogative of the Attorney General in filing the Direct Action of Unconstitutionality disappeared under the current constitutional text of 1988. Nevertheless, there is a general determination in the first paragraph of article 103 for the Attorney General of the Republic to be previously heard in actions of unconstitutionality and in all lawsuits under the STF jurisdiction. The number of authorized entities or organs to file such action has dramatically increased, as inferred from the current list of authorized parties in the Constitution, also in article 103 of the Constitution.\textsuperscript{172}

The case law of the STF created a distinction between two categories of authorized filing parties for the direct action of unconstitutionality, and also the declaratory action of constitutionality. The case law of the Court formulated such differentiation, albeit the absence of constitutional provisions. The first category refers to the so-called universally authorized actors, i.e., those who can file such actions without the necessity of proving compliance with further requirements.\textsuperscript{173} They are the President

\textsuperscript{170} Barroso, \textit{O Controle de Constitucionalidade no Direito Brasileiro}, at 186, and at 197.

\textsuperscript{171} \textit{Idem}, at 187, where the author notes that the direct action review used to have its exercise very limited to hypotheses which were not embarrassing for the executive branch, in practice.

\textsuperscript{172} Article 103 of the Republican Constitution: The following may file an action of unconstitutionality and the declaratory action of constitutionality: I - the President of the Republic; II - the Directing Board of the Federal Senate; III - the Directing Board of the Chamber of Deputies; IV - the Directing Board of a State Legislative Assembly or of the Legislative Chamber of the Federal District; V - a State Governor or the Governor of the Federal District; VI - the Attorney General of the Republic; VII - the Federal Council of the Brazilian Bar Association; VIII - a political party represented in the National Congress; IX - a confederation of labor unions or a professional association of a nationwide nature.

\textsuperscript{173} Barroso, \textit{O Controle de Constitucionalidade no Direito Brasileiro}, at 188.
of the Republic, the Directing Board of the federal Senate or the one of the Chamber of Deputies, the Attorney General of the Republic, the Federal Council of the Brazilian Bar Association, and any political party represented in the National Congress, regardless if the political party merely has a single member in the Chamber of Deputies or in the Senate.

The second category refers to the specially authorized actors: the state Governor, the Directing Board of the State Legislative Assembly, and confederation of labor unions or a nationwide professional association. The case law of the court requires that all those actors shall prove the specific repercussion of the juridical question in their legal sphere, or of theirs of its associates. In addition, it also demands that they act with adequate procurement and pertinent powers of attorney. Those restrictions were created by STF in order to implement particular limitations on the number of direct actions of constitutionality, aiming to lighten its busy dockets.\textsuperscript{174} It is important to note that the STF is not authorized to exercise the writ of \textit{certiorari}, as it is strictly defined.\textsuperscript{175}

We next turn our focus to each of the universally authorized parties to file abstract actions of constitutionality, in the exact order that they are mentioned in article 103 of the Constitution. The President of the Republic may provoke the abstract control when his or her veto was overridden by the legislative, even in cases where the President has previously sanctioned the norm. The sanction, therefore, does not have the power to cure the unconstitutionality of the norm.\textsuperscript{176} The Directing Board of the federal Senate or the one of the Chamber of Deputies\textsuperscript{177} are also universal actors and are authorized to file

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\textsuperscript{174} Clève, \textit{A Fiscalização Abstrata da Constitucionalidade no Direito Brasileiro}, at 162–163.
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\textsuperscript{176} Barroso, \textit{O Controle de Constitucionalidade no Direito Brasileiro}, at 188. The author also stresses that the \textit{Enunciado de Súmula} No. 5 of the STF, stating that the veto would cure the unconstitutionality, is no longer effective.
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\textsuperscript{177} Barroso, \textit{O Controle de Constitucionalidade no Direito Brasileiro}, at 189.
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direct actions having as object their own acts or those that the National Congress would be able to prohibit by exclusive deliberation.\textsuperscript{178}

The Attorney General of the Republic is among the universal parties and remains with complete discretion in deciding whether to exercise the abstract control.\textsuperscript{179} The Attorney General of the Republic is also entitled to be heard in his or her required legal opinion,\textsuperscript{180} regardless if the Attorney General was the one who filed the abstract action or not.\textsuperscript{181}

The federal Council of the Brazilian Bar Association is mentioned separately in the constitutional text. Therefore, it is interpreted as being distinguished from the other general nationwide professional associations. This particularization led the STF to confer to the federal Council of the Brazilian Bar Association the universal authorization for filing actions of constitutionality.\textsuperscript{182} Also among the universal authorized parties in the STF case law are the political parties represented in the National Congress. The rationale of this provision is that the minorities are able to question the constitutionality in abstract\textsuperscript{183} with the verification of the representation of the political party done when the action is filed.\textsuperscript{184}

Having analyzed the universal authorized parties, we turn our focus to the specially authorized parties. The STF understands that the Directing Board of the State assembly is only authorized to file actions of abstract control if there exists a particular

\textsuperscript{178} Article 49, V of the Republican Constitution: It is exclusively the competence (among the powers) of the National Congress: V - to stop the normative acts of the Executive Power which exceed their regimental authority or the limits of legislative delegation.

\textsuperscript{179} Barroso, \textit{O Controle de Constitucionalidade no Direito Brasileiro}, at 189.

\textsuperscript{180} Article 103 of the Republican Constitution: Paragraph 1 - The Attorney General of the Republic shall be previously heard in actions of unconstitutionality and in all lawsuits under the power of the STF. In similar determination: article 8 of the federal law no. 9,868, of 1999.

\textsuperscript{181} Barroso, \textit{O Controle de Constitucionalidade no Direito Brasileiro}, at 197.

\textsuperscript{182} \textit{Idem}, at 189.

\textsuperscript{183} Noting that the choice for political parties instead of a percentage of the members of the House or the Senate was an explicit refutation of foreigner models of abstract review, such as in Spain, Portugal, Austria and Germany: Mendes and Branco, \textit{Curso de Direito Constitucional}, at 1117.

\textsuperscript{184} Barroso, \textit{O Controle de Constitucionalidade no Direito Brasileiro}, at 190.
link between the thematic pertinence of the arguable unconstitutionality of the law or
normative act and the competences or powers of the legislative assembly or of the state to
which it belongs as a representative organ. Along these lines, the unconstitutionality
might be argued even when the law or normative act emanated from the State Assembly
itself.\footnote{Barroso, O Controle de Constitucionalidade no Direito Brasileiro, at 190–191.}

State governors are similarly required to prove the thematic pertinence between
the law (or normative act) arguably in violation of the Republican constitutional text and
the interests (including the powers) that the governor shall protect.\footnote{Idem, at 191.} In the light of
recurrent decisions of the STF, the governor is authorized to file direct actions when the
law emanates from its own state, the federal union, or even other states, as long as the law
or normative act is interfering illegitimately with the interests or powers of the
governor.\footnote{Arguing that this exigency of thematic pertinence of Governors to exercise the abstract control of
constitutionality of laws or normative acts of governors of other states is not aligned with the nature of the
abstract control and stating that it is not correct: Mendes and Branco, Curso de Direito Constitucional, at
1116–1117.} The governor – and not the state nor the State Attorney General – is the one
authorized to file the claim in this abstract control.\footnote{Barroso, O Controle de Constitucionalidade no Direito Brasileiro, at 191.}

The most controversial topic in the case law of the STF is the special requirements
for professional association of nationwide nature. The STF ruled that in order to be
characterized as a nationwide professional association, it must have associates in at least
nine states of the Brazilian federation.\footnote{As justice Gilmar Mendes clarifies: One third of the unities of the Brazilian Federation, i.e., nine. They
reach that number through analogical application of article 7, paragraph first, of the federal law 9,096, of
1995, also known as the Organic Law of Political Parties: Mendes and Branco, Curso de Direito
Constitucional, at 1114, where the author criticizes that analogical application was aimed at to reduce those
authorized to provoke the abstract review.} Considering the concept of professional
association, the Court understands that there must be the same professional exercise
among the associates or the exercise of the same economic activity linking the
associates.\footnote{Barroso, O Controle de Constitucionalidade no Direito Brasileiro, at 192.}
Specific discussions about the complexity of the STF case law are beyond the purpose of this research. It is worth mentioning, however, that the National Students Association is not considered a professional association. Also excluded are associations including enterprises (juridical persons) in the association, instead of merely natural persons. Remarkably, the case law of the Supremo is evolving and has admitted associations including enterprises, provided that their objective is the protection of the same social category.191 Another requirement regarding the professional associations refers to the verification of thematic pertinence between the impugnation of the arguable unconstitutional law and the particular objectives of the association.192

The last specially authorized actor to file action of abstract review is the confederation of labor unions. The STF also demands from them thematic pertinence. It has been argued that the Court tries to balance adequate representation with the excessive number of direct actions of unconstitutionality.193 Initially, mere federations of labor unions were admitted as professional associations. This understanding was superseded by a more restricted one, according to which only confederations194 would be authorized to initiate the abstract control.195

With the promulgation of the federal law 9,868 of 1999, cases of direct action were granted the participation of specific organs or entities who are representative of a particular segment of the society in order to promote relevant discussions about the case at bar, in an analogous manner to the U.S. amicus curiae.196 The decision regarding the

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191 Barroso, O Controle de Constitucionalidade no Direito Brasileiro, at 193. In this direction: Mendes and Branco, Curso de Direito Constitucional, at 1112.

192 Barroso, O Controle de Constitucionalidade no Direito Brasileiro, at 194. Criticizing this requirement in light of the nonexistence of constitutional and legal provisions for that: Mendes and Branco, Curso de Direito Constitucional, at 1116.

193 Barroso, O Controle de Constitucionalidade no Direito Brasileiro, at 195.

194 According to the Brazilian labor law, confederations are formed by three or more federations (whose scope of representation is a federal state): as stated in articles 533 to 537 of the Consolidation of Labor Laws: Decree-law no. 5,452, of 1943 (CLT).

195 Mendes and Branco, Curso de Direito Constitucional, at 1114–1115.

196 Barroso, O Controle de Constitucionalidade no Direito Brasileiro, at 197.
admission of the *amicus curiae* (or its denial) is exclusive of the justice rapporteur in the Supremo, without appeals.\textsuperscript{197}

At this point, we turn to the direct actions of unconstitutionality. At the federal level, as outlined above, the arguably unconstitutional norms are measured against the Republican Constitution. Under article 59 of the Constitution, the following normative species compromises the legislative process: (1) amendments to the Constitution; (2) complementary laws; (3) ordinary laws; (4) delegated laws; (5) provisional measures; (6) legislative decrees; and (7) resolutions. Regarding constitutional amendments,\textsuperscript{198} the STF has already acknowledged the admissibility of their control in abstract review.\textsuperscript{199} It is worth noting that the unconstitutionality may be material if referring to the content of the amendment.\textsuperscript{200} It may also be formal, when there is a procedural violation.\textsuperscript{201} There are also circumstantial limitations of the amendment power, which bar any modifications of the Constitution when particular events occur.\textsuperscript{202}

\textsuperscript{197}Article 7, paragraph two, of the federal law no. 9,868, of 1999: The justice rapporteur, considering the relevance of the subject matter and the degree of representation of those requesting to intervene, may, in interlocutory decision that is not subject to appeal, (…) admit the manifestation of distinct organs and entities.”

\textsuperscript{198}For references to the classification of limitations of constitutional amendments: Barroso, *O Controle de Constitucionalidade no Direito Brasileiro*, at 200.

\textsuperscript{199}The most famous case being, perhaps, the Constitutional Amendment no. 3, about the tax called IPMF, judged by the STF *en banc* on March 17, 1994, when the Court ruled the article two of that amendment as unconstitutional, according to information last accessed on January, 2014, and available at: http://www.stf.jus.br/portal/peticaoInicial/verPeticaoInicial.asp?base=ADIN&s1=939&processo=939

\textsuperscript{200}As the limitation of the so-called stone clauses of paragraph four of article 60: No 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.

\textsuperscript{201}As determined in article 60 of the Republican Constitution: The Constitution may be amended on the proposal of: I - at least one-third of the members of the Chamber of Deputies or of the Federal Senate; II - the President of the Republic; III - more than one half of the Legislative Assemblies of the units of the Federation, each of them expressing itself by the relative majority of its members. (…) Paragraph two: The proposal shall be discussed and voted upon in each House of the National Congress, in two readings, and it shall be considered approved if it obtains in both readings, three-fifths of the votes of the respective members.

\textsuperscript{202}Article 60 of the Republican Constitution, paragraph one: The Constitution shall not be amended while federal intervention; a state of defense; or a state of siege is in force.
Complementary laws – sometimes referred as supplementary laws – are legislative species that only occurs when explicit mention in the constitutional text exists. It requires a particular quorum for deliberation.\textsuperscript{203} If an ordinary law invades the sphere of competence that the Constitution particularly allocated to the complementary law, it is a case for constitutional control based in such constitutional violation – not due to the existence of hierarchy between the two legislative species.\textsuperscript{204} Technically, each legislative species of law has its own sphere of competences, defined according to the constitutional text itself.

It is important to emphasize that the most frequent object of direct actions of unconstitutionality refers to ordinary laws because it is the principal tool used to innovate in the legal order. The most common violation concerns invasions of initiative, i.e., the organ or power that is not empowered to initiate the legislative procedure regarding that particular subject matter. The unauthorized power, therefore, exceeds its own sphere of action and conflicts with the Constitution.\textsuperscript{205} Hence, those violations of initiative encompass actions of actors who are not empowered to be involved in the legislative procedure of the legislative act. There are several constitutional provisions determining that the initiative to legislate in a particular topic does not belong to a member of the Congress, but to other branches.\textsuperscript{206}

Delegated law is legislative specie that is in currently in disuse, but it is subject to a dual possibility of review of its constitutionality.\textsuperscript{207} First, when referring to the resolution of the Congress delegating the matter; second, to the delegated law itself.\textsuperscript{208}

\textsuperscript{203} Article 69 of the Republican Constitution: Supplementary laws shall be approved by absolute majority.

\textsuperscript{204} Barroso, \textit{O Controle de Constitucionalidade no Direito Brasileiro}, at 201–202.

\textsuperscript{205} For the statistical references mentioned in this paragraph: \textit{Idem}, at 202.

\textsuperscript{206} For an example of the STF being empowered to start legislation: Article 96 of the Republican Constitution: It is of the exclusive competence of: II - the Supreme Federal Court, the Superior Courts and the Courts of Justice, to propose to the respective Legislative Power (…): a) alteration in the number of members of the lower courts.

\textsuperscript{207} Barroso, \textit{O Controle de Constitucionalidade no Direito Brasileiro}, at 202.

\textsuperscript{208} Article 68 of the Republican Constitution: Delegated laws shall be elaborated by the President of the Republic, who shall request the delegation from the National Congress. Paragraph one - There shall be no delegation of acts falling within the exclusive competence of the National Congress, of those within the exclusive competence of the Chamber of Deputies or the Federal Senate, of matters reserved for
Provisional measures are subject to dual constitutional review, considering its formal requirements as well as the contents of such legislative specie. The STF ruled that the formal exigencies of relevance and urgency shall preponderantly be the object of political control by the President, when enacting the measure. Equally, it shall be object of such control by the National Congress when the measure is submitted. When abuse of legislating power, or in the case of clear absence of reasonability of the provisional measure, it shall be reviewed by the judiciary. As for the contents of the provisional measure, the Supremo understands that the reenactment of the provisional measure or its conversion in law, as long as the same writing is maintained, are not obstacles to the direct action filed against the originally provisional act impugned. In this sense, mootness would not bar the direct action to continue.

Legislative decrees and resolutions are normative species enacted exclusively by the Congress – or by one of its houses – having the force of law. Hence, they are also subject to the dual constitutional review based on the material and formal requirements. There is precedent in the STF regarding legislative decrees that approved treaties as being subject to the abstract control, and similarly, there has been invalidation of executive normative acts. There are also normative species that are subject to the abstract control

supplementary laws and of legislation on: I - the organization of the Judicial Power and of the Public Prosecution, the career and guarantees of their members; II - nationality, citizenship, individual, political and electoral rights, III – pluriannual plans, budgetary directives and budgets. Paragraph two - The delegation to the President of the Republic shall take the form of a resolution of the National Congress, which shall specify its contents and the terms of its exercise. Paragraph three - If the resolution calls for consideration of the bill by the National Congress, the latter shall do so in a single voting, any amendment being forbidden.

209 Article 62 of the Republican Constitution: In relevant and urgent cases, the President of the Republic may adopt provisional measures with the force of law and shall submit them to the National Congress immediately.

210 For the discussion of those requirements as well as the case law of the STF, we referred to: Barroso, O Controle de Constitucionalidade no Direito Brasileiro, at 203.

211 References relating to the mootness doctrine present in the American constitutional law were based on the concepts explained by Erwin Chemerinsky, Constitutional Law: Principles and Policies (New York: Aspen, 2006), at 124–125, specifically addressing future modifications altering the text of the arguably unconstitutional law that is being examined by the judiciary.

212 Discussing the precedents of the Supremo in terms of legislative decrees and resolutions: Barroso, O Controle de Constitucionalidade no Direito Brasileiro, at 204.
exercised in direct actions, but that are not mentioned in article 59 of the Constitution. Those types are: autonomous decrees, state legislation, and international treaties.

We start with the autonomous decrees. The validation of such decrees is not in an ordinary law. Hence, they are primary normative acts, i.e., capable of directly innovating in the legal order. In this sense, the autonomous decree may be subject to abstract review, and commonly is so, due to possible violations of the legality principle.\textsuperscript{213} By contrast, ordinary decrees are unable to autonomously innovate in the legal order because they are secondary acts. Ordinary decrees have their validity based on a primary legislative act, thus, not enacted with the force of law.\textsuperscript{214}

State legislation is also subject to the abstract control of constitutionality of direct actions started in the Supremo, as expressly mentioned in the Republican Constitution.\textsuperscript{215} The concept of state legislation includes the state constitution, state ordinary legislation, and autonomous decrees of the state.\textsuperscript{216} States have self-organization capacity, while being subject to the limitations of the Republican Constitution.\textsuperscript{217} Several precedents in the Supremo have declared dispositions of state constitutions invalid in light of the Republican Constitution. Importantly, as previously mentioned, state laws and state normative acts are subject to a dual control of constitutionality. The first control occurs in the STF, with the review exercised based on the Republican Constitution. The second happens in the state Supreme Court, when the unconstitutionality is verified based on the state constitution.\textsuperscript{218}

International treaties and conventions are incorporated in the Brazilian legal order with the status of ordinary rule. The STF decided that when an international treaty refers

\begin{footnotesize}
\begin{itemize}
\item\textsuperscript{213} Idem, at 205, where the author also notes that the internal procedural regulations of the tribunals (\textit{regimentos internos}) are also subject to the abstract review.
\item\textsuperscript{214} Idem.
\item\textsuperscript{215} Article 102 of the Republican Constitution is quoted supra, footnote 162.
\item\textsuperscript{216} Barroso, \textit{O Controle de Constitucionalidade no Direito Brasileiro}, at 205.
\item\textsuperscript{217} Article 25 of the Republican Constitution is referred supra, footnote 128.
\item\textsuperscript{218} Barroso, \textit{O Controle de Constitucionalidade no Direito Brasileiro}, at 205–206. The jurisdiction to decide the constitutionality of a state law that is arguably violating the state constitution belongs to the state Court of Appeals (also referred as state Supreme Courts).
\end{itemize}
\end{footnotesize}
to human rights, it is hierarchically superior to ordinary laws but is below the Constitution. Therefore, supervening ordinary law cannot revoke such treaty.\textsuperscript{219} In addition, the Constitutional Amendment 45, of 2004, introduced the possibility that international treaties about human rights might be incorporated to the Republican Constitution as long as the procedure for amending the Constitution is obeyed.\textsuperscript{220} In this case, the constitutional review applicable will be the one previously addressed regarding the process of reviewing amendments to the Constitution.\textsuperscript{221}

The focus is now on the main legal claims that the STF considers as not being subject to abstract review exercised in direct actions. The first hypothesis refers to the so-called normative secondary acts,\textsuperscript{222} which encompasses regulations, regulatory decrees, and declaratory acts, among others. Such acts are not capable of innovating in the legal order and, thus, are not immediately conflicting with the Constitution. In this case, the pertinent control is the one of legality – not constitutionality.\textsuperscript{223}

The second hypothesis considers laws that were enacted previously to the current Constitution. The reiterative case law of the Supremo does not accept abstract review in direct actions of laws that were promulgated in accordance with the previous Constitution. For the Supremo, the abstract control shall only occur in relation to laws and normative acts that are posterior to the current Constitution.\textsuperscript{224} Accordingly, possible conflicts between legislative acts enacted before the current Constitution and the

\begin{footnotes}
\item[219] Noting that, technically, the constitutional review operates to invalidate the legislative decree that approved the treaty and the presidential decree that promulgates the treaty – not upon the treaty itself: Luís Roberto Barroso, \textit{Interpretação e Aplicação da Constituição} (Rio de Janeiro: Saraiva, 2004), at 15–33.
\item[220] Article 5, paragraph three of the Republican Constitution: The international treaties and conventions on Human Rights which are approved, in each House of National Congress, in two rounds, by three fifths of votes of the respective members, will be equivalent to Constitutional Amendments.
\item[221] Barroso, \textit{O Controle de Constitucionalidade no Direito Brasileiro}, at 207.
\item[222] In principle, Enunciate of \textit{Súmulas} of the Tribunals (enunciates reflecting a true compilation of the jurisprudence of a given tribunal in a specific ruling) are not object of Adin, due to its lack of innovation in the legal system. In this sense and for a related discussion about this topic: Barroso, \textit{O Controle de Constitucionalidade no Direito Brasileiro}, at 210–211.
\item[223] Idem, at 208.
\item[224] For a deeper discussion – which is beyond our scope at the present work–, including different theoretical formulations as well as the evolution of the case law of the Supremo with regard to the distinction between illegality and unconstitutionality: Barroso, \textit{Interpretação e Aplicação da Constituição}, at 67–90.
\end{footnotes}
Constitution itself can solely be settle incidentally, in the concrete control of constitutionality.\textsuperscript{225}

The third unauthorized hypothesis of abstract review in direct action is the one of revoked laws. Those laws shall not be object of such control because they are no longer effective.\textsuperscript{226} Hence, if a direct action is filed against a particular law and such law is later revoked during the lawsuit, there is the loss of the object of the direct action that consequently shall end.\textsuperscript{227}

The fourth inadmissible hypothesis of direct action is the one based on municipal law.\textsuperscript{228} The express provision of the Constitution only mentions as objects of direct actions state or federal law or normative acts.\textsuperscript{229} Therefore, municipal laws and normative acts are excluded. The STF not only rules as inadmissible direct action to declare the unconstitutionality of municipal law or normative act arising out of conflicting provisions with the Republican Constitution, but forbids that state constitutions attribute this jurisdiction to the state supreme courts. Such bar is justified under theoretical concerns of usurpation of the original jurisdiction of the Supremo itself.\textsuperscript{230}

The fifth unauthorized case of direct action refers to norms whose formation is not completed: amendments to the Constitution and proposed bills (proposed legislation). The Republican Constitution of 1988 does not have a preventive abstract constitutional

\textsuperscript{225} Barroso, \textit{O Controle de Constitucionalidade no Direito Brasileiro}, at 208.

\textsuperscript{226} Idem, at 209.

\textsuperscript{227} In the parlance of the United States Supreme Court, the Brazilian procedural doctrine of “losing the object of a claim,” in the particular sense discussed here, would be equivalent to mootness. For definition of mootness: Chemerinsky, \textit{Constitutional Law: Principles and Policies}, at 124–125.

\textsuperscript{228} The federal district has competences and powers of state as well as those peculiar of municipalities, according to article 32, paragraph 1 of the Republican Constitution: The legislative powers and competences reserved to the states and municipalities are attributed to the Federal District. In order to determine if the direct action based on violation of the Republic Constitution is admissible, one shall look to the exercise of such competence and powers. If those relate to the exercise of municipal competences and powers, then no Adin is admissible. Along those exact lines, the STF edited the Enunciate of Súmula No. 642, of 2003: It is not admissible direct action of unconstitutionality of law or normative act of the Federal District that are derived from its municipal competence and powers.

\textsuperscript{229} Article 102 of the Republican Constitution is quoted at footnote 162, \textit{supra}.

\textsuperscript{230} This is so, because the STF is the court whose jurisdiction based on abstract review encompasses direct acts that are arguably in violation of the Republican Constitution: Barroso, \textit{O Controle de Constitucionalidade no Direito Brasileiro}, at 210.
review.\textsuperscript{231} Importantly, when a member of the Congress commences a specific injunction (\textit{mandado de segurança}), the claim arises out of possible violations of the material limitations of the procedures of amendments to the Constitution. Hence, the political actor does so based on the exercise of his or her prerogatives under the concrete review.\textsuperscript{232}

The last inadmissible case of direct actions is intuitive, nevertheless deserves comments. It encompasses the \textit{súmulas}. Those are juridical propositions about controversial legal topics that integrate the reiterative jurisprudence of a tribunal and therefore lack the primary force that is generally required to file a constitutional review claim.\textsuperscript{233}

The nature of the norm according to which the constitutional review is exercised is often called paradigm in Brazil. Paradigm of constitutionality refers to the constitutional norms or group of constitutional norms that might have been violated and that are suffering control in its abstract form.\textsuperscript{234} Existence of two trends in the STF should be noted.\textsuperscript{235} The majoritarian approach considers that only principles and norms, even though not express, may be utilized as a constitutional parameter. The second, less restrictive, trend considers that general principles that are not positive may also be deemed as paradigm. Ultimately, it admits general principles of natural law as a parameter for judicial review.\textsuperscript{236} Therefore, in the Brazilian case, all the dogmatic constitutional norms (articles 1 to 250) and the Act of the Transitory Dispositions

\textsuperscript{231} Barroso, \textit{O Controle de Constitucionalidade no Direito Brasileiro}, at 210.

\textsuperscript{232} \textit{Idem}. Similarly, there have been occasions in the U.S. constitutional experience that only a member of Congress had standing, due to violation of his or her prerogatives. For instance: when Senator Kennedy successfully argued that his prerogative to vote has been denied by a pocket veto used by Nixon: Louis Fisher and Katy J. Harriger, \textit{American Constitutional Law: Constitutional Structures} (Durham: Carolina Academic Press, 2013), at 15.

\textsuperscript{233} Barroso, \textit{O Controle de Constitucionalidade no Direito Brasileiro}, at 211.

\textsuperscript{234} See chapter six of this thesis: Do Specialized Constitutional Courts make a Difference?

\textsuperscript{235} As pointed out by Paulo Roberto de Figueiredo Dantas, \textit{Direito Processual Constitucional} (São Paulo: Atlas, 2013), at 179.

\textsuperscript{236} As, for instance, defended by STF Justice Celso de Mello, in the transcripts of Informative n. 258, at 2 (Informativo do STF no. 258, of February 18, 2002).
(articles 1 to 97) are considered as parameters of constitutionality. The preamble is not a parameter because it does not have normative character, but merely interpretative force.\textsuperscript{237} It is noteworthy that when the Constitution mentions law or normative act as objects of the abstract control of constitutionality, it includes provisional measures \textit{(medidas provisórias)}, as well as constitutional amendments. It encompasses even concrete laws, as those disciplining the annual budget.\textsuperscript{238}

Our focus shifts to the most relevant procedural questions for this thesis involving Adins. The general procedural rules are established in the federal law 9,868, of 1999, and in the case law of the Supremo. Notwithstanding previous decisions, recent case law purports as inadmissible Adins whose unconstitutionality has already been declared by the STF in an Extraordinary Appeal.\textsuperscript{239} Once the Adin is filed, the plaintiff is no longer capable of ending the lawsuit.\textsuperscript{240} As argued in the previous sections, it is an objective procedure,\textsuperscript{241} namely, without a specific concrete case or controversy, as defined under the U.S. Constitutional Law parlor.\textsuperscript{242}

The possibility of preliminary injunctions (also addressed as decisions \textit{in limine}) is explicitly defined in the Constitution,\textsuperscript{243} while being detailed at federal law 9,868, of 1999. This law determines that the minimum quorum for the concession of preliminary injunctions in the case of Adins is the so-called absolute majority – hence, the necessity

\begin{footnotesize}
\begin{enumerate}
\item Moraes, \textit{Direito Constitucional}, at 18.
\item As stated by Justice Gilmar Ferreira Mendes, in Meirelles, Wald and Mendes, \textit{Mandado de Segurança e Ações Constitucionais}, at 413–414.
\item Barroso, \textit{O Controle de Constitucionalidade no Direito Brasileiro}, at 213, where the author remarked that the case law of the STF considers as exceptions to this general rule circumstances that have modified the social context or the legal order. Thus, the newer Adin shall be admissible, if at least one of the exceptions is verified.
\item Article 5 of law 9,868, of 1999: Once filled the Adin, it is not admissible the desistence by the plaintiff.
\item Also for that reason it is not applicable the double time period for the public parties to file the defense, as generally stated in article 188 of the Code of Civil Procedure, as stressed in Barroso, \textit{O Controle de Constitucionalidade no Direito Brasileiro}, at 217.
\item For references about standing in American Constitutional law experience, see, among others: Chemerinsky, \textit{Constitutional Law: Principles and Policies}, at 60–82, in particular.
\item Article 102: The Supremo Tribunal Federal is responsible, essentially, for safeguarding the Constitution, and it is within its competence: I - to institute legal proceeding and trial, in the first instance, of: \textit{p}: preliminary injunctions and petitions of provisional remedy in direct actions of unconstitutionality.
\end{enumerate}
\end{footnotesize}
of having six members of the Court. Doctrinally, the preliminary injunction in Adin should be an exceptional measure given the general legal presumption of constitutionality of the acts of the government (encompassing all the branches and levels of government). This presumption includes laws and normative acts. Nevertheless, due to the crowded dockets of the STF, the suspension of the effects caused by conceding an injunction against the arguably unconstitutional act has important consequences. It ultimately turns a provisional measure to have effects as if it were definitive, in light of the long period that such injunction may last. Similarly, the denial of the concession of such injunction postpones the final decision to an undetermined future.

The case law of the STF has established several requirements to be fulfilled in order to grant preliminary injunctions in Adins. The requirements generally mentioned by the STF and legal scholars are the plausibility of the legal claim (\textit{fumus boni iuris}), the likelihood of harm if the injunction is denied (\textit{periculum in mora}), the irreparability or the endurableness of the nature of the damages that will arise out of the arguably unconstitutional act, and the necessity to secure the posterior efficacy of the award. The Court has occasionally mentioned the relevance of the claim, which would encompass the plausibility and the convenience of the measure, and ultimately involves a judgment made by balancing the onus and benefits of conceding the injunction in that abstract control. It also bears emphasis the understanding that when the Adin is filled after a longer period of time, such lapse may disavow the concession of the provisional measure. Consequently, the STF tends to hold that the full efficacy of the law was not causing irreparable harm if a long time elapsed without constitutional challenges.

The refusal of a preliminary injunction shall not have biding effect, whereas its concession shall suspend any transiting lawsuit filed in the Supremo until the final

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244 Article 10 of law 9,868, of 1999: Except for the official period of recess, the injunction shall be granted in Adin by an absolute majority of the members of the Court, which must rule within five days, subject to the provisions of art. 22, after hearing the organs or authorities from which emanated a challenged law or normative act.


246 In this direction, among other authors, see: Mendes and Branco, \textit{Curso de Direito Constitucional}, at 1138–1140; Barroso, \textit{O Controle de Constitucionalidade no Direito Brasileiro}, at 218.

decision of the Court regarding the Adin. Likewise, there is precedent stating that the same shall occur to lawsuits commenced in different judicial spheres, as long as those lawsuits involve a law whose efficacy has been suspended in limine by the STF.\textsuperscript{248} There are no appeals from the decision that grants the injunction to suspend the (arguably) unconstitutional act. If the injunction is denied, such decision may be the object of reconsideration, once the occurrence of supervening facts capable of justifying a new judgment is verified.\textsuperscript{249}

The federal law 9,868, of 1999, also determined the effects of the injunction as biding and generally applicable against all (\textit{erga omnes}), without retroaction (\textit{ex nunc}).\textsuperscript{250} Retroactive effects may occur, however, if the STF decides it is appropriate in particular cases.\textsuperscript{251} Generally, once the injunction is granted, the previous legislation becomes applicable, unless the Court decides otherwise.\textsuperscript{252} This general rule is based on the overall presumption that invalid acts shall not produce invalid effects.\textsuperscript{253} The current law allows the tribunal to anticipate the final decision considering the exceptional circumstances of the case.\textsuperscript{254} The federal law 9,868, of 1999, addresses jointly the final decision in direct

\textsuperscript{248} \textit{Idem}, at 218–219.

\textsuperscript{249} \textit{Idem}, at 219.

\textsuperscript{250} Article 11 of law 9,868, of 1999: paragraph 1: The injunctive relief shall be provided with efficacy against all, and shall be granted with effect \textit{ex nunc}, unless the Court decided that the efficacy shall be retroactively. Paragraph 2: The concession of the injunction shall turn applicable the previous existent legislation – if there is one –, except when the Court expressly decides differently.

\textsuperscript{251} Barroso, \textit{O Controle de Constitucionalidade no Direito Brasileiro}, at 220, noting that the law above referred is consistent with the previous case law of the Court. In cases that the article which was the object of the preliminary injunction has ordered the revocation of a particular norm, according to reiterative decisions of the Court, such injunction shall have retroactive effect in order to allow that previous norm to remain valid.

\textsuperscript{252} Barroso, \textit{O Controle de Constitucionalidade no Direito Brasileiro}, at 220.

\textsuperscript{253} \textit{Idem}.

\textsuperscript{254} Also considering the peculiar necessities of the case, the judge rapporteur may submit the claim to a faster procedure, as stated in article 12 of law 9,868, of 1999: If there is a request for preliminary injunctive relief, the rapporteur, given the relevance of the material and its particular significance to the social order and juridical safety, will be able, after provision of information, within ten days, and the manifestation of the Attorney-General of the Republic and the Advocate General Office, successively, within five days, refer the case directly to the Court, which will have the power to award a final judgment in the abstract action.
actions of unconstitutionality and declaratory actions of constitutionality. Such law understands both actions as a unitarian system.\textsuperscript{255}

Hence, once the direct action of unconstitutionality is admitted and ultimately declared unconstitutional, other eventual declaratory actions of constitutionality are deemed inadmissible. Importantly, there are no appeals from the final decision,\textsuperscript{256} except eventual motion for clarification.\textsuperscript{257}

At this point, we turn our attention to the effects of the final decision in direct actions of unconstitutionality. As a rule, such decision produces retroactive effects.\textsuperscript{258} Remarkably, the STF has sparsely utilized the so-called modulation of effects of the final decision – the faculty of the Court to determine the effects of the unconstitutionality decision to be reduced (or not being retroactive at all) in final decisions of the abstract control.\textsuperscript{259}

Final decisions of the Supremo in abstract control are binding toward all (\textit{erga omnes}) the organs of the judiciary and the public administration in the three (federal, state, and municipal) spheres.\textsuperscript{260}

\begin{itemize}
    \item \textsuperscript{255} Barroso, \textit{O Controle de Constitucionalidade no Direito Brasileiro}, at 221.
    \item \textsuperscript{256} For the specific deliberation quorum about the final decisions in direct actions of unconstitutionality and declaratory actions of constitutionality, article 22 of law 9,868, of 1999, states the following: The final decision about constitutionality or unconstitutionality shall only be made in the presence of eight justices, at least.
    \item \textsuperscript{257} Article 26 of law 9,868, of 1999: The decision declaring the constitutionality or unconstitutionality of the law or normative act in direct action or declaratory action is unappealable, except for the filing of motion of clarification, and it cannot be subject to rescission action.
    \item \textsuperscript{258} Article 27 of law 9,868, of 1999: By declaring the unconstitutionality of the law or normative act, and in view of legal security and exceptional social interest, the Supremo Tribunal Federal will be able to, by a majority of two thirds of its members, restrict the effects of that declaration or decide that it has effectiveness from the final decision or other time as may be prescribed by the STF.
    \item \textsuperscript{259} For examples in the case law of the STF (including declaration of unconstitutionality incidentally, declaration of constitutionality in abstract, and modifications of the case law of the STF), while noting that other courts also used such modulation: Barroso, \textit{O Controle de Constitucionalidade no Direito Brasileiro}, at 241–242.
    \item \textsuperscript{260} The first norm regulating this matter was the federal law 9,868, of 1999, article 28, sole paragraph: The declaration of constitutionality or unconstitutionality – even the interpretation in accordance with the Constitution and the partial declaration of unconstitutionality without reduction of the text – shall have binding effect and efficacy against all the organs of the judicial power and the public administration on the federal, state and municipal spheres. With the Constitutional Amendment 45, of 2004, and the inclusion of the paragraph second of article 102 of the Constitution, such effect is now provided in the constitutional text: Final decisions on judgments, pronounced by the Supremo Tribunal Federal, in direct actions of
\end{itemize}
It is worth stressing that the legislative branch is not included in this binding effect of final decisions reached in abstract review.\textsuperscript{261}

There is a particular hypothesis concerning the effects of the declaration of unconstitutionality. For the hypothesis that the law declared unconstitutional by the STF also revokes a previous norm, such revocation stops existing upon the declaration of unconstitutionality that operates retroactively. The revoked norm becomes valid again, with the legal order returning to the \textit{status quo ante}\textsuperscript{262} – although the Court may decide differently, considering the particular impact in a given case.\textsuperscript{263}

The law 9,868, of 1999, distinguishes between the interpretation in accordance with the Constitution and the partial declaration of unconstitutionality without reduction of the text.\textsuperscript{264} We agree with the understanding that conceives the interpretation in accordance with the Constitution as encompassing the following actions by the interpreter: (1) the reading of the infra-constitutional norm in a manner that best suits the sense and the reach of values and goals of the Constitution that are directly related to such norm; (2) the declaration of nonoccurrence of the norm in a particular factual hypothesis; or (3) the partial declaration of the norm without reduction of the text, which shall exclude a conceivable interpretation of the norm – often, the most obvious sense –

\begin{flushleft}
\textsuperscript{261} Understanding that the legislative branch may edit and promulgate a new norm that would bear, in theory, the same unconstitutionality and explaining that the sole defense would be a new Adin based on the most recent legislation: Barroso, \textit{O Controle de Constitucionalidade no Direito Brasileiro}, at 233; and Clève, \textit{A Fiscalização Abstrata da Constitucionalidade no Direito Brasileiro}, at 241–242, who advocated at that moment, \textit{de lege ferenda}, the extension of the binding effects to all abstract decisions of the STF. It is noteworthy that the STF has already decided that the legislative branch is not bound by this effect, due to its impact in potentially jeopardizing the principle of separation of powers, as contended by Moraes, \textit{Direito Constitucional}, at 794, where the Professor also criticizes the understanding of the Supremo.

\textsuperscript{262} Barroso, \textit{O Controle de Constitucionalidade no Direito Brasileiro}, at 229.

\textsuperscript{263} Prior to the existence of the federal law 9,868, of 1999, it was widely accepted that if the plaintiffs in a abstract action did not want the previously revoked norm to resurrect, they would have to make a specific request stating so in the initial petition of the direct action: Clève, \textit{A Fiscalização Abstrata da Constitucionalidade no Direito Brasileiro}, at 250.

\textsuperscript{264} As stated in the sole paragraph of article 28. The law makes this distinction. Although there have been positions arguing that they are the same, according to the case law of the STF. An in depth discussion about this controversy is besides the topic of our research.
\end{flushleft}
therefore determining an alternative interpretation as being the one compatible with the Constitution.265 The binding effect shall only occur in the last two hypotheses because they exclude possible interpretations.266 The legal text remains the same but its interpretation can only be the one that the STF determines.267

A note referring to the declaration of constitutionality in Adin is necessary. When the decision of an Adin declares that a given act or norm is constitutional, it does not prohibit future actions of unconstitutionality based on different arguments or factual circumstances. In this sense, there is no material effectiveness of the *res judicata*.268 On the other hand, it does have the so-called formal effectiveness of the *res judicata* (the organ who made the final decision cannot review the same case) and the *erga omnes* effect (the organ who decided the lawsuit can decide other lawsuits differently, if circumstances are modified, but other organs of the judiciary are bound to the decision of the STF and to its reasoning).269 Hence, judicial organs in the concrete review shall be bound to decide in accordance with the determination made by the Supremo in the abstract review of constitutionality and, if judicial organs violate this rule, there may be a reclamation action270 started in the Supremo.271 It is worth stressing that there is no application of the suspension of the unconstitutional law by the Senate,272 because direct

265 Barroso, *O Controle de Constitucionalidade no Direito Brasileiro*, at 234.

266 *Idem*.


268 For an analysis of this subject matter, including the possibility of constitutional norms that are constitutional in a historical moment but are progressively moving towards unconstitutionality, see, among others: Barroso, *O Controle de Constitucionalidade no Direito Brasileiro*, at 227–228.

269 *Idem*, at 231. It is worth noticing that the author also emphasizes that judicial organs are bound not only to the final order of the STF, but also to its reasoning: at 235. In this sense: Moraes, *Direito Constitucional*, at 794.

270 Article 102 of the Brazilian Constitution: The Supremo Tribunal Federal is responsible, essentially, for safeguarding the Constitution, and it is within its competence: I - to institute legal proceeding and trial, in the first instance, of: l) claims for the preservation of its powers and guarantee of the authority of its decisions.


272 Article 52 of the Constitution of 1988: It is exclusively the competence of the Federal Senate: (…) X - to stop the application, in full or in part, of a law declared unconstitutional by final decision of the STF.
actions are a form of principal control of constitutionality. Therefore, the reiterative case law of the STF did not require such suspension for claims based on the principal review exercised by the STF – even before the Constitution of 1988.

**B. The Declaratory Action of Constitutionality**

The declaratory action of constitutionality – abbreviated ADC – has no rigorous counterpart in comparative experience. It has been argued that the declaratory action of constitutionality has its origins in the Brazilian constitutional history, to the extent that the direct action of unconstitutionality would also be an action of constitutionality. This understanding is due to the fact that the STF is able to declare the constitutionality of the law or normative act under scrutiny. The declaratory action of constitutionality originated after a general reaction against the reintroduction of the avocatória action in Brazil. Under the previous Constitution, the avocatória allowed the STF to avocate actions that had final judgments pending in lower courts and decide them.

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273 Determining that the public administration (direct and indirect) and all its agents shall obey the constitutional decisions of the STF that were made within the scope of a direct action as well as in the incidental cases (as long as the Senate has suspended the norm): Decree 2.246, of October ten, of 1997, article first; and the current article 1-A, as introduced to the Decree 2.246 by the Decree 3.001, of March 26, of 1999, which also added that injunctions granted in Adin by the STF shall also be obeyed by such agents.

274 Barroso, *O Controle de Constitucionalidade no Direito Brasileiro*, at 230.

275 This action is also sometimes referred to as direct action of constitutionality – as, for instance, occurs with Clève, *A Fiscalização Abstrata da Constitucionalidade no Direito Brasileiro*, at 272, and at 285, for example.

276 Barroso, *O Controle de Constitucionalidade no Direito Brasileiro*, at 258.


278 The tentative reintroduction of the avocatória occurred in 1991, during the presidency of Fernando Collor de Mello. For reference of the date of the failed project: Clève, *A Fiscalização Abstrata da Constitucionalidade no Direito Brasileiro*, at 293.

279 The avocatória was introduced by the first time in Brazil during the Constitution of 1967/69 (during the military ruling) by the Constitutional Amendment 7, of 1977. It authorized the STF to avocate any claim, upon request of the General Advocate of the Union, and as long as the Court verified the following: existence of an impending threat to public order, or public health, or public security or public finances in order to suspend lower courts decisions whose appeals were pending. The avocatória devolved to the STF the complete examination of the subject matter, enabling the Court to decide the factual and legal basis of the claim. Clève, *A Fiscalização Abstrata da Constitucionalidade no Direito Brasileiro*, at 282, noting that
In principle, the necessity of a declaratory action of constitutionality might be striking in light of the general presumption of constitutionality of all acts of the government. Nevertheless, in the Brazilian system that admits both concentrate and diffuse manifestations of control of constitutionality, the ADC has an important goal, namely, the achievement of a faster and unified interpretation, when conflicting interpretations of federal law or normative acts exists in the judiciary. \(^{280}\) Accordingly, it allows the STF to solve the controversy in a definitive manner, with efficacy *erga omnes* (binding towards all) and determinative effect.

The constitutionality of the Constitutional Amendment no. 3 of 1993, which introduced the declaratory action of constitutionality, was subject of large controversy. The object of the first declaratory action of constitutionality (ADC Number One, of 1993) referred to the constitutionality of the ADC itself. \(^{281}\) The main arguments attacking the constitutionality of the Constitutional Amendment 3 – and the introduction of the ADC in the Brazilian system – were the following: \(^{282}\) offense to the principle of separation of powers, violation of the principle of the due appreciation of the Judiciary and the citizens access to court, \(^{283}\) violation of the principle of the due process of law, \(^{284}\) and potential violations of the principle of ample defense, dual degree of jurisdiction, securing that at least one appeal shall be granted. \(^{285}\)

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\(^{280}\) Clève, *Fiscalização Abstrata da Constitucionalidade no Direito Brasileiro*, at 279–280; and at 293.

\(^{281}\) *Idem*, at 289.

\(^{282}\) For arguments against the ADC and the pertinent counter arguments, see, among others: Clève, *Fiscalização Abstrata da Constitucionalidade no Direito Brasileiro*, at 282–290.

\(^{283}\) Article 5 of the Brazilian Constitution of 1988: All persons are equal before the law, without any distinction whatsoever, with Brazilians and foreigners residing in the country being ensured of inviolability of the right to life, to liberty, to equality, to security and to property, on the following terms: XXXV- the law shall not exclude any injury or threat to a right from the consideration of the Judicial Power.

\(^{284}\) Article 5 of the Brazilian Constitution of 1988: LIV- no one shall be deprived of freedom or of his assets without the due process of law.

\(^{285}\) Article 5 of the Brazilian Constitution of 1988: LV- litigants, in judicial or administrative processes, as well as defendants in general, are ensured of the adversary system and the guarantees of ample and complete defense, with the means and resources inherent to it.
The Supremo, who ruled that the ADC was another form of abstract review, thus, not violating the constitutional text, rebuked all the arguments above. According to the STF, the ADC provided for a more effective protection to the rights secured by the Court. At this point, it is worth stressing that the STF is the highest court of the Judiciary, namely, it is within the judicial branch, an important distinction of the European Constitutional Courts.

The original text of the Constitutional Amendment no. 3 was much more restricted than the current text because it only authorized the President of Republic, the Mesas (Directing Boards) of the Senate and Deputies Chamber, and the Attorney General of the Republic. Currently, there is no distinction between the authorized parties to file the Adin and ADC, with both parties being the same for standing purposes in accordance with the reformed text of the Constitution, introduced by the Constitutional Amendment 45 of 2004.

Considering the federalism implications of such an amendment, the inclusion of the Directing Board of a State Legislative Assembly or of the Legislative Chamber of the Federal District as well as of State Governor or of the Governor of the Federal District provide an example of an open avenue for states to question federal norms – despite such questioning being centralized in the STF.

We proceed next to the analysis of the object of the declaratory action of constitutionality. The ADC can only be filled having as object a federal norm or federal legislative act. Hence, state norms and state legislative acts cannot be the base of such

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286 The Court held so in a decision en banc, from October 27, of 1993, when ruling in the first ADC (ADC 1 QO-DF). This decision also determined that the procedure of the declaratory action of constitutionality shall be the same as the one of the direct actions of unconstitutionality as show the copy of the decision available online at: http://www.stf.jus.br/portal/jurisprudencia/listarJurisprudencia.asp?%28ADC+e+1+e+1993%29&pagina=4&base=baseAcordaos&url=http://tinyurl.com/mdolovt

287 Citing France, Belgic and Portugal as constitutional courts that are not situated within the judiciary: Clève, A Fiscalização Abstrata da Constitucionalidade no Direito Brasileiro, at 288.

288 Article 103 of the Republican Constitution: The following may file an action of unconstitutionality and the declaratory action of constitutionality: I - the President of the Republic; II - the Directing Board of the Federal Senate; III - the Directing Board of the Chamber of Deputies; IV - the Directing Board of a State Legislative Assembly or of the Legislative Chamber of the Federal District; V - a State Governor or the Governor of the Federal District; VI - the Attorney General of the Republic; VII - the Federal Council of the Brazilian Bar Association; VIII - a political party represented in the National Congress; IX - a confederation of labor unions or a professional association of a nationwide nature.
declaratory action. Exception being made to state norms and state normative acts, the object of the Declaratory Action of Constitutionality is the same as the previously discussed object for the Direct Action of Unconstitutionality.

Importantly, the generic Adin and the ADC are very similar actions, whose main difference – for our purposes – is the requirement for the existence of a prior judicial controversy about the constitutionality to file the declaratory action. The justification for that specific requirement for ADC is based on the general presumption of constitutionality of the norms. It is worth emphasizing that the existence of relevant controversy refers to judicial controversies – not merely doctrinal divergences.

We turn to the analysis of the procedural elements of the declaratory action of constitutionality. First, the Constitution does not explicitly authorize injunctions in ADC – despite providing so in direct actions of unconstitutionality. The STF has traditionally authorized preliminary injunctions in ADC since the inception of such action. The federal law 9,868, of 1999 specifically authorizes such remedy.

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289 Criticizing this restriction and exemplifying that a state Governor can have interest in seeing the declaration of constitutionality (in light of the federal Constitution) of a state norm which has been object of judicial controversy (diffuse review): Clève, *A fiscalização Abstrata da Constitucionalidade no Direito Brasileiro*, at 296.


291 Technically, the other difference concerns the object of the abstract actions. In order to avoid possible misinterpretation, we reiterate that only federal norms and legislative acts can be controlled in the ADC – as opposed to state and federal norms (and state legislative acts) that might be impugned through Adin.

292 Considering this objective requirement as too restrictive: Justice Gilmar Ferreira Mendes, in Meirelles, Wald and Mendes, *Mandado de Segurança e Ações Constitucionais*, at 470.

293 Barroso, *O Controle de Constitucionalidade no Direito Brasileiro*, at 264.

294 Article 102 of the Brazilian Constitution: The Supremo Tribunal Federal is responsible, essentially, for safeguarding the Constitution, and it is within its competence: I - to institute legal proceeding and trial, in the first instance, of: p: injunctions/petitions of provisional remedy in direct actions of unconstitutionality.

295 Emphasizing that since the Declaratory Action of Constitutionality no. 4 of May 1999, the case law of the STF authorizes injunctions: Mendes and Branco, *Curso de Direito Constitucional*, at 1150.

296 Article 21 of federal law 9,868, of 1999: The Supremo Tribunal Federal, by decision of the absolute majority of its members, may determine the concession of injunctions in declaratory actions of unconstitutionality, that shall consist that judges and courts suspend the trial of cases involving the application of the law or normative act whose constitutionality is discussed until the final judgment of the declaratory action. Sole paragraph: Once granted the injunction, the Supremo Tribunal Federal shall
There are no appeals from the final decision\textsuperscript{297} in declaratory actions of constitutionality – exception being made for motions toward clarification of the award.\textsuperscript{298} In practice, rarely would be the case that a declaratory action of constitutionality is filed without a direct action of unconstitutionality being also intended.\textsuperscript{299} In any event, once verified the existence of direct action of unconstitutionality and the declaratory action of constitutionality attacking the same provisions, both abstract actions will be judged jointly.\textsuperscript{300}

As for the final effect of the declaratory action of constitutionality, if such decision considers the normative act or law as being constitutional, there is no application of the retroactive effect. This is so because those acts were presumed valid and, after the decision of the Court, they merely have this assumption renewed.\textsuperscript{301} The declaration of constitutionality, as the one of unconstitutionality, is binding against all (\textit{erga omnes} effect) and must be obeyed.\textsuperscript{302} Nevertheless, later rulings of the Court do not have to be

\begin{footnotesize}
\begin{itemize}
\item Article 22 of law 9,868, of 1999: The final decision about constitutionality or unconstitutionality shall only be made in the presence of eight justices, at least.
\item Article 26 of law 9,868, of 1999: The decision declaring the constitutionality or unconstitutionality of the law or normative act in direct action or declaratory action is unappealable, except for the filing of motion of clarification, and it cannot be subject to rescission action.
\item As noted by Justice Gilmar Ferreira Mendes, in Mendes and Branco, \textit{Curso de Direito Constitucional}, at 1147.
\item According to article 24 of law 9,868, of 1999, once the constitutionality of a given law or normative act is proclaimed by the STF, the eventual Adin shall be judged as inadmissible, whereas the (if existing) ADC be granted. The same article determines that if the Court rules such law or act as unconstitutional, the Adin shall be admitted, with the ADC being denied. This occurs assuming the existence of other pertinent actions, which is frequent in the Court. In addition, article 24 is applicable to both direct actions: Adin as well as ADC.
\item Barroso, \textit{O Controle de Constitucionalidade no Direito Brasileiro}, at 268. Nevertheless, another current justice of the STF, Gilmar Ferreira Mendes, makes no distinction, defending the exact same consequences of the decisions made in Adin and ADC: Mendes and Branco, \textit{Curso de Direito Constitucional}, at 1151.
\item The first norm regulating this matter was the law 9,868, of 1999, article 28, sole paragraph: The declaration of constitutionality or unconstitutionality (…) shall have binding effect and efficacy against all the organs of the judicial power and the public administration on the federal, state and municipal spheres. With the Constitutional Amendment 45, of 2004, and the inclusion of the paragraph second of article 102 of the Constitution, such effects were placed in the Constitutional text, as stated previously in footnote 149.
\end{itemize}
\end{footnotesize}
bound necessarily by such decision, as we discussed in the direct action of unconstitutionality. The rationale being that new circumstances may arise from the application of the previously examined law or normative act thus leading to a distinguished award.\textsuperscript{303}

The text of the Republican Constitution of 1988 is silent regarding the existence of the declaratory action of constitutionality on the state level. Despite such omission, there is specialized legal doctrine contending its admissibility,\textsuperscript{304} with several state constitutions openly foreseeing such action.\textsuperscript{305}

\textit{C. Direct Action of Unconstitutionality by Omission}

Before the Constitution of 1988, there has been a continuous struggle between the text of the Constitution and the effectiveness of the rights secured by it.\textsuperscript{306} There is no field of law that is so intimately linked to the normative strength of the facts – with those facts being of utmost importance for the final decision of the Court. Those same facts would often determine which written provisions in the Constitution are actually applicable in practice.\textsuperscript{307} Due to the long Brazilian experience of ineffectiveness of constitutional norms, – namely, with its practical application being disregarded –, the native legal doctrine developed several classifications for constitutional norms.\textsuperscript{308} It is

\textsuperscript{303}Barroso, \textit{O Controle de Constitucionalidade no Direito Brasileiro}, at 269.

\textsuperscript{304}Citing the support of the legal community and also advocating for the admissibility of the Declaratory Action at the state level: Barroso, \textit{O Controle de Constitucionalidade no Direito Brasileiro}, at 261, and at 264; and Moraes, \textit{Direito Constitucional}, at 811; Uadi Lammêgo Bulos, \textit{Curso de Direito Constitucional} (São Paulo: Saraiva, 2012), at 318; Clève, \textit{A Fiscalização Abstrata da Constitucionalidade no Direito Brasileiro}, at 396.

\textsuperscript{305}It is the case of the Constitution of the State of Rio de Janeiro. For a complete survey of the twenty-seven state constitutions, see table six (three sets) of the chapter about specialized panels in state supreme courts (chapter six).

\textsuperscript{306}For a historical account about the topic, including how the Imperial Constitution of 1824 commanded the equality of all while also embracing slavery, which was lately abolished in Brazil in 1888: Barroso, \textit{O Direito Constitucional e a Efetividade de suas normas}, at 11–12.

\textsuperscript{307}José Afonso da Silva, \textit{Aplicabilidade das Normas Constitucionais} (São Paulo: Malheiros, 2002), at 16.

\textsuperscript{308}For particular classifications, see, among others: José Afonso da Silva, \textit{Aplicabilidade das Normas Constitucionais}; Barroso, \textit{O Direito Constitucional e a Efetividade de suas normas}; Celso Ribeiro Bastos e Carlos Ayres de Brito, \textit{Interpretação e Aplicabilidade das Normas Constitucionais} (São Paulo: Saraiva,
noteworthy that the U.S. experience used to have its own general classifications, such as mandatory and directory provisions, and self-executing, and not self-executing provisions that inspired the Brazilian categorization.

During the elected constitutional assembly of 1986, legal authors and politicians debated the problem of unconstitutional omissions and it is generally pointed out that, as a result, two mechanisms of protection found their way to the text. Such mechanisms are the *mandado de injunção* and the direct action of unconstitutionality by omission. The first one aims to grant effectiveness to particular rights that are inapplicable due to the lack of a legislative measure. Hence, it creates a specific norm for

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309 The distinction between mandatory and directory provisions is presented in *Constitutional Law reprinted from Ruling Case Law*, Vol. Six (1915), Edward Thompson Company, at 55, available online at: http://books.google.com/books/reader?id=yEVOAAYAAYAJ&printsec=frontcover&output=reader&pg=GBS.PR3, last accessed November, 2013. Also at 55, it is noted that courts generally were hesitant to declare constitutional provisions directory, in light of the potential disregard for the legislature.

310 *Idem*, at 57, where it is remarked that self-executing propositions require no legislation to give effect to them, whereas the opposite occurs with not self-executing norms. Intent and to whom the provisions were addressed (courts or legislature) were factor considered in order to classify those constitutional norms. For a classic passage referring to self-executing provisions: “But although none of the provisions of a constitution are to be looked upon as immaterial or merely advisory, there are some which, from the nature of the case, are as incapable of compulsory enforcement as are directory provisions in general. The reason is that, while the purpose may be to establish rights or to impose duties, they do not in and of themselves constitute a sufficient rule by means of which such right may be protected or such duty enforced. In such cases, before the constitutional provision can be made effectual, supplemental legislation must be had; and the provision may be in its nature mandatory to the legislature to enact the needful legislation, though back of it there lies no authority to enforce the command. Sometimes the constitution in terms requires the legislature to enact laws on a particular subject; and here it is obvious that the requirement has only a moral force: the legislature ought to obey it; but the right intended to be given is only assured when the legislation is voluntarily enacted,” from Thomas Cooley, updated by Victor Hugo Lane, *A Treatise on the Constitutional Limitations which rest upon the Legislative Power of the States of the American Union* (Boston: Little, Brown and Company,1903), at 119–20.

311 Barroso, *O Controle de Constitucionalidade no Direito Brasileiro*, at 276.

312 Constitution of 1988, article 5, LXXI: a writ of injunction (*mandado de injunção*) shall be granted whenever the absence of a regulatory provision disables the exercise of constitutional rights and liberties, as well as the prerogatives inherent to nationality, sovereignty and citizenship.

313 Article 103 of the Constitution of 1988: The following may file an action of unconstitutionality and the declaratory actions of constitutionality: (…) Paragraph second: When the unconstitutionality is declared on account of lack of a measure to render a constitutional provision effective (omission), the competent power shall be notified for the adoption of the necessary actions and, in the case of an administrative body, it shall be determined to do so within thirty days.
the case at bar whose effects are limited to the parties in the lawsuit. The decision is not an order determining the edition of the lacking measure, but the measure itself in that concrete case.\textsuperscript{314} The second mechanism is truly an abstract action that is originally and solely judged by the STF\textsuperscript{315} and whose effect is general and biding toward all.\textsuperscript{316} The same parties authorized to file direct actions of unconstitutionality\textsuperscript{317} and declaratory actions of constitutionality are also authorized to file direct actions of unconstitutionality by omission.\textsuperscript{318}

We turn our attention to the object of the direct action of unconstitutionality by omission.\textsuperscript{319} There are three basic types of unconstitutionality by omission. The first refers to the one lacking a political-administrative measure; the second refers to a judicial measure; and last one to a legislative measure.\textsuperscript{320} The main challenge regarding

\textsuperscript{314}Barroso, \textit{O Controle de Constitucionalidade no Direito Brasileiro}, at 164–165.

\textsuperscript{315}Article 102 of the Brazilian Constitution is quoted supra, at footnote 155.

\textsuperscript{316}Article 12-H of federal law 9,868, of 1999, as included by federal law 12,063, of 2009, determines that shall be applicable to the final decision in direct actions by omission, when possible, the provisions of direct action of unconstitutionality and declaratory action of constitutionality. Hence, articles 26 and 28 of law 9,868, of 1999, are applicable, i.e., the decision shall have biding effects and must be obeyed by all. Importantly, article 12-H, paragraph first of the current text of law 9,868 authorizes, in exceptional circumstances, that the thirty days constitutional deadline (the thirty day period is mentioned in article 103, paragraph second of the Constitution and it is cited in footnote 203 of the current work) may be extended. There are comments arguing the constitutionality of this provision, despite enlarging the time frame originally set in the constitutional text. In this direction, among others: Barroso, \textit{O Controle de Constitucionalidade no Direito Brasileiro}, at 293.

\textsuperscript{317}The case law of the STF always approaches the general direct action of unconstitutionality to the direct action of unconstitutionality based on omission – even before the law 12,063, of 2009. The website of the Court itself, in its search mechanisms, did not distinguish both actions, until October of 2008, as noted by: Mendes and Branco, \textit{Curso de Direito Constitucional}, at 1156, pointing out the difficulties if a researcher wants to even know the number of the direct actions of unconstitutionality arising out of omissions.

\textsuperscript{318}This is the exact writing of article 12-A added by law 12,063, of 2009, to the law 9,868, of 1999. Nevertheless, for criticism in light of the peculiarities of the legislative omission in the cases that the judiciary is involved in the omission – as, e.g., when it has exclusive initiative to propose a particular law: Mendes and Branco, \textit{Curso de Constitucional}, at 1156–1157. Despite those specificities, our discussion about standing in direct actions of unconstitutionality remains applicable here. In this sense: Lammêgo Bulos, \textit{Curso de Direito Constitucional}, at 341.

\textsuperscript{319}As a general rule, the procedure of the direct action by omission is the same as the one pertinent to direct actions of unconstitutionality and declaratory action of constitutionality, as stated in article 12-E of law 12063, of 2009.

\textsuperscript{320}Clève, \textit{A Fiscalização Abstrata da Constitucionalidade no Direito Brasileiro}, at 322, where the author clarifies that the lacking of political-administrative measures is solved in the political; whereas the absence of a judicial measure is solved within the judiciary branch itself – with its procedures of appeals and particular actions for effectiveness of the constitutional text.
unconstitutional omissions in Brazil concerns to the absence of a legislative measure – with law and normative acts considered in material and formal conceptions.\textsuperscript{321} Such absence constitutes a deeper concern, to the extent that the Brazilian Constitution contains several commands directed to the legislator – and any measure of nonobservance of the fundamental law, by omission or commission, diminishes the constitutional conscience.\textsuperscript{322}

Consequently, the specific requirement for filing direct action of unconstitutionality by omission is the inaction of the legislative (or executive) that must have acted editing a normative measure, as demanded in a particular disposition of the Constitution. Despite the constitutional command, the legislative (or executive) remained still. Remarkably, there is no general requirement of a mandatory minimum period to elapse in order to characterize the inertia of a given branch.\textsuperscript{323}

The omissions that can be object of the specific direct action of unconstitutionality are divided in total or partial.\textsuperscript{324} The first type refers to the omission arising out of the disobedience of an autonomous duty to legislate. The second one exists when such duty is not entirely fulfilled, or when there is a breach of the general clause of isonomy.\textsuperscript{325} It is worth noting that regardless of the type of omission, it must have a normative character, i.e., concrete and specific cases are excluded from such action. Still referring to the object of such actions is the possibility of state omissions being rendered unconstitutional in light of the Republican Constitution, which would also be within the competence of the STF.\textsuperscript{326} There are constitutionalists\textsuperscript{327} as well as state constitutions\textsuperscript{328} foreseeing

\begin{itemize}
\item \textsuperscript{321} Idem, at 323.
\item \textsuperscript{322} Idem, at 323–324.
\item \textsuperscript{323} Clève, A Fiscalização Abstrata da Constitucionalidade no Direito Brasileiro, at 340.
\item \textsuperscript{324} It is worth stressing that any direct action of unconstitutionality based on omission provides a legal remedy that traditionally has been treated as a typical political question. Along those lines: Mendes and Branco, Curso de Direito Constitucional, at 1155.
\item \textsuperscript{325} For distinction about the two types of omission, see, among others: Clève, A Fiscalização Abstrata da Constitucionalidade no Direito Brasileiro, at 328.
\item \textsuperscript{326} From all the authors surveyed, only Justice Gilmar Mendes emphasized explicitly such possibility: Mendes and Branco, Curso de Constitucional, at 1158.
\end{itemize}
explicitly the possibility of a direct action of unconstitutionality by omission having as parameter the state constitution, not the federal fundamental norm.

The finality of the direct action of unconstitutionality by omission is to notify the Legislative of the omission, and nothing beyond such notification, according to the traditional case law of the Supremo. This limitation is due to potential violations of the principle of separation of powers. Nevertheless, in cases where the omission is caused by the absence of a normative act by an administrative organ, the decision of the STF is actually an order.

It is noteworthy that current justices are eager to change the Court’s current position referring to a legislative omission based on the jurisdictional power of the STF itself. This is the case because the judgment that determines the unconstitutionality by omission ultimately also orders the legislature to eliminate such omission by acting within a reasonable time. The first understanding about the nature of the omission is still dominant in the Court and was the main justification for the denial of preliminary injunctions. The federal law 12,063, of 2009, departed from that understanding and authorized such remedies in its article 12-F.

Finally, having established the framework under which judicial review occurs in Brazil, we turn our focus to the pertinent application of those concepts and procedures in

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327 As argued, for instance, by the following constitutionalists: Lammêgo Bulos, *Curso de Direito Constitucional*, at 342–343; Clève, *A Fiscalização Abstrata da Constitucionalidade no Direito Brasileiro*, at 392–395; Barroso, *O Controle de Constitucionalidade no Direito Brasileiro*, at 283.

328 For a complete survey of all the state constitutions in Brazil and whether or not the provision of direct action by omission exists: see chapter six of this thesis.

329 Criticizing emphatically such understanding and stating this line of interpretation by the STF ultimately removed the practical importance of the action on point: Lammêgo Bulos, *Curso de Direito Constitucional*, at 340–341.

330 Article 2 of the Constitution of 1988: The Legislative, the Executive and the Judiciary, independent and harmonious among themselves, are the powers of the Union.

331 Barroso, *O Controle de Constitucionalidade no Direito Brasileiro*, at 286.

332 As contended by: Mendes and Branco, *Curso de Direito Constitucional*, at 1172–1173, where the Professors defend the definition of deadlines to be enforced by the Court determining the Legislative to act.

333 Mendes and Branco, *Curso de Direito Constitucional*, at 1169.
the following chapters. Our next (immediate) chapter, however, provides an overview of the U.S. system of federal judicial review.
CHAPTER FOUR

OVERVIEW OF FEDERAL JUDICIAL REVIEW IN THE UNITED STATES

This chapter outlines the U.S. practice of judicial review focusing on the national level. It starts with the historical constitutional background of judicial review. Part II describes the main characteristics of federal judicial review in the United States, whereas Part III addresses some of the implications of federal judicial review to the states. Part IV considers the justiciability doctrines, and Part V surveys the recurrent arguments in the debate about the existence of abstract review in the United States.

I. GENERAL BACKGROUND

The origins of judicial review are attributed to the Greek experience and the necessity of subordinating particular acts of the lawmaking power to higher principles. Formulation and general conceptions with regard to the doctrine of supremacy of the laws and of the illegality of the unjust law are found in Aristotle. The necessity of those doctrines has been linked to the perennial struggle for permanence in humankind.

The common-law experience of judicial review dates back to the famous British decision in the Dr. Boham’s Case. In the United States, it was first recognized by the

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334 Mauro Cappelletti, Judicial Review in the Contemporary World (Indianapolis: The Bobbs-Merrill Company, Inc., 1971), at 28, where we also find the following passage: “In Athenian law, for example, there was a distinction made between a νόμος, corresponding to law in the strict sense, and a ψέφισμα, which in our times might be called a decree. In fact νόμοι might in a certain sense be compared to modern constitutional laws, for they often concerned the organization of the State and could be amended only by a special procedure which would remind a modern lawyer of the procedure for revision of the Constitution.”

335 Idem., at 29.

336 In this sense: “Written constitutions, and the subordination by the courts of statutory law to those constitutions, represent innovations with deep philosophical roots. From the earliest times men have sought to create or discover a hierarchy of laws and to guarantee this hierarchy. Indeed, this search is one aspect of man’s never-ending attempt to find something immutable in the continuous change which is his destiny. Laws change, but the Law must remain, and with it the fundamental values; a law which contravenes that Higher Law is not a law at all.” Idem., at VII.

337 In the Dr. Bonham’s Case, dated from 1610, Sir Edward Coke affirmed that: “(…) when an act of Parliament is against common right or reason or repugnant, or impossible to be performed, the common law will control it and adjudge such act to be void.” Sir Coke contended that the common lawyer has “artificial reason of the law” and that “(…) this capacity elevated him to nearly equal footing with king and Parliament” and, in this sense, the expertise necessary to interpret the law positioned it above politics, as
Supreme Court in its the unanimous decision written by Chief Justice Marshall, in *Marbury v. Madison*.\(^{338}\)

Judicial review as a manifestation of the particular system of separation of powers in the United States – namely, checks and balances – had already been subject of much debate. Most remarkably, Alexander Hamilton stated in the *Federalist Papers* (No. 78) the following often cited quote:

> Whoever attentively considers the different departments of power must perceive that, in a government in which they are separated from each other, the judiciary, from the nature of its functions, will always be the least dangerous to the political rights of the Constitution; because it would be least in capacity to annoy or injure them. The executive not only dispenses the honors but holds the sword of the community. The legislature not only commands the purse but prescribes the rules by which the duties and rights of every citizen are to be regulated. The judiciary, on the contrary, has no influence over either the sword or the purse; no direction either of the strength or of the wealth of the society, and can take no active resolution whatever. It may truly be said to have neither *force* nor *will* but merely judgment; and must ultimately depend upon the aid of the executive arm even for the efficacy of its judgments.\(^{339}\)

That particular conception of separation of powers has already been defended in France, based on the argument that the legislative power is the one susceptible to

\(^{338}\) The role of Chief Justice Marshall was very important for the implementation of the practice of judicial review in the United States. Nevertheless, even before the independence, there have been arguments supporting such review. Among those, James Otis advocated, in 1761, challenging an act of Parliament granting general search warrants: “(…) As to Acts of Parliament. An act against the Constitution is void; an act against natural equity is void; and if an act of Parliament should be made, in the very words of this petition, it would be void. The executive Courts must pass such acts into disuse.” Louis Fisher and Katy J. Harriger, *American Constitutional Law: Constitutional Structures* (Durham: Carolina Academic Press, 2013), at 35. The authors emphasize that such enthusiastic view supporting judicial review was disputable. There were positions that would agree with Blackstone’s Commentaries, defending the supremacy of the Parliament: *Idem*. In addition, between 1791 and 1799, several federal courts challenged and stroke down states laws; whereas state judiciaries also exercised judicial review over state statutes, before Marbury: Kermit L. Hall, Paul Finkelman and James W. Ely, Jr., *American Legal History* (New York: Oxford University Press, 2005), at 140–141.

overthrow existing laws due to unstable political majorities. As far this argument goes, to avoid such danger, the United States developed a strong constitutionality control exercised by the judiciary, which is not considered a political power. It is that fine, albeit delicate, balance of powers that constitutes, in practice, the rule of law.\textsuperscript{340}

II. \textbf{SIGNIFICANT PROVISIONS ABOUT JUDICIAL REVIEW IN THE UNITED STATES}

Article III of the U.S. Constitution\textsuperscript{341} is silent about judicial review, which contributed to controversies about the decision in \textit{Marbury v. Madison}.\textsuperscript{342} The Court understood that it had original jurisdiction to hear the mandamus, as argued by Marbury, under § 13 of the Jurisdiction Act of 1789.\textsuperscript{343} Later, the Court had to examine whether or not this jurisdictional provision was compatible with Article III of the Constitution.\textsuperscript{344}

\textsuperscript{340} The arguments referred in this paragraph were all claimed by Maurice Hauriou, \textit{Précis Élémentaire de Droit Constitutionnel} (Paris: Librairie du Recueil Sirey, 1930), at 27: “(...) c’est le pouvoir législatif qui peut bouleverser les lois existantes au gré de majorité politiques changeantes; c’est contre ce danger que les citoyens des Etats-Unis d’Amérique ont organisé fortement le contrôle judiciaire de la constitutionnalité des lois.” Later, the constitutionalist also affirms that: “le régime de la legalité tend ainsi `a créer `a l'intérieur de l'Etat, au point de vue spécial de l'observation du droit établi, un équilibre constitutionnel entre les pouvoirs politiques, d'une part, et, d'autre part, le pouvoir juridictionnel, qui est considéré comme ne devant pas être un pouvoir politique. C'est cet équilibre de pouvoirs, très délicat et susceptible de plusieurs modalités, qui constitue pratiquement ' l'etat de droit!’” The author further stresses that the previous control exercised in the Parliament are subject to political passions: at 195.

\textsuperscript{341} Article III, Section 1, of the Constitution of the United States: The judicial Power of the United States, shall be vested in one Supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The remaining provisions of Article III do not address judicial review expressly.

\textsuperscript{342} Fisher and Harriger, \textit{American Constitutional Law: Constitutional Structures}, at 33.

\textsuperscript{343} Erwin Chemerinsky, \textit{Constitutional Law: Principles and Policies} (New York: Aspen Publishers, 2006), at 43. Nevertheless, the constitutionalist remarks that a careful reading of that provision may cast doubts about the original jurisdiction of the United States Supreme Court to hear the case.

\textsuperscript{344} \textit{Idem}, at 44. The author emphasizes, at 44–45, the following: “Irrespective of possible alternative interpretations, the Court’s holding that Congress cannot increase the Supreme Court’s original jurisdiction remains the law to this day. However, the Court’s statement that the categories of original and appellate jurisdiction are mutually exclusive has not been followed. The Supreme Court subsequently held that Congress could grant the district courts concurrent jurisdiction over matters within the Court’s original jurisdiction. More generally, by viewing Article III as the ceiling of federal jurisdiction, \textit{Marbury} helped establish the principle that federal courts are courts of limited jurisdiction, and that Congress may not expand the jurisdiction granted in Article III of the Constitution.”
Marshall had the difficult task to establish the two assumptions necessary for judicial review: the Constitution as law, and that it is law that courts are able to expound.\textsuperscript{345} The Court developed those arguments in the excerpt below:\textsuperscript{346}

The Constitution is either a superior, paramount law, unchangeable by ordinary means, or it is on a level with ordinary legislative acts, and, like other acts, is alterable when the legislature shall please to alter it. If the former part of the alternative be true, then a legislative act contrary to the Constitution is not law; if the latter part be true, then written Constitutions are absurd attempts on the part of the people to limit a power in its own nature illimitable. Certainly all those who have framed written Constitutions contemplate them as forming the fundamental and paramount law of the nation, and consequently the theory of every such government must be that an act of the Legislature repugnant to the Constitution is void. This theory is essentially attached to a written Constitution, and is consequently to be considered by this Court as one of the fundamental principles of our society. . . . It is emphatically the province and duty of the Judicial Department to say what the law is.

The Court further emphasized the connection between written constitutions, its supremacy, and the fact that all were bound by the Constitution, including the judicial branch.\textsuperscript{347} As illustrated in the quote of \textit{Marbury v. Madison} referred above, judicial review was established as a corollary of the supremacy of the constitution.\textsuperscript{348} The often


\textsuperscript{346} Marbury v. Madison, 5 U.S. (1 Cranch) 137, (1803), at 177. Importantly, all internal citations by the United States Supreme Court to other decisions in this thesis are omitted, unless stated otherwise.

\textsuperscript{347} Marbury v. Madison, 5 U.S. (1 Cranch) 137, (1803). This decision concluded addressing the supremacy of the constitution with the following words, at 180: “Thus, the particular phraseology of the constitution of the United States confirms and strengthens the principle, supposed to be essential to all written constitutions, that a law repugnant to the constitution is void, and that courts, as well as other departments, are bound by that instrument.” Noting that the real question at bar was actually who could decide if the act was repugnant to the Constitution and emphasizing the absurdity that courts were not elected: Alexander M. Bickel, \textit{The Last Dangerous Branch} (New Haven: Yale University Press, 1986), at 3–4; and at 23–28, the Professor justifies why courts are suited for judicial review.

\textsuperscript{348} The supremacy of the Constitution has been previously argued. Hamilton had already discussed it on the \textit{Federalist Papers} (No. 78): “Some perplexity respecting the rights of the courts to pronounce legislative acts void, because contrary to the Constitution, has arisen from an imagination that the doctrine would imply a superiority of the judiciary to the legislative power. It is urged that the authority that can declare the acts of another void must necessarily be superior to the one whose acts may be declared void. As this doctrine is of great importance in all the American constitutions, a brief discussion of the grounds on which
named as the most important case of U.S. constitutional law established the power of the judiciary to review the constitutionality of executive and legislative acts.\textsuperscript{349} In authorized words:

The American version of judicial review was the logical result of centuries of European thought and colonial experiences, which had made western man in general willing to admit the theoretical primacy of certain kinds of law and had made Americans in particular ready to provide a \textit{judicial} means if enforcing that primacy. This is not to minimize the importance of American contribution, since prior to the formation of the American system of judicial review, nothing similar had been created in other countries. The reason for this is readily understandable, as it was the Constitution of the United States which initiated an era of “constitutionalism,” with the notion of supremacy of the constitution over ordinary laws. The American Constitution represented the archetype of so-called “rigid” constitutions in contrast to “flexible” ones. That is to say that it was the model of those constitutions not subject to change or revision through ordinary laws, but changeable, if at all, only by a special amending procedure. (…) Marshall’s decision, with its enunciation of the supremacy of the constitution over other laws and of the judicial power to disregard unconstitutional laws, has certainly been a grand innovation.\textsuperscript{350}

\textsuperscript{349} Chemerinsky, \textit{Constitutional Law: Principles and Policies}, at 39. The Professor contends, at 45, that \textit{Marbury} has been criticized to the extent that the language of the decision does not necessarily determine that “(…) the Court is \textit{the} authoritative interpreter of the Constitution or just one among many.” Emphasis in the original.

\textsuperscript{350} Cappelletti, \textit{Judicial Review in the Contemporary World}, at 25–27, with emphasis in the original. The quote is particularly relevant to the uniqueness of the American experience, because other European countries had written constitutions, but that did not empower the judiciary to nullify laws that were conflicting with the constitution. In this direction, specifically: \textit{Idem}, at 26.
It is not to say that judicial review has been fully and unanimously embraced. Judicial review suffered attacks over time. More recently, it has been contended that constitutional judicial review does not provide effective achievements toward social change, and some went even further, arguing that it should be abolished.\footnote{As exemplificative references contending the potential abolition of judicial review: Gerald N. Rosenberg, \textit{The Hollow Hope: Can Courts Bring About Social Change?} (Chicago: The University of Chicago Press, 1991); and Mark Tushnet, \textit{Taking the Constitution Away from the Courts} (New Jersey: Princeton University Press, 1999), respectively. For a fierce criticism about Professor Tushnet’s work: Erwin Chemerinsky, “Losing Faith: America without Judicial Review?,” \textit{Michigan Law Review} 98 (2008): 1416–1435. For historical context of judicial activism in the late nineties and how the critique was divided in partisan lines: Barry Friedman, \textit{The Will of the People: How Public Opinion has Influenced the Supreme Court and Shaped the Meaning of the Constitution} (New York: Farrar, Straus and Giroux, 2009), at 344–346.}

We turn next to the federal jurisdiction. The Constitution in Article III, § 1, specifically addresses the creation of the U.S. Supreme Court but does not similarly provide for lower federal courts.\footnote{Tribe, \textit{American Constitutional Law}, at 267.} In addition, § 2 of the same Article confers the original jurisdiction to the Court.\footnote{Article III, section 2, of the United States Constitution: In all cases affecting ambassadors, other public ministers and consuls, and those in which a state shall be party, the Supreme Court shall have original jurisdiction. In all the other cases before mentioned, the Supreme Court shall have appellate jurisdiction, both as to law and fact, with such exceptions, and under such regulations as the Congress shall make.} The latter is the apex of a pyramid in which federal district courts sit in the base; and the U.S. Court of Appeals is level at the intermediary.\footnote{Tribe, \textit{American Constitutional Law}, at 268.}

Article III of the Constitution, thus, limits the jurisdiction of federal courts to “cases” or “controversies,” with jurisdiction being granted by the Constitution and statutory provisions.\footnote{Fisher and Harriger, \textit{American Constitutional Law: Constitutional Structures}, at 75. In addition, the Evarts Act of 1891 determined the basic outline regarding the pyramid we referred above, whereas the Judges’ Bill of 1925 provided for the discretionary character of the Supreme Court review, according to: Tribe, \textit{American Constitutional Law}, at 268.} Importantly, in 1988, the U.S. Supreme Court mandatory appeal jurisdiction disappeared due to Congress action.\footnote{\textit{Idem}.} Similarly, Supreme Court review became discretionary in almost all the cases.\footnote{Tribe, \textit{American Constitutional Law}, at 269. At the same page, the Professor notes that refusals of the Court to hear matters pertaining to its original exclusive jurisdiction have been criticized in terms of judicial policy.} Despite the broad jurisdiction over federal
claims granted by Congress to federal courts, federal courts may still be threatened by the legislative because federal jurisdiction is not self-executing, i.e., Congress may withdraw federal jurisdiction. Nevertheless, federal courts have jurisdiction to rule about the constitutionality of such withdrawals. The composition of the Court is another instance that has been subject to modifications. The number of justices has fluctuated during the nineteenth century, but legislation in 1869 established the current number of nine justices in the Court, which, since then, has been constant. Article II, § 2, of the Constitution determines that the President shall nominate and shall appoint justices of the Supreme Court, upon advice and consent of the Senate. Federal judges are subject to presidential nomination and confirmation by the Senate, which creates a highly politicized process.

With regard to the access to the U.S. Supreme Court, five avenues lead to it. The first refers to the original jurisdiction of the Court, having its own separate docket. The

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361 This does not mean that the composition of the Court was sheltered from possible attacks. Most famously, the so-called Court-Packing Plan attempt to increase the number of justices in order to have the New Deal’s policies approved by the Court. For a detailed description of the Plan and how states and “big business” were against such plan: William E. Leuchtenburg, *The Supreme Court Reborn: The Constitutional Revolution in the Age of Roosevelt* (New York: Oxford University Press, 1995), at 104–130.

362 Article II, section two, when referring to the President, states: “He shall have power, by and with the advice and consent of the Senate, to make treaties, provided two thirds of the Senators present concur; and he shall nominate, and by and with the advice and consent of the Senate, shall appoint ambassadors, other public ministers and consuls, judges of the Supreme Court, and all other officers of the United States, whose appointments are not herein otherwise provided for, and which shall be established by law: but the Congress may by law vest the appointment of such inferior officers, as they think proper, in the President alone, in the courts of law, or in the heads of departments.”


364 28 U.S. Code § 1251, Original jurisdiction: (a) The Supreme Court shall have original and exclusive jurisdiction of all controversies between two or more States; (b) The Supreme Court shall have original but not exclusive jurisdiction of: (1) All actions or proceedings to which ambassadors, other public ministers, consuls, or vice consuls of foreign states are parties; (2) All controversies between the United States and a State; (3) All actions or proceedings by a State against the citizens of another State or against aliens. For a discussion about the original jurisdiction, its general requirement of the state itself being a litigant, and the restriction of b.3 requiring that only a state can be plaintiff: Erwin Chemerinsky, *Federal Jurisdiction* (New York: Aspen Publishers, 2007), at 667–671.
Court has always been concerned in becoming a fact-finding trial court because it does not have the necessary structure. Hence, the Court avoids exercising its own original (and discretionary) jurisdiction. The second avenue is statutory rights, with Congress enacting statutes that authorize direct appeal, preferred treatment, or expedited action. Remarkably, Congress has accepted the Court’s request and has granted broad discretion in those subjects. The third (and the most common) avenue is the writ of certiorari. According to the Rule 10 of the Rules of the U.S. Supreme Court, review by certiorari “is not a matter of writ, but of judicial discretion.”

The writ of certiorari is limited to the hypotheses listed in such Rule. The fourth avenue is quite limited. It addresses petitions for review submitted by indigents, encompassing prison inmates. The fifth route to the Court is initiated by an appellate court, which submits a writ of certification to seek instruction on a question of law. This is not commonly used, because it “forces the Court to decide questions of law

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366 Idem. Another striking aspect concerning appeals is the one referring to the case law of the Court, who held that it will only hear an appeal if it has a substantial federal question, i.e., if the legal issue is not settled in prior decisions: Chemerinsky, *Federal Jurisdiction*, at 674–675.

367 Rule ten of the Rules of the Supreme Court of the United States: “Review on a writ of certiorari is not a matter of right, but of judicial discretion. A petition for a writ of certiorari will be granted only for compelling reasons. The following, although neither controlling nor fully measuring the Court's discretion, indicate the character of the reasons the Court considers: (a) a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter; has decided an important federal question in a way that conflicts with a decision by a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's supervisory power; (b) a state court of last resort has decided an important federal question in a way that conflicts with the decision of another state court of last resort or of a United States court of appeals; (c) a state court or a United States court of appeals has decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court. A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law.”


369 Certification is only admitted if the issues are limited to questions of law and as long as the questions are not very general, with the certification not being use as disguised appeals: Chemerinsky, *Federal Jurisdiction*, at 679.
without the guidance of findings and conclusions by the lower courts.” Thus, it is too abstract, potentially.

The most effective route to the U.S Supreme Court, the writ of certiorari, requires lawyers to demonstrate the importance of the issue at bar. The importance of the lawsuit is reflected on the fact that certiorari is often granted when the federal government is seeking review because the Solicitor General would only petition in cases that would merit an appeal. Related factors in granting certiorari are the presence of a civil liberty claim, conflict between circuits, a lower court decision in which the votes of the deciding judges were split, flagrant abuse of justice in the lower courts, interpretation of an important federal statute, state or federal court’s holding a congressional statute unconstitutional, among others.

After having discussed the jurisdiction and how the Court rules in a lawsuit, we pass now for the effects of the decision. As for the effects of the declaration of unconstitutionality, there are two main assumptions. The first one refers to the fact that the Constitution operates in its own force – the judicial acknowledgement of that is what may be delayed. The second assumption focuses on the context of litigation. Thus, the declaration of unconstitutionality is not the result of the lawsuit itself, since this declaration comes as the outcome of a judgment aiming at the resolution of the litigation

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371 Chemerinsky, *Federal Jurisdiction*, at 673, notes that since the statute 662, of 1988 (responsible for virtually eliminating the differences between appeal and certiorari regarding the review of the Supreme Court), almost all the cases heard by the Court are so under the writ of certiorari. It is emphasized that under appeals, the Court was obliged to listen the case; whereas in the writ of certiorari the Court has discretion.

372 Fisher and Harriger, *American Constitutional Law: Constitutional Structures*, at 143, where the author refers to this process as the “cue theory”.

373 *Idem*, at 144.

374 Charles R. Epp, *The Rights Revolution: Lawyers, Activists and Supreme Courts in Comparative Perspective*, at 36, noting: “… justices have developed an institutionalized reluctance to decide issues that have been subject of little sustained litigation in lower courts.” The Professor also contends that the justices are further constrained by the *sua sponte* doctrine, which requires that issues shall be raised by at least one party in the litigation, i.e., with the Court avoiding to decide on its own motion, generally. In addition, at 37, emphasis is made to the fact that early certiorari petitions usually are declined on the rationale that if an issue is actually important, it will re-appear in the Courts’ dockets again.
among the parties.\textsuperscript{375} Despite the decision being biding immediately on the parties, it shall become a norm of vast applicability, which must not be ignored in future cases.\textsuperscript{376} There are exceptions to this premise, to the extent that the Government may relitigate issues – regardless if those are of statutory or constitutional nature –, as long as different parties are involved in a succession of cases.\textsuperscript{377}

In light of the assumptions made above, we move to the analysis of the strict effects concerning the declaration of unconstitutionality.\textsuperscript{378} The U.S. Supreme Court has distinguished the effects within criminal and civil cases. Initially, the court would deny retroactive effect to criminal laws ruled unconstitutional based on policy reasons;\textsuperscript{379} whereas in civil cases, nonretroactivity was the exception and could only be authorized to avoid injustice or hardship.\textsuperscript{380} The Court first dismissed the general bar of retroactivity in criminal cases. Departing from the previous understanding were concerns of separation of powers and equality because selective retroactive effects would ultimately lead to similar situated parties being treated differently.\textsuperscript{381} The Court later solved the retroactivity controversy concerning civil cases.\textsuperscript{382} In Harper, the Court did not state that all the

\textsuperscript{375} Tribe, \textit{American Constitutional Law}, at 214.

\textsuperscript{376} Idem, where it is stressed: “The degree to which a constitutional norm announced in an individual case will bind those involved in future situations calling for a constitutional choice thus depends in large parts on issues of (…) the degree to which the internal structure of the norm admits of value judgments contrary to the thrust of the Court’s opinion; the degree to which the Supreme Court views differing interpretations by other courts and branches as a threat to its judicial supremacy; whether future courts will have jurisdiction to reinforce the norm; whether the norm is properly presented in a justiciable lawsuit; and whether future courts will refrain, for equitable reasons, from imposing the norm on parties to other lawsuits.”

\textsuperscript{377} Idem, at 215.

\textsuperscript{378} We survey the main cases.

\textsuperscript{379} Tribe, \textit{American Constitutional Law}, at 218. The rule was announced in Linkletter v. Walker, 381 U.S. 618 (1965).

\textsuperscript{380} Idem, at 219.

\textsuperscript{381} Idem, at 219–220. The case at bar was Griffith v. Kentucky, 479 U.S. 314 (1987).

\textsuperscript{382} Tribe, \textit{American Constitutional Law}, at 220–221, reference is made to the existence of different conceptions of retroactivity in civil cases. Different conceptions were based on retroactivity occurring as a choice of law rule or as a remedial principle. This distinction is particular relevant for cases arising out of state court or federal courts. In the latter, substantive and procedural laws are both within the federal sphere. In cases arising out of state law, by contrast, the federal Constitution secures a minimum remedy that shall be granted by state courts, but those remedies are subject, first, to state law.
decisions of federal law shall be applied retroactively.\textsuperscript{383} It also bears emphasis that the Constitution does not state, for the most part, the remedies that shall be granted in a given case. Accordingly, state courts still have some room of maneuver when a decision determines retroactive effects.\textsuperscript{384}

A related topic to the retroactivity effect of a decision is the one of \textit{stare decisis}. Constitutional law in the United States is based on the text of the Constitution itself, as well as on the decisions of the U.S. Supreme Court interpreting that document.\textsuperscript{385} More significantly, it has been contended that: “the bare words of the Constitution’s text and the skeletal structure on which those words were hung, only begin to fill out the Constitution as a mature, ongoing system of constitutional law.”\textsuperscript{386} The Court may depart from prior understandings, despite the existence of \textit{stare decisis}. It has already done so in issues concerning the core of the U.S. tradition. The interpretation of federalism and the powers granted to states, slavery and, later, racial segregation during the Jim Crow era, the Court stoke a balance between constitutional precedents and constitutional values being protected. In this sense, the decision of the Court not to confer retroactivity to a given unconstitutional law is also based in respect to previous precedents and the sense of legitimate expectations that attached to the interpretation of the law.\textsuperscript{387}

Constitutional determinations that the Supreme Court deem mistaken should be easier to be modified by the Court itself than through an amendment to the Constitution.\textsuperscript{388} The Court has stated that when it reexamines prior decisions, it often refers to “a series of prudential and pragmatic considerations designed to test the

\textsuperscript{383} The case was Harper v. Virginia Department of Taxation, 509 U.S. 86 (1993). Tribe, \textit{American Constitutional Law}, at 225, where the author explains that decision: “(…) The Court held that, when a federal court applies a substantive rule of federal law to the parties before it, that rule must be given full retroactive effect in all cases still pending on direct review and as to all occurrences, including those that predate the rule’s announcement.”

\textsuperscript{384} Tribe, \textit{American Constitutional Law}, at 226.

\textsuperscript{385} \textit{Idem}, at 78.

\textsuperscript{386} \textit{Idem}, at 81–82, with emphasis on the original.

\textsuperscript{387} \textit{Idem}, at 235–251. The discussion of \textit{stare decisis} in the United States, although fascinating, is not within the delimitations established at our Introduction.

\textsuperscript{388} \textit{Idem}, at 84.
consistency of overruling a prior decision with the ideal of the rule of law, and to gauge the respective costs of reaffirming and overruling a prior case.\textsuperscript{389} It is noteworthy that those concerns are particular related to the interpretation of constitutional stare decisis. By contrast, in statutory stare decisis, those concerns are made more acute because the legislative power is directly involved.\textsuperscript{390}

III. JUDICIAL REVIEW OF STATE LAW FROM A FEDERAL PERSPECTIVE

First, we address issues related to federalism before developing the review of state laws. The Constitution, it has been contended, presumes the existence of states as lawmakers and governmental institutions that are different from the national government.\textsuperscript{391} There is a fine balance between the federal government and the power granted to the states. Federalism consequences are innumerous and very controversial. This work outlines the main limitations with regard to constitutional review of state action, considering that federalism has supported judicial supremacy.\textsuperscript{392} Despite not being exhaustive, this part aims to discuss potential issues raised in the comparison of chapters concerning local governments and the pertinent implications of judicial review itself.

State sovereignty is protected in different constitutional provisions. Article IV, § 3 protects their territorial integrity,\textsuperscript{393} whereas Article V protects the equal representation of

\textsuperscript{389} Planned Parenthood v. Casey, 505 U.S. 833 (1992), at 854. The Court also held, at 854–855, that: “(…) whether the rule has proven to be intolerable simply in defining practical workability; whether the rule is subject to a kind of reliance that would lend a special hardship to the consequences of overruling and add inequity to the cost of repudiation; whether related principles of law have so far developed as to have left the old rule no more than a remnant of abandoned doctrine; or whether facts have so changed, or come to be seen so differently, as to have robbed the old rule of significant application or justification.”

\textsuperscript{390} Tribe, \textit{American Constitutional Law}, at 251.

\textsuperscript{391} Idem, at 464.


\textsuperscript{393} Article IV, Section three, of the Constitution of the United States: New states may be admitted by the Congress into this union; but no new states shall be formed or erected within the jurisdiction of any other state; nor any state be formed by the junction of two or more states, or parts of states, without the consent of the legislatures of the states concerned as well as of the Congress.
each state in the Senate. The Tenth Amendment determines the states and the people remain with all the powers not delegated to United States nor prohibited to the states. The Eleventh Amendment protects states from particular lawsuits in federal courts by textually limiting federal power in light of the interests of the states as independent entities. It is noteworthy that the Supreme Court affirmed that sovereign immunity, being derived from the scheme of the original Constitution bars lawsuits against state governments in federal and state courts. The Supreme Court, however, has established three main avenues to circumvent the Eleventh Amendment, thus enabling the compliance of state law with federal law.

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394 Article V: The Congress, whenever two thirds of both houses shall deem it necessary, shall propose amendments to this Constitution, or, on the application of the legislatures of two thirds of the several states, shall call a convention for proposing amendments, which, in either case, shall be valid to all intents and purposes, as part of this Constitution, when ratified by the legislatures of three fourths of the several states, or by conventions in three fourths thereof, as the one or the other mode of ratification may be proposed by the Congress; provided that no amendment which may be made prior to the year one thousand eight hundred and eight shall in any manner affect the first and fourth clauses in the ninth section of the first article; and that no state, without its consent, shall be deprived of its equal suffrage in the Senate.

395 The Tenth Amendment says: “The powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people.”

396 The Eleventh Amendment determines: “The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another state, or by citizens or subjects of any foreign state.” The decision in Hans v. Louisiana, 134 U.S. I (1890), interpreted that this amendment also encompassed suits by a citizen of the same state – as clarified by: Louise Weinberg, “The New Judicial Federalism,” Stanford Law Review 29 (1977): 1191–1244, at 1200. The author remarks, at the same page, the following about the decision in Ex parte Young, 209 U.S. 123 (1908): “(…) laid down the principle that a federal court has power, despite the amendment, to override state sovereignty upon a showing of state unconstitutionality. Because the action was not against the state as party of record but only against the official, upon a showing that the defendant had violated the plaintiff’s constitutional rights, he was ‘stripped of his official or representative character and (…) subjected in his person to the consequences of his individual conduct.’”

397 Tribe, American Constitutional Law, at 465. The author further remarks, at 519–520, that the Eleventh Amendment and the related state immunity were founded in a “(…) anachronistic fiction – that the King can do no wrong – the concept of sovereignty immunity is an established part of our law.” The Supreme Court, according to the same author, at 520, was not able to develop a consistent interpretation of such amendment and the relation with federalism, separation of powers and fundamental rights that shall be protected.

398 Chemerinsky, Federal Jurisdiction, at 406, stressing the importance of the decision in Alden v. Maine, 527 U.S. 706 (1999). Professor Chemerinsky notes, also at 406, that if a broad interpretation of the sovereign immunity was authorized, federal and constitutional rights (civil rights litigation, for example) would not be enforced.

399 Chemerinsky, Federal Jurisdiction, at 407.
The three main circumvention avenues that the Court has authorized are: (1) lawsuits against state officers; (2) states are authorized to waive their sovereign immunity and consent to suit; and (3) litigation sanction against the states based on statutes adopted to secure guarantees of the Fourteenth Amendment.\textsuperscript{400} In addition, the amendment does not bar lawsuits against a state by another state, as long as the state is suing to protect its own interest and not merely interests of its citizens.\textsuperscript{401} It does not prohibit suits in federal courts by the U.S. government against a state, and it does not apply to municipalities or to subdivisions of a state.\textsuperscript{402}

The Eleventh Amendment bars only the original jurisdiction of the Supreme Court, but is ineffective with regard to the appellate jurisdiction.\textsuperscript{403} Federalism concerns informs the Supremacy Clause,\textsuperscript{404} which has been interpreted as to establish that state laws and state constitutions must be in accordance with the federal laws and the Constitution.\textsuperscript{405} The Supreme Court famously decided, in 1796, that in a conflict between

\textsuperscript{400}Idem. The discussion of detailed limitations of the Eleventh Amendment is beyond the scope of this work.

\textsuperscript{401}Chemerinsky, Federal Jurisdiction, at 424.

\textsuperscript{402}Idem, at 426, where he points out: “The ability to sue local governments in federal court is significant because it is this level of government that provides most social services in this country, such as police and fire protection, education, and sanitation.” The Professor underlines that, at 427, the Eleventh Amendment’s state immunity extends to local governments when there is “so much state involvement in the municipalities’ actions that the relief, in essence, runs against the state.” Among such examples are when funding of a giving activity comes almost completely from the state and state statute provided for cooperation.

\textsuperscript{403}Idem, at 424–425.

\textsuperscript{404}Article VI, Paragraph 2, of the Constitution, the so-called Supremacy Clause, says: “This Constitution, and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the Constitution or laws of any State to the contrary notwithstanding.”

\textsuperscript{405}Noting that state courts are entitled to exclusive or concurrent jurisdictions over significant federal-question litigation, with the role of state courts being to protect and enforce all the rights determined by the United States Constitution: Paul M. Bator, “The State Courts and Federal Constitutional Litigation,” William and Mary Law Review 22 (1981): 605–637, at 606. The author also stresses, at 607, and at 624, that federal judges are more competent in solving conflicts arising out of federal law. Along this line of reasoning, explaining the independence of federal judges from political and popular interests, and contenting that there is no parity between state and federal instances: Burt Neuborne, “The Myth of Parity,” Harvard Law Review 90 (1977): 1105–1131.
a state law and a treaty, the treaty shall prevail. The power of the U.S. Supreme Court over the highest courts of the state has increased along the years. State power has suffered specific limitations as well. It has been qualified under the Property Clause, with Congress exercising its power over some public land inside the states, mainly western states. Another qualification is expressed in the Privileges and Immunities clause of Article IV, § 2. This clause, in connection with the Commerce Clause, aimed at the creation of a national economic union.

In light of the federalism delimitations, we address important concepts of the federal jurisdiction in relation to the states. Preliminary, the fact that federal courts engaged, albeit in a limited fashion, in the so-called common law powers bears emphasis. The first example of such engagement refers to Article III, § 2, of the Constitution. Technically, Congress shall grant federal courts jurisdiction concerning

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407 Friedman and Delaney, *Becoming Supreme: The Federal Foundation of Judicial Supremacy*, at 1152, noting that the power to review state highest courts has been originally limited to the situations of the Judiciary Act of 1789. The Act determined, in its section 25, that the USSC has jurisdiction to review the decisions of the highest court of the state if the validity of a treaty or statute of the United States was questioned and the decision refused such validity. At 1165, emphasis is made to the increase in the discretion of the Court, upon the Judiciary Act of 1914, based on concerns of uniformity, to the extent that “the U.S. Constitution could mean one thing in one State and the reverse in another,” and the fact that the control over the Court’s docket only came with the Judiciary Act of 1925.

408 Article IV, Section three, clause two: The Congress shall have power to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States; and nothing in this Constitution shall be so construed as to prejudice any claims of the United States, or of any particular state.


410 The citizens of each state shall be entitled to all privileges and immunities of citizens in the several states. Privileges and immunities also appear in Section 1, of the Fourteenth Amendment: No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States. We do note that the Court has differentiated the application of such clauses in its case law.


413 Article III, section two states, in the relevant part: “The judicial power shall extend to all cases, in law and equity, arising under this Constitution, the laws of the United States, and treaties made, or which shall be made, under their authority; (…) to all cases of admiralty and maritime jurisdiction.”
admiralty before they exercise it; but once empowered by such jurisdiction, federal courts do not depend of Congress for the deciding rules.\(^{414}\) The second manifestation of common law powers refers to the so-called diversity jurisdiction, also found in Article III,\(^{415}\) which was conceived to protect nonresidents of a given state from possible state court bias.\(^{416}\)

We turn next to examine the judicial review by the U.S. Supreme Court of state laws. Such authority is not expressly mentioned in the Constitution but was contained in § 25 of the 1789 Judiciary Act.\(^{417}\) The rationale of such review was determined in *Martin v. Lessee*, with Justice Joseph Story’s powerful assumption that review of state law by the U.S. Supreme Court was presumed by the Constitution.\(^{418}\) The decision detailed to a great length the provisions of Article III, particularly § 2, in order to establish the original and appellate jurisdiction of the Supreme Court as the only correct interpretation of the Constitution.\(^{419}\) The Court emphasized the following as pragmatic reasons for having such review of state law:

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\(^{415}\) Article III, in the pertinent part: “(…) to controversies (…) between citizens of different states.”


\(^{417}\) Chemerinsky, *Federal Jurisdiction*, at 658, where the author notes that Section 25 authorized the Supreme Court to review state court decisions by a writ of error to the highest court of the state in particular hypotheses. Hence, such review did not encompass all the cases of Article III, of the Constitution; nor all the federal questions. Professor Chemerinsky, at 658, argues: “In general, Section 25 granted the Supreme Court authority to review state courts decisions that ruled against federal law or federal government interests. For example, the Act granted the Court power to hear cases where the state court declared invalid a federal statute or treaty or an act of the United States government or ruled against any title, right, privilege or exception claimed under federal law. Also, Section 25 provided for review where the highest state court ruled in favor of a state statute or state authority when there was a challenge based on federal law.” We clarify that, in accordance with historical and revision notes available at: http://www.law.cornell.edu/uscode/text/28/1251, the Act Jan. 31, 1928, ch. 14, § 2, amended Apr. 26, 1928, ch. 440, June 25, 1948, ch. 646, § 23, determines that: “All Acts of Congress referring to writs of error shall be construed as amended to the extent necessary to substitute appeal for writ of error.”


\(^{419}\) Martin v. Lessee, 14 U.S. 304 (1816), at 326–331. This understanding that the state courts shall be bound to the Supreme Court decisions and related mandates in a specific case has been reiteratively reassured by the latter, as observes: Weinberg, *The New Judicial Federalism*, at 1197.
The constitution has presumed (...) that state attachments, state prejudices, state jealousies, and state interests, might sometimes obstruct, or control, or be supposed to obstruct or control, the regular administration of justice. Hence, in controversies between states; between citizens of different states; between citizens claiming grants under different states; between a state and its citizens, or foreigners, and between citizens and foreigners, it enables the parties, under the authority of congress, to have the controversies heard, tried, and determined before the national tribunals. No other reason than that which has been stated can be assigned, why some, at least, of those cases should not have been left to the cognizance of the state courts.420

In that decision, the Court remarked that the appellate jurisdiction was also justified under uniformity matters across the states.421 Technically, the Court affirmed that appellate jurisdiction was the “only adequate remedy” capable of harmonizing potentially conflicting decisions across different state supreme courts.422 The Court further confirmed its authority to review state court judgments on a different occasion.423

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420 Martin v. Lessee, 14 U.S. 304 (1816), at 347. The Court, at the same page, went further with regard to its original jurisdiction: “In respect to the other enumerated cases – the cases arising under the constitution, laws, and treaties of the United States, cases affecting ambassadors and other public ministers, and cases of admiralty and maritime jurisdiction – reasons of a higher and more extensive nature, touching the safety, peace, and sovereignty of the nation, might well justify a grant of exclusive jurisdiction.” The Court continues, at 348, specifically mentioning the necessity of uniformity of decisions across the United States. Referring to uniformity as an attribute of the American judicial federalism, Justice Sandra Day O’Connor, “Our Judicial Federalism,” Case Western Reserve Law Review 35 (1985): 1–12, at 4, affirms: “The goal of national uniformity rests on a fundamental principle: that a single sovereign’s laws should be applied equally to all – a principle expressed by the phrase, ‘Equal Justice Under Law,’ inscribed over the great doors to the United States Supreme Court.”

421 General arguments supporting uniformity were presented in earlier occasions, as, e.g., by Madison, in Alexander Hamilton, James Madison and John Jay, The Federalist Papers, No. 80, at 475: “If there are such things as political axioms, the propriety of the judicial power of a government being coextensive with its legislative may be ranked among the number. The mere necessity of uniformity in the interpretation of the national laws decides the question. Thirteen independent courts of final jurisdiction over the same causes, arising upon the same laws, is a hydra in government from which nothing but contradiction and confusion can proceed.”

422 Martin v. Lessee, 14 U.S. 304 (1816), at 347–348: “(...) the importance, and even necessity of uniformity of decisions throughout the whole United States, upon all subjects within the purview of the constitution. Judges of equal learning and integrity, in different states, might differently interpret a statute, or a treaty of the United States, or even the constitution itself: If there were no revising authority to control these jarring and discordant judgments, and harmonize them into uniformity, the laws, the treaties, and the constitution of the United States would be different in different states, and might, perhaps, never have precisely the same construction, obligation, or efficacy, in any two states.”

In this case, Chief Justice John Marshall emphasized that “(...) in many States the judges are dependent for office and for salary on the will of the legislature.”\footnote{Cohens v. Virginia, 19 U.S. 264 (1821), at 386–387. The case also involved the Tenth Amendment. This amendment will be mentioned, infra.}

Federal courts also have jurisdiction to review the constitutionality of state laws and actions of state officials.\footnote{Chemerinsky, Constitutional Law: Principles and Policies, at 49, referring to Martin v. Lessee, supra.} The Supremacy Clause does not bind, if literally read, other state officers than state judges.\footnote{Article VI, Paragraph 2 of the Constitution is quoted supra.} Nevertheless, several constitutional provisions – the Fourteenth Amendment among them – are referred to all state officials and frequently are not dependent upon state courts ruling on the validity of their acts.\footnote{For the line of reasoning argued in this paragraph: Tribe, American Constitutional Law, at 255.} Article VI of the Constitution commands all members of State Legislatures and all executive and judicial officers to be bound by oath or affirmation to support the Constitution.\footnote{Article VI of the United States Constitution: “(...) The Senators and Representatives before mentioned, and the members of the several state legislatures, and all executive and judicial officers, both of the United States and of the several states, shall be bound by oath or affirmation, to support this Constitution; but no religious test shall ever be required as a qualification to any office or public trust under the United States.”} The decision of the Court in \textit{Cooper v. Aaron}\footnote{Cooper v. Aaron, 358 U.S. 1 (1958), at 18–19: “No state legislator or executive or judicial officer can war against the Constitution without violating his undertaking to support it. Chief Justice Marshall spoke for a unanimous Court in saying that: ‘If the legislatures of the several states may, at will, annul the judgments of the courts of the United States, and destroy the rights acquired under those judgments, the constitution itself becomes a solemn mockery.’ A Governor who asserts a power to nullify a federal court order is similarly restrained. If he had such power (...) ‘it is manifest that the fiat of a state Governor, and not the Constitution of the United States, would be the supreme law of the land; that the restrictions of the Federal Constitution upon the exercise of state power would be but impotent phrases’. As a historical fact that helps to illustrate the opposition to the desegregation order and the concerns of the Court with the effectiveness of its decision, each Justice signed the award in \textit{Cooper}, as observed by Tribe, American Constitutional Law, at 255.} mentioned the Supremacy Clause and such oath, thus obliging the Governor of Arkansas to obey the judicial desegregation order.\footnote{For an interesting discussion about members of the legislative and executive being bound by the interpretation of the Supreme Court and how the Presidential oath of Article II, Section 1, clause 8, might be distinct: Tribe, American Constitutional Law, at 258–267.}
In addition, state courts are the final interpreters of state laws and state constitutions. The general common sense approach is that the Supreme Court is the final arbiter of federal law, whereas state supreme courts are entitled to this role with respect to state law. Issues related to judicial federalism, however, have been interpreted differently.

We turn to the review by the U.S. Supreme Court of the final judgments of the highest court of a state. The appellate jurisdiction is detailed in a statutory provision with all the Supreme Court review of the highest court of a state being by the discretionary writ of certiorari. The main issues arising out of this jurisdiction are the following: definition of the final judgment of the state’s highest court, and determination of what constitutes independent and adequate state grounds.

With regard to the first issue, an individual has to exhaust all potential appeals in a given state system – not including another appeal to the same court – in order to have his or her case heard by the Supreme Court. Informed by federalism concerns,

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431 As noted by Chemerinsky, *Federal Jurisdiction*, at 661, citing the leading case of the United States Supreme Court: Murdock v. City of Memphis 87 U.S. (20 Wall.) 590 (1875). Along those lines, the highest court in a given state “(…) is the authoritative interpreter of state law and the Supreme Court’s power to review state courts is limited to the later decisions as to federal questions” – as contended by Chemerinsky, *Federal Jurisdiction*, at 705.

432 *Idem*, at 661.

433 There have been criticisms of the deference to state powers as well as to state adjudication protected by the Supreme Court in the end of the sixties. The criticism intensified in the seventies, after National League of Cities v. Usury, 426 U.S. 833 (1976). This case invalidated an act of Congress based on the Commerce Clause and the arguable violation of state powers of the Tenth Amendment for the first time since the Thirties: Weinberg, *The New Judicial Federalism*, at 1193–1194.

434 28 U.S. Code § 1257: (a) Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari where the validity of a treaty or statute of the United States is drawn in question or where the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, or where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States. (b) For the purposes of this section, the term “highest court of a State” includes the District of Columbia Court of Appeals.

435 Chemerinsky, *Federal Jurisdiction*, at 676.

436 *Idem*.

437 *Idem*, at 685.
particularly comity, the Court prefers to rule on final judgments of the highest court of a given state.438 Concerning the second issue, the general rule is that if a state court decision is based on two grounds, one of which is federal law and the other is state law, the Supreme Court will not review the decision when the state law ground is independent of the federal law ground and is sufficient, by itself, to support the decision.439

There is a general policy against federal court review of state court decisions resting on “adequate and independent state grounds.”440 The Court has held that it will accept the state court interpretations of state laws and state constitutional provisions, instead of reviewing those state acts.441 Along with federalism concerns (avoiding reversals of state laws tend to reduce tensions between the federal and state spheres),442 another justification for such interpretation is the prohibition of advisory opinions.443

438 Chemerinsky, Federal Jurisdiction, at 684. Generally, the Court waits for the decision of the highest state court to be final, i.e., not an interlocutory one. For potential exceptions: Chemerinsky, Federal Jurisdiction, at 685–697. It is worth noting that federalism and comity are also cited as main reasons to justify abstention doctrines: Tribe, American Constitutional Law, at 568–569. Abstention, however, was not directly targeted for the main discussions of the cases further addressed on chapter seven. Nevertheless, we do note that the goal of abstention doctrines is to authorize federal courts to dismiss or remand cases in which parties seek redress based on equitable or discretionary relief from federal courts. According to such doctrines, federal courts are authorized to abstain (ultimately not judging) in very particular circumstances that require the protection of state law in its totality, and the related autonomy of the state judiciary: Tribe, American Constitutional Law, at 568–569. For a detailed analysis of the normative discretion regarding jurisdiction, i.e., hypothesis in which the federal courts were completely free in exercising their choice of considering the exercise of their jurisdiction: David L. Shapiro, “Jurisdiction and Discretion,” New York Law Review 60 (1985): 543–589, at 546–570.

439 Chemerinsky, Federal Jurisdiction, at 707. Hence, there is a threshold that the state ground for the decision must also being authorized by federal laws, as claimed by: Tribe, American Constitutional Law, at 506.

440 Tribe, American Constitutional Law, at 501.

441 Idem, at 502, where it was emphasized that even when there are legal controversies about the state law, federal courts should predict the outcome of the case as if it was tried by the highest state court. Federal courts, however, shall not follow such procedure and shall review de novo a district court decision concerning state law, as explained at 503.

442 Also stating that review by the Supreme Court shall not be too limited: Tribe, American Constitutional Law, at 508.

443 Chemerinsky, Federal Jurisdiction, at 707–708, where it is stressed that this being the case, because if the review of the federal law will not alter the outcome of the case, such review by the Supreme Court will tantamount to an advisory opinion.
It has been remarked that the federal Constitution provides a floor with regard to the protection of individual rights and liberties.\textsuperscript{444} Accordingly, when states clearly express their own independent view, the U.S. Supreme Court does not review it.\textsuperscript{445} The Court held that:

The principle that we will not review judgments of state courts that rest on adequate and independent state grounds is based, in part, on “the limitations of our own jurisdiction.” The jurisdictional concern is that we not “render an advisory opinion, and if the same judgment would be rendered by the state court after we corrected its views of federal laws, our review could amount to nothing more than an advisory opinion.” Our requirement of a “plain statement” that a decision rests upon adequate and independent state grounds does not in any way authorize the rendering of advisory opinions. Rather, in determining, as we must, whether we have jurisdiction to review a case that is alleged to rest on adequate and independent state grounds, we merely assume that there are no such grounds when it is not clear from the opinion itself that the state court relied upon an adequate and independent state ground and when it fairly appears that the state court rested its decision primarily on federal law.\textsuperscript{446}

This rationale, which rests on the prohibition of advisory opinions, has been criticized for allowing incorrect interpretations of federal law to continue and, potentially, remain influencing other decisions.\textsuperscript{447} Importantly, it belongs to the U.S. Supreme Court the authority to determine what is “adequate and independent state grounds,” not to the highest court in a given state.\textsuperscript{448}

The general rule is that state supreme court decisions based on state law procedures are considered as adequate and, thus, capable of preventing U.S. Supreme Court from reviewing substantive constitutional issues of the decision.\textsuperscript{449} The Court has

\textsuperscript{444} Fisher and Harriger,\textit{ American Constitutional Law: Constitutional Structures}, at 21.
\textsuperscript{445} \textit{Idem}.
\textsuperscript{447} Chemerinsky, \textit{Federal Jurisdiction}, at 708.
\textsuperscript{448} \textit{Idem}, at 709.
\textsuperscript{449} \textit{Idem}, at 711.
enacted limitations concerning the definition of what is an adequate state ground of decision. The first among those limitations refers to the unconstitutionality of the state law itself. Another limitation is the hypothesis when state law is considered inadequate due to the lack of support for the decision of the state court in the record.

In addition, state procedural rules are not adequate if the state law denies due process guaranteed by the Fourteenth Amendment. It has been argued that a state procedure that bars state or federal judicial consideration of any question, federal or state, shall meet the “fundamental fairness requirement” of such amendment. Another condition settled is that state procedural rules only preclude review by the Supreme Court as long as those rules serve an important state interest.

State procedural rules are not considered as adequate ground if such rule is designed to circumvent review of the federal issue by the Supreme Court – even if there is a legitimate state interest. Another requirement for a state law to bar review is that the procedural state law shall be mandatory (instead of discretionary) in order to qualify as adequate state ground.

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450 Along those lines and for a complete discussion about the issue and the pertinent case law: Chemerinsky, Federal Jurisdiction, at 710.

451 See footnote above for the case Ward v. Board of Commissioners of Love County, Oklahoma, 253 U.S. 17 (1920), where the Indians who received federal lands were forbidden to sue based on state law that would not authorize review, if taxes were paid voluntarily. The state court has found that the Native Americans had paid the land taxes “voluntarily,” despite knowing that they only have paid such taxes due to threats of forced sale by the state. Hence, the United States Supreme Court considered that the state law was inadequate in light of the absence of support for the decision in the record.

452 Chemerinsky, Federal Jurisdiction, at 712.

453 Tribe, American Constitutional Law, at 508.

454 Chemerinsky, Federal Jurisdiction, at 713, where the explanation of Henry v. Mississippi (1965) is detailed. At 714–715, the author stresses that the Court in of Henry v. Mississippi specifically emphasized that procedural rules must serve a “legitimate state interest” in order to bar review – while distinguishing that state substantive rules were always deemed as adequate if reversal determined on the federal law ground would not modify the final decision of the case. The controversial issue is what is a legitimate state interest and how it is reconciled with the Supremacy Clause of article VI. That Clause determines to which extent state law may limit the impact of a federal – which is, on itself, a federal question, thus authorizing review by the Supreme Court, as observed in: Tribe, American Constitutional Law, at 509.

455 Developing those main arguments, see: Chemerinsky, Federal Jurisdiction, at 717–719.

456 Tribe, American Constitutional Law, at 509.
The Supreme Court, as a rule, does not review state law if the state decision is independent from federal law. State ground is considered independent as long as it is in its totality based on state law, and it is not related to federal law. The Supreme Court has interpreted that the decisions lack independence when the state law incorporates federal law. Significant controversies have arisen if a state law was unclear, because in some cases it was difficult to determine when the state law decision intended to incorporate federal law instead of being an independent ground for the decision.

Uncertainty reigned until 1983, when the Supreme Court settled the issue in *Michigan v. Long*. According to the decision in the case, the Court held that it would assume the absence of independent state ground if the state supreme court said nothing on the contrary. Hence, a compromise between federalism concerns and pragmatic considerations was reached: the Court would not review the decision if the state court has clearly mentioned that state law was the ground. At the same time, the Court decided to review issues in which the decision was not clear, thus fostering federalism because it supported states to develop their own state law doctrines, such as state constitutions. It has also been argued that if a state court relies on federal law and the Supreme Court later judges such decision, it would provide an opportunity for the state court to be corrected because there might be no actually applicable federal law.

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458 *Idem*, at 722 and related case law.

459 Chemerinsky, *Federal Jurisdiction*, at 723.

460 463 U.S. 1032 (1883). Procedural analyses are not our focus.


462 Chemerinsky, *Federal Jurisdiction*, at 726.

463 *Idem*. There are, however, severe criticisms to the decision in *Michigan v. Long*. The criticism is rooted in the general and strong legal presumption favoring review by the Supreme Court. Such presumption had as side effects the potential to jeopardize states as laboratories to test solutions to new legal problems, while being a burden for the Supreme Courts’ dockets. For detailed criticism and famous arguments developed by Justices Stevens and Ginsburg: Chemerinsky, *Federal Jurisdiction*, 727–729; Tribe, *American Constitutional Law*, at 510–512.
It has been contended\textsuperscript{464} that the Supreme Court has used and modified the doctrine of adequate and independent grounds according to their own interests in allowing or barring review.\textsuperscript{465}

IV. STANDING REQUIREMENTS

At this point, it is worth discussing the general requirements for a case to be judged on the merits or dismissed.\textsuperscript{466} The justiciability doctrines were developed by the U.S. Supreme Court to encompass the prohibition against advisory opinions, standing requirements, ripeness, mootness, and political question.\textsuperscript{467} The justiciability doctrines can be strictly constitutional, as it is the case referring to standing requirements based on the textual “cases and controversies.”\textsuperscript{468} Justiciability can be also derived from the interpretation of the Constitution in a given time period, when they are considered prudential requirements. Determining the precise scope and extent of prudential or constitutional requirements has been controversial for the Court.\textsuperscript{469}

\textsuperscript{464}Chemerinsky, Federal Jurisdiction, at 730–731.

\textsuperscript{465}A note regarding habeas corpus is necessary, despite not being the scope of our research. Relief based on federal habeas corpus generally arises out of arguable violations of state court proceedings that led to the defendant’s incarceration, notwithstanding the violation of the federal constitution. Technically, the federal court is not modifying the judgment of the state court when ruling on a federal habeas based on 28 U.S.C. § 2254. The Supreme Court verifies if the prisoner who is in custody is so in violation of the Constitution or laws or treaties, as explained in: Tribe, American Constitutional Law, at 512–518.

\textsuperscript{466}Helen Hershkoff, “State Courts and the Passive Virtues: Rethinking the Judicial Function,” Harvard Law Review 114 (2001): 1833–1941, at 1836, where the Professor clarifies that justiciability doctrines are a product of the federal constitution and, as so, they are based on separation of powers and federalism issues that do not have necessarily to be mandatory to state courts.

\textsuperscript{467}Chemerinsky, Federal Jurisdiction, at 44, where the author notes that those doctrines were not present at the constitutional text nor were they considered by the Framers.

\textsuperscript{468}For relevant considerations regarding the principle of separation of powers as well as the importance of the Court not declaring an act unconstitutional, but merely resorting to the justiciability doctrines to not decide the unconstitutionality in a specific case: Bickel, The Last Dangerous Branch, at 201–207, specifically.

\textsuperscript{469}For the distinction between constitutional and prudential requirements, and how the Court has switched, for instance, in the general prohibition of generalized grievances from a prudential requirement to later classify it as a constitutional one: Chemerinsky, Federal Jurisdiction, at 44–45. The Professor also stresses the relevance of the distinction, because Congress can change prudential, but it cannot modify constitutional requirements. Ripeness is another example in which it is difficult to precisely determine in the Court’s view if prudential reasoning or constitutional provisions informed the decision. The Court has decided that some cases were ripe, despite being too abstract: David L. Shapiro, “Jurisdiction and
Justiciability requirements are based on widely ranging policy considerations. Separation of powers (commonly referred as tripartite allocation of powers protected by the prerequisite of cases and controversies), the conservation of judicial resources (mootness and ripeness preserve an optimum time component), the necessity of concrete controversies for federal courts to provide an improved judicial making, which is also promoted through fairness, particularly in light of individuals who are not litigants in a case. The reiterative concern regarding justiciability doctrines is to balance restraint and review, which is informed by the normative consideration of the “proper role of the federal courts,” questioning whether or not courts have been consistently applying justiciability.

The ban on advisory opinions is a consequence of the constitutional requirement of existing case or controversy under Article III of the Constitution, which the Court interpreted as a bar on “abstract, hypothetical or contingent questions.” This ban is complemented by the other justiciability doctrines, despite the Supreme Court not addressing the prohibition as often it mentions other doctrines.

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470 Chemerinsky, *Federal Jurisdiction*, at 45–46. Moreover, it has been remarked that the necessity of concrete case or controversy advances the Court (and the separation of powers principle), since the Court shall decide after a given statute was enacted, thus having an advantage in comparison to the abstract considerations of the political branches: Bickel, *The Last Dangerous Branch*, at 115–116.

471 Chemerinsky, *Federal Jurisdiction*, at 47. It has been stressed that if courts had a mandatory obligation to decide an issue, it would lead to the judiciary second-guessing the legislative and the executive, jeopardizing, potentially, the legitimacy of the judiciary: Bickel, *The Last Dangerous Branch*, at 200.

472 It is worth noting that the case or controversy requirement exists, as earlier referred, to protect the separation of powers. Along those lines, even in the states where advisory opinion were historically admitted (Colorado, Florida, Massachusetts, Maine, New Hampshire, Rhode Island and South Dakota), state judges often wrote that such opinions are rendered in an extrajudicial function, thus not being subject to *stare decisis*: Tribe, *American Constitutional Law*, at 329. The Professor further contends, *Idem*, that this absence of *stare decisis* jeopardizes the principal function of advisory opinions, namely: reduce the uncertainty as to the matter brought to judgment.


474 Chemerinsky, *Federal Jurisdiction*, at 57.
For a case to fulfill the prohibition against advisory opinions, it must meet a two-part test. 475 First, the dispute must be an actual one among adverse litigants. 476 The second requirement refers to the effectiveness of the judgment itself because there shall be a “substantive likelihood that a federal court decision in favor of a claimant will bring about some change or have some effect.” 477 Therefore, federal courts must not issue a mere recommendation, without practical effects, regardless of the remedy pursued by the claimant (i.e., monetary, injunctive, or declaratory relief). 478

Standing is another justiciability doctrine. It primarily focuses on the party seeking relief in federal courts with the question of which issues could ancillary. 479 Standing refers to the case or controversy requirement of Article III of the Constitution, 480 but commentators and the Court itself had acknowledged the difficulties inherent to this particular subject matter. 481 The constitutional requisites of Article III

475 Note, Advisory Opinions, at 1302, defining advisory opinions as “answers given by the justices of the highest court of a state to questions of law submitted by a house of the legislature or by the chief executive.”

476 Chemerinsky, Federal Jurisdiction, at 49.

477 Idem, at 51.

478 Chemerinsky, Federal Jurisdiction, at 54. It is worth quoting the following: “… the fact that a judgment adverse to one of the litigants removes only one of the lawful option available to that litigant does not render such a judgment impermissibly advisory,” as clarified at: Tribe, American Constitutional Law, at 332.

479 Tribe, American Constitutional Law, at 385–386. The Professor stresses, at 390, that standing requirements are verified at the time the lawsuit is commenced, so before evidence has been gathered, and with courts being required to assume that these statements are true, construing the most favorable interpretation to plaintiff as possible.

480 Idem, at 386.

481 Chemerinsky, Federal Jurisdiction, at 57. The Professor underlines, at 58, that there is a sense that the Court has modified its interpretation according to its willingness to adjudicate (or not) particular cases. Discussing that at the end of the Warren Court, more than forty years ago, the standing requirements were interpreted to ensure that federal courts did not exceed their Article III powers by adjudicating abstract claims, and the further shift in that rationale to emphasize separation of powers, in particular: Tribe, American Constitutional Law, at 387–388. At 392, the Professor emphasizes that the shift in the interpretation of the Court regarding standing demonstrates different conceptions of the role of federal courts: “… the continuing debate over whether federal courts exist primarily to resolve concrete disputes among individual litigants, with the power to make constitutional decisions only a necessary incident to this role, or whether federal courts have a special responsibility, as the branch of government best able to develop a coherent interpretation of the Constitution, to engage in the exposition of constitutional norms, limited primarily by the requirement that they do so in the context of reasonably concrete disputes presented to them for review.”
have been interpreted by the Court as to include, generally, the following: (1) plaintiff must have suffered or will imminently suffer an injury; (2) such injury is “fairly traceable” to the defendant’s conduct (causation); and (3) the decision of the federal court will likely redress the injury (redressability).

Furthermore, the Court has formulated three prudential requisites to supplement the constitutional commands of Article III. The former might be modified by Congress through statues, whereas the latter cannot. The Court has previously held:

Beyond the constitutional requirements, the federal judiciary has also adhered to a set of prudential principles that bear on the question of standing. Thus, this Court has held that “the plaintiff generally must assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights or interests of third parties.” In addition, even when the plaintiff has alleged redressable injury sufficient to meet the requirements of Art. III, the Court has refrained from adjudicating “abstract questions of wide public significance” which amount to “generalized grievances,” pervasively shared and most appropriately addressed in the representative branches. Finally, the Court has required that the plaintiff’s complaint fall within “the zone of interests to be protected or regulated by the statute or constitutional guarantee in question.”

Along those lines of reasoning, plaintiffs have to demonstrate the injury-in-fact requirement, being precluded to seek relieve if they do not have an interest at stake. This is justified based on the case and controversy constitutional command, as well as the general separation of powers. The latter prohibits advisory opinions, and the former advances that the person who brought suit uses the federal court system as efficiently as possible. In addition, the Court has also established that causation must be verified,

482 Chemerinsky, *Federal Jurisdiction*, at 60.


namely that the plaintiff must argue that the conduct of the defendant caused the harm.\textsuperscript{487} The third related requisite is redressability, which is met when plaintiff contends that a decision of the court in his or her favor would probably remedy the injury, therefore making a difference.\textsuperscript{488} Unsurprisingly, causation and redressability have not been immune from criticisms.\textsuperscript{489}

Standing has also been subject to prudential considerations that the plaintiff must meet in addition to the constitutional requirements. Within the prudential considerations, there is a general prohibition against third-party standing because a plaintiff can only claim if she or he has suffered the alleged injuries.\textsuperscript{490} Other prudential requisites are the ban on generalized grievances\textsuperscript{491} and the requirement that plaintiff must be within the zone of interests protected by the statute.\textsuperscript{492}

\textsuperscript{487} Chemerinsky, \textit{Federal Jurisdiction}, at 75. For criticisms concerning causality as an independent requirement, and how it may be easily manipulated by courts: Tribe, \textit{American Constitutional Law}, at 426–427.

\textsuperscript{488} Chemerinsky, \textit{Federal Jurisdiction}, at 75. Specifically addressing the requirements for standing: Lujan v. Defenders of Wildlife, 504 U.S. 555 (1992), at 560: “Over the years, our cases have established that the irreducible constitutional minimum of standing contains three elements. First, the plaintiff must have suffered an ‘injury in fact’ – an invasion of a legally protected interest which is (a) concrete and particularized, and (b) ‘actual or imminent’, not ‘conjectural’ or ‘hypothetical’, there must be a causal connection between the injury and the conduct complained of the injury has to be ‘fairly (…) traceable to the challenged action of the defendant, and not (…) the result of the independent action of some third party not before the court’. Third, it must be ‘likely,’ as opposed to merely ‘speculative’, that the injury will be ‘redressed by a favorable decision’.”

\textsuperscript{489} For an overview about the criticisms: Chemerinsky, \textit{Federal Jurisdiction}, at 79–84; and Tribe, \textit{American Constitutional Law}, at 431–434.

\textsuperscript{490} Chemerinsky, \textit{Federal Jurisdiction}, at 84. There are exceptions for this bar on third-party claims. The first one refers to situations in which the third party is unlikely to be able to sue; the second exception is based on the close relationship between the plaintiff and the third party who brings the claim; and the final exception refers to the so-called overbreadth doctrine. Such exceptions are merely cited here, since further examination is outside the purpose of this work. As reference, we do cite, for instance, \textit{Idem}, at 84–91.

\textsuperscript{491} Chemerinsky, \textit{Federal Jurisdiction}, at 92, where the Professor clarifies: “… a generalized grievance is where the plaintiffs sue solely as citizens concerned with having the government follow the law or as taxpayers interested in restraining allegedly illegal government expenditures. (…) the bar against generalized grievance standing is inapplicable if a person claims that he or she has been denied freedom of speech or due process of law, even if everyone else in society suffered the same harm.” Also significant is the fact that the limitations regarding taxpayer standing are a manifestation of the prohibition against generalized grievances: Tribe, \textit{American Constitutional Law}, at 421.

\textsuperscript{492} Chemerinsky, \textit{Federal Jurisdiction}, at 100, emphasizing that all those prudential requirements are cumulative. At 101, stating how the Court has been inconsistent: if a plaintiff sues based on a statutory provision, this plaintiff will only have standing if s/he is within the group intended to benefit from the law.
In addition, standing requirements have been subject to particular problems when involving organizations, government entities, and legislators as potential plaintiffs.\footnote{Chemerinsky, \textit{Federal Jurisdiction}, at 106. This has been referred as supra-individual legal capacity, as well. Tribe, \textit{American Constitutional Law}, at 450, stating that the litigant “… might plausibly be said to be asserting, rather than or in addition to the litigant’s own interests, the interests of others whom the litigant purports to have a special role in representing.”} Regarding the standing of organizations, the organization or its members must face repercussions in a “tangible way by the challenged action,” with the organization solely having standing on its own behalf if it had suffered injuries.\footnote{Chemerinsky, \textit{Federal Jurisdiction}, at 106. This is perceived as a general application of the ordinary standing requirements, because organizations, in this hypothesis, will be suing in their own capacity, not in their representative capacity: Tribe, \textit{American Constitutional Law}, at 450.} The organization (or association) may sue in its representative capacity, i.e., on behalf of its members, as long as it meets a three-part test determined by the Court.\footnote{Chemerinsky, \textit{Federal Jurisdiction}, at 107.} The first part states that the organization has standing when its members would be authorized to sue on their own capacity. Second, the interests that the lawsuit aims to protect are “germane to the organization’s purpose.” Third, participation of individual members of the organization is not required for the claims proposed or for the remedy that it seeks.\footnote{Tribe, \textit{American Constitutional Law}, at 450, quoting the requirements and the Court’s language in New York State Club Association v. City of New York, 487 U.S. 1, 9 (1988), in which the Court referred to the test set on: Hunt v. Washington States Commission, 432 U.S. 333, 343 (1977). In that case, a state agency had standing in order to challenge other state’s regulatory policies, as explained \textit{Idem}, at 452. The Court has declared that people joined organizations to advance their interests, with the third part of the test to be prudential: Chemerinsky, \textit{Federal Jurisdiction}, at 108.} The last requirement is the most difficult to meet because it cannot be easily verified if the presence of the litigation can fully secure adequate representation of the interests of its members.\footnote{Tribe, \textit{American Constitutional Law}, at 452.}

Government entities (federal government, states, and municipalities) may have standing denied if they sue on behalf of their own citizens,\footnote{The exception to the rule is when the state is suing in a \textit{parens patriae} capacity in order to promote a quasi-sovereignty interest: Tribe, \textit{American Constitutional Law}, at 453. The Court decided that the \textit{parens
authorized to proceed if suing asserting the entities’ own interests. Legislators have standing to sue in cases arising out of injuries that they personally suffered – as it is the case in a potential reduction of salary – and there is no controversy. The disputable topics refer to representatives based on claims arising out of injuries to their capacity as representatives and thus jeopardizing such perform. The general prohibition of general grievances bars legislators to sue as representatives of the interests of their constituents. The Court has dismissed cases based on political questions, but had reiterated that legislators have standing if they have been “singled out for specially unfavorable treatment as opposed to other members of their bodies or that their votes have been denied or nullified.”

Among the remaining justiciability doctrines, ripeness and mootness directly refer to when review is appropriate. The first is concerned with whether review might be premature, whereas the latter addresses if it is already “too late” in litigation terms. Ripeness has been pointed out as interrelated to standing (and the injury in fact requisite)

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499 Tribe, *American Constitutional Law*, at 452. For instance, the federal government has standing to sue state governments who were violating the Voting Rights Act, as exemplified by: Chemerinsky, *Federal Jurisdiction*, at 113.

500 Chemerinsky, *Federal Jurisdiction*, at 108.

501 *Idem*, at 109. The general principles articulated in cases of standing regarding members of Congress are valid for state legislators, but the latter do not involve issues of separation of powers: Tribe, *American Constitutional Law*, at 456.

502 Tribe, *American Constitutional Law*, at 457. This prohibition, the Professor argues, remains valid even if the representatives frame their claim as a violation of their constituents’ interests in their representatives’ official power.

503 Chemerinsky, *Federal Jurisdiction*, at 110, where the author explains that the Court has previously denied review under the principle of equitable discretion, i.e., the Court understood that review must be avoided, potentially on separation of powers implications. For a discussion about this requirements and development of policy implications: *Idem*, at 111–113.

504 Tribe, *American Constitutional Law*, at 334, and further at 344, where the author emphasizes that ripeness cannot easily be categorized or orderly deduced to a predictable outcome, due to the discretion that is inherent to it. Also following this line of reasoning: Chemerinsky, *Federal Jurisdiction*, at 119.
and to the ban on advisory opinion (and the abstract questions it involves). When considering ripeness of a case, the Supreme Court examines “the fitness of the issues for judicial decision” as well the “hardship to the parties of withholding court consideration.” This inquiry about the fitness of the issue encompasses constitutional (live case and controversy requirement of Article III of the Constitution) and prudential considerations.

Ripeness is particularly relevant when pre-enforcement challenges cast doubts on the applicability or the effect of the law under review to the plaintiff. The plaintiff must show a minimum enforcement of the law if he or she is contending a constitutional right that is subject to a “chilling effect,” even though such effect is usually confined to free speech cases. Mootness is also another justiciability doctrine that relates to the necessity of a live case or controversy (Article III of the Constitution) in all phases of the federal process. It has also been justified under the prohibition of advisory opinions, and as such can be raised at any time during the procedure, including sua sponte, i.e., by the court’s own motion. The Supreme Court conferred to the mootness doctrine a flexible character, based on Article III of the Constitution, and has carved out four general exceptions. Cases are not considered moot if there are “collateral or secondary injuries,” the conduct is capable of repetition, yet evading review, if the practice that is

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505 For the arguments, see, respectively: Chemerinsky, Federal Jurisdiction, at 117; and Tribe, American Constitutional Law, at 334.


507 Tribe, American Constitutional Law, at 334–335.

508 Idem, at 338.

509 Tribe, American Constitutional Law, at 339, where the Professor states that ripeness is also present, even if a law’s effective date is from years of now, as long as it is certain that the law would be applicable to the plaintiff who is challenging it.

510 Chemerinsky, Federal Jurisdiction, at 129.

511 Tribe, American Constitutional Law, at 344.

512 Chemerinsky, Federal Jurisdiction, at 131.

513 Idem.
arguably illegal is ceased voluntarily by defendant who is capable to resume it at any moment, or if the case is a class action that has been properly certified.\textsuperscript{514}

The final justiciability doctrine that we shall mention is the political question. It is founded in a residual analysis, so even if the case at bar meets all the previously discussed requirements for justiciability, it can still be dismissed under the political question.\textsuperscript{515} This doctrine has been subject to strong criticisms\textsuperscript{516} and arguably is the most controversial among the doctrines of justiciability.\textsuperscript{517} The political question doctrine is based in constitutional considerations embedded in Article III but also in prudential concerns that involve the discretion of the Court.\textsuperscript{518}

The modern test for political question was enunciated in Baker v. Carr, where the Court held:

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\textsuperscript{514} \textit{Idem}. For the pertinent exceptions: Tribe, \textit{American Constitutional Law}, at 347–361.

\textsuperscript{515} Commenting on the necessity of a political question doctrine in a case involving state secrets, Professor Bickel affirms, in \textit{The Last Dangerous Branch}, at 184–185: “Such is the foundation, in both intellect and instinct, of the political-question doctrine: the Court’s sense of lack of capacity, compounded in unequal parts of: (a) the strangeness of the issue and its intractability to principled resolution; (b) the sheer momentousness of it, which tends to unbalance judicial judgment; (c) the anxiety, not so much that the judicial judgment will be ignored, as that perhaps it should but it would not be; (d) finally (‘in a mature democracy’), the inner vulnerability, the self-doubt of an institution which is electorally irresponsible and has no earth to draw strength from. The case does not exist in which the power of judicial review has been exercised without some such misgivings being applicable in some degree. But the differences of degree can on occasion be satisfyingly conclusive. There are cases of which no more need be said than what Maurice Finkelstein said of \textit{Dred Scott v. Sandford}: ‘A question which involved a Civil War can hardly be proper material for the wrangling of lawyers’.”

\textsuperscript{516} The main criticism is directly related to the conception of the legitimacy of the Court itself. Arguing that it is considerable fragile, for example: Bickel, \textit{The Last Dangerous Branch}, at 183–198, where the Professor provides an historical overview of cases about political question. For an opposing view of this understanding, see, among others: Tribe, \textit{American Constitutional Law}, at xvi, where he writes: “ … I reject the assumptions characteristic of (…) scholars like Alexander Bickel: the highest mission of the Supreme Court, in my view, is not to conserve judicial credibility, but in the Constitution’s own phrase, ‘to form a more perfect Union’ between rights and rights within that charter’s necessarily evolutionary design.”

\textsuperscript{517} Chemerinsky, \textit{Federal Jurisdiction}, at 147. Moreover, the position of the Court has changed over the years. In \textit{Marbury v. Madison}, political questions were limited to subject matters in which the President had unlimited discretion, without allegations of constitutional violations; whereas the Court modernly understands that political question encompasses violations of individual rights, as contended by: Chemerinsky, \textit{Idem}, at 148–149. In this sense, the Professor argues that such test is, in practice, not very useful: \textit{Idem}, at 150.

\textsuperscript{518} Tribe, \textit{American Constitutional Law}, at 385.
Prominent on the surface of any case held to involve a political question is found a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question. Unless one of these formulations is inextricable from the case at bar, there should be no dismissal for nonjusticiability on the ground of a political question's presence. The doctrine of which we treat is one of "political questions," not one of "political cases." The courts cannot reject as "no law suit" a bona fide controversy as to whether some action denominated 'political' exceeds constitutional authority.\footnote{Baker v. Carr, 369 U.S. 186 (1962), at 217. Professor Lawrence contends that three different lines of thoughts, at minimum, can be found in the test enunciated in Baker v. Carr regarding the role of the Supreme Court and federal courts, generally. The first one is a classical view, from Marbury v. Madison, in which the Court has to decide cases, unless it interprets that the Constitution itself has determined the decision of the particular matter to other branches. The second view is prudential, and it is founded on the idea that the Court should not decide the case, if the decision of the merits would lead to a compromise in particular constitutional principle or could jeopardize the legitimacy of the Court. The last view is functional and arises out of pragmatic concerns as to the access of the information, uniformity and the responsibilities of the Courts to other branches of the government. For the development of this reasoning: Tribe, American Constitutional Law, at 366.}

In general, the doctrine of political question has been used in different contexts. The Court has decided that the clause establishing the Republican form of government is not justiciable,\footnote{Article IV, section four of the United States Constitution establishes that: "The United States shall guarantee to every State in this Union a Republican form of government." The seminal case is Luther v. Borden, in which the Court held that the Congress has to decide which state government was established in a given state. Chemerinsky, Federal Jurisdiction, at 154–155.} but that challenges based on reapportionment to election districts are justiciable, and that issues involving foreign affairs are not; neither issues directly relating to Congressional self-governance.\footnote{Chemerinsky, Federal Jurisdiction, at 157–166. In other areas, such as the ratification of constitutional amendments, the Court has been inconsistent. Further developments of the political doctrine include its use to avoid intrusive interference with coordinate branches of government, impeachments, and removal procedures from office: Idem, at 168–172.} Recently, the relevant inquiry of political
question is no longer based on political considerations only, but in the content of the law itself,\textsuperscript{522} which ultimately reduced the application of such doctrine.\textsuperscript{523}

V. \textbf{SEPARATION OF POWERS AND RECURRENT ARGUMENTS ABOUT THE EXISTENCE OF ABSTRACT REVIEW IN THE UNITED STATES}

Judicial review has been understood as the most controversial task of the judiciary because it blurs the distinction between the political and legal spheres.\textsuperscript{524} In light of the previous discussion, constitutional review in the United States is, as a rule, concrete. There are, however, exceptions.\textsuperscript{525} This Part contextualizes the distinct origins for the U.S. and continental systems of judicial review (German, Italian, and French have


\textsuperscript{523} Ming-Sung Kuo, “Discovering Sovereignty in Dialogue: is Judicial Dialogue the Answer to Constitutional Conflict in the Pluralist Landscape?,” \textit{The Canadian Journal of Law and Jurisprudence} 26 (2013): 341–376, at 372–374. The author contends, based on the decision in \textit{Baker v. Carr}, that there is no longer an absolute political sovereignty, with constitutional sovereignty rising grounded on judicial dialogue.

\textsuperscript{524} Martin Shapiro and Alec Stone Sweet, \textit{On Law, Politics & Judicialization} (New York: Oxford University Press, 2011), at 142, where the authors refer to constitutional judicial review, excluding the mere judicial review that ordinarily opposes to the supremacy of parliament principle. In this sense, constitutional judicial review is even more controversial, because it authorizes the judicial organs to interpret the validity of an act based on the Constitution itself – not only an act of parliament, but an act which is the product of the constitutional convention that in some countries is even directly approved by the people through \textit{referendum}.

\textsuperscript{525} We do note that the classification between abstract and concrete review may be understood in a spectrum, starting with “pure” abstract review evolving to concrete review. Under such understanding, abstract review could be achieved through flexible standing rules – as it would be the case of article 38 of the Constitution of the Republic of South Africa, where authorized parties could sue, regardless if they suffered the injury when the legislation was enforced: Michael C. Dorf, “Abstract and Concrete Review,” \textit{Global Perspectives on Constitutional Law}, ed. Vikram David Amar and Mark Tushnet (New York: Oxford University Press, 2009), at 4–8. This is relevant because we classified one of the modalities of the Brazilian judicial review as abstract, even though it is not exercised for pre-enforcement of legislation. Concrete review is perceived as more accurate than pure abstract (including pre-enforcement review), to the extent that there will exist factual concrete elements for a court to evaluate, despite being more expensive: Tom Ginsburg, “Economic Analysis and the Design of Constitutional Courts,” \textit{Theoretical Inquiries at Law} 3 (2002): 49–85, at 69.
inspired others), considering the principle of separation of powers. It also surveys the recurrent arguments regarding the existence of abstract judicial review in the United States.

Preliminarily, it is worth locating the relevance of the distinction between concrete and abstract as being inherent to how different jurisdictions understand the principle of separation of powers. Judicial review, as previously noticed, has been openly initiated in the United States with the case of *Marbury v. Madison*. Judicial review in the United States is decentralized based on the assumption that every judge has to interpret the law so he or she can apply it to concrete cases. When facing a conflict between a superior norm, i.e., the Constitution and an ordinary norm, the latter is disregarded and the judge applies the constitutional one. Hence, in the decentralized system – also called the U.S. system – every judicial organ of a legal system is authorized to exercise the constitutional control. Because courts are not directly elected, judicial review itself (and its related countermajoritarian difficulty) has been subject of criticisms.

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528 Cappelletti, *Judicial Review in the Contemporary World*, at 50–53.

529 *Idem*, at 46.

530 Emphasizing that such difficulty is not exclusive to the American experience, because judicial review forces the majority (“either the parliamentary or popular majority to revisited an issued it had tried to settle”): Ferejohn and Pasquino, *The Countermajoritarian Opportunity*, at 354.

By contrast, in the centralized system, one single judicial organ is authorized to exercise such control. This occurs because, in civil law jurisdictions, the doctrines of separation of powers and supremacy of statutory law are interpreted more rigidly. It has been remarked that:

Originally, those doctrines meant, to Montesquieu, Rousseau and others haunted by fears of a self-seeking anti-democratic judiciary, that any judicial interpretation or, a fortiori, invalidation of statutes was a political act, and therefore an encroachment on the exclusive power of the legislative branch to make the law. (…) Although the advisability of some sort of control over the constitutionality of legislation is admitted, the essentially political aspects of this function are recognized. Thus, the centralized systems refuse to grant the judiciary in general the power to review legislation; in fact, the ordinary judges must accept and apply the law as they find it. (…) A genuine presumption of legislative validity. The only attenuation of these notions lies in the power of ordinary judges to suspend concrete litigation pending a reference to the Constitutional Court of a constitutional issue which has been raised.

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Considering the traditional division of state functions in legislative, jurisdictional, and executive in continental systems, there must be a differentiation when the annulment is made inside the power structure from which the invalid act emanated and or not. The

532 Cappelletti, Judicial Review in the Contemporary World, at 47, where the Professor notes that traditional synonyms for centralize and decentralize would be concentrate and diffuse, respectively. There is another classification that the Professor does not mention, but it is noteworthy. Such classification addresses if the review is exercised previously or after the enactment of a given law. France was the famous example where there was the monopoly of the ex ante constitutional review. Before the constitutional amendment of July 23, 2008, there was no challenge of the constitutionality of a statute which had come into force. After such amendment, under the application for a priority preliminary ruling, any person who is involved in legal proceedings before a court is authorized to argue that a statutory provision infringes rights and freedoms guaranteed by the French Constitution, according to information available at the website of the French Conseil Constitutionnel (last accessed July, 2014): http://www.conseil-constitutionnel.fr/conseil-constitutionnel/english/priority-preliminary-rulings-on-the-issue-of-constitutionality-qpc-/texts-and-presentation/12-questions-to-begin-with.47857.html. For an analysis of the judicial review model adopted by France, their strong resistance to judicial review, and primacy of legislative law as the general will of the people: Alec Stone Sweet, “Why Europe rejected American Judicial Review – and Why it may not matter,” Michigan Law Review 151 (2003): 2744–2780, at 2746–2765.

533 Cappelletti, Judicial Review in the Contemporary World, at 54.

534 Idem. This general presumption of legality of acts shall not be confused with the general assumption of validity and biding force of the administrative acts in general. For the latter: Hans Kelsen, Jurisdição Constitucional (São Paulo: Vmf Martins Fontes, 2013), at 141.

535 Kelsen, Jurisdição Constitucional, at 147.
annulment of a legislative act exercised by an organ that is not legislative constitutes an intromission with “the legislative power.” However, in Kelsen’s conception, the constitutional court would not be a judicial body, albeit organized as a tribunal, due to its composition (nomination of specialists, including academics, through joint appointments involving the executive and legislative). The other factor why the constitutional court could be characterized as legislative is that annulling a norm is actually a legislate act exercised negatively, with the court acting as a negative legislator in Kelsenian parlance.

In addition, the centralized system of judicial review was founded on the absence of stare decisis by the judiciary. So, Kelsen, when creating the Austrian Constitution, had to consider the necessity of the decisions of that court to be erga omnes, i.e., with a

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536 Idem, at 151. Stone Sweet, Why Europe rejected American Judicial Review – and Why it may not matter, at 2766–2767, where the Professor argues that Kelsen emphasized the distinction between positive and negative legislator as a preventive measure, due to potential attacks from two main different groups: politicians (who were generally suspicious of the judiciary) and academics favoring the American (decentralized) model.

537 Kelsen, Jurisdição Constitucional, at 154. For a contemporary discussion about the topic, see, for instance, the controversy about the nature of the constitutional court and theoretical claims that the French Conseil Constitutionnel was not a legislative body – as its own pronouncement contending that “its review authority does not confer upon it a general power of judgment and decision making identical to that possessed by parliament;” Alec Stone Sweet, “The Politics of Constitutional Review in France and Europe,” International Journal of Constitutional Law (2007): 69–92, at 73–74. Other distinguished features of European constitutional courts are: appointment for long time periods – but not life tenure; the avoidance of oral arguments made by the parties, and the fact that deliberations occur in secret, with the court speaking in a single voice: John Ferejohn and Pasquale Pasquino, “Constitutional Adjudication: Lessons from Europe,” Texas Law Review 82 (2004): 1671–1704 at 1677–1678.

538 Victor Ferreres Comella, “Comparative Avenues in Constitutional Law: Constitutional Structures and Institutional Designs: The Consequences of Centralizing Constitutional Review in a Special Court: Some thoughts on Judicial Activism,” Texas Law Review 82 (2004): 1705–1736, at 1722–1723, stating that courts should either invalidate or uphold statutes; but should not render interpretative decisions dictating a single form to interpret the norm, because doing so the court acts a positive legislator in the Kelsenian view. As far this argument goes, the court would be activist, in a sense that it will authorize an interpretation that is different from the original understanding upon the legislative branch had when passing the legislative act.

539 Kelsen, Jurisdição Constitucional, at 151–152, where the Professor notes that the annulment of a norm is the establishment of a general norm, akin to a legislative effect; but not a concrete and individual norm, which is the limited realm of the judicial activity. Kelsen claims, at 153, that legislators acted almost freely, despite in conformance with the procedures and directives of the Constitution; while constitutional courts can only act in the limited scope to invalidate a law that is incompatible with the Constitution. In addition, the Professor stresses that the principles applicable to the creation and organization of the judiciary shall encompass the constitutional court, since it also applies the law – being in a very restrict parcel of legislative creation.
general binding effect, but also with uniformity, thus conferring legal certainty. The decisions of constitutional courts were generally conceived to be abstract, in a sense that such decisions would be made before the law was enforced. Although the original Kelsenian conception of constitutional courts would exclude the review of rights, this review is the core of the jurisprudence of constitutional courts nowadays.

U.S. judicial review is concrete, in general, because it arises out of a claim of an unconstitutional act whose enforcement brought an actual injury to the plaintiff. The concreteness of such review is based on the requirements of case and controversy of Article III as well as the particular doctrines of justiciability for denying judicial

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540 Cappelletti, *Judicial Review in the Contemporary World*, at 60.


543 Shapiro and Stone Sweet, *On Law, Politics & Judicialization*, at 343. Nevertheless, this is no longer the rule. In Brazil, for instance, the classification remains abstract when there is no pre-enforcement of legislation, mainly because only political parties can trigger the review that happens without a case or controversy, as stated in chapter two of this thesis.

544 Kelsen, *Jurisdição Constitucional*, at 153, where the Professor further cautions that each jurisdiction shall consider its own peculiarities when creating their own constitutional court.

545 Stone Sweet, *The Politics of Constitutional Review in France and Europe*, at 83–84, where he stresses that Kelsen equated review of rights with natural law and, if such review were authorized, the distinction between positive and negative legislation would collapse. Nevertheless, constitutional adjudication was adopted in Europe in a centralized fashion in post authoritarian regimes, where there was a need for the protection of such rights; while in “old democracies” there were no constitutional courts created – as it was the case in the Netherlands, the United Kingdom, and Luxembourg. These countries did not see a valuable trade off in weakening their parliaments to rights that were already generally protected, as noted by Ferejohn and Pasquino, *Constitutional Adjudication: Lessons from Europe*, at 1674.

546 Shapiro and Stone Sweet, *On Law, Politics & Judicialization*, at 344. The authors notice, at the same page, that constitutional courts have their own particular space, thus not being attached to the legislative nor the judiciary. Noting that the constitutional courts are a quasi-legislative power, holding more political capital than the American judge: Rebecca R. Zubaty, “Foreign Law and the U.S. Constitution: Delimiting the Range of Persuasive Authority,” *University of California Los Angeles Law Review* 54 (2007): 1414–1461, at 1450–1451.
review. Among such doctrines, there are advisory opinions, standing (usually referred to the necessity of a live case or controversy that shall be concrete, i.e., have an injury in fact, for instance), ripeness (often founded in the rationale of the case being too abstract).

Accordingly, the general orthodoxy doctrine understands that the case or controversy requirement authorizes concrete judicial review at the federal level, while barring the abstract one, based on the peculiar separation of powers of the U.S. system. In light of the above, the requirement of case or controversy allows judicial review in its concrete modality, prohibiting abstract review on the federal level due to potential violations of their principle of separation of powers.

In Europe, however, abstract and concrete reviews coexist, but the latter remains largely abstract because generally exercised through a reference procedure. Another

547 Limiting the concreteness of the American judicial review to the requirements of case or controversy stated in article III, section 2, of the United States Constitution and the fact that the unconstitutionality is declared in the course of ordinary litigation: David S. Law and Mila Versteeg, “The Declining Influence of the United States Constitution,” New York University Law Review 87 (2012): 762–858, at 795.

548 Helen Hershkoff, “State Courts and the ‘Passive Virtues;’ Rethinking the Judicial Function,” Harvard Law Review 114 (2001): 1833–1941, at 1836–1837, underlyng that the case or controversy of article III of the Constitution does not apply to states, with state judiciaries having authorized standing to taxpayers who had alleged abuse of public funds; and having also decided cases that federal courts would deem as being moot. In addition, the Professor remarks, at 1845–1846, that there are states where the state Constitution authorizes advisory opinions; in others this authorization occurs in state statutes; and, in others, as it was the case of North Carolina, the state supreme court would issue advisory opinions – despite lacking provisions authorizing so. Noting that English courts also rendered advisory opinions: Bickel, The Last Dangerous Branch, at 115.

549 Noting the discussion of third party standing being command to meet the minimum of Article III case or controversy requirement with regard to access to the judiciary: Hershkoff, State Courts and the “Passive Virtues;” Rethinking the Judicial Function, at 1842.


551 Zubaty, Foreign Law and the U.S. Constitution: Delimiting the Range of Persuasive Authority, at 1449–1452, emphasizing that concrete review (with the live case or controversy requirement) does have a greater level of specificity, and was instrumental to the separation of powers principle, excluding judges from a blatant role as policymaking.

552 Alec Stone Sweet, “Why Europe rejected American Judicial Review – and Why it may not Matter,” Michigan Law Review 151 (2003): 2744–2780, at 2771. Constitutional courts now decide the outcome of a legal disputes – as it would be the case in the Appellate jurisdiction of the United States Supreme Court, as stated at 2772. The reference procedure (in which the Italian constitutional court does not have the task to decide the case at bar, but merely the question posed to the them by the referring court) is not immune from considerations by the constitutional court about the concrete case, i.e., the original dispute: Ferejohn and Pasquino, Constitutional Adjudication: Lessons from Europe, at 1674.
possibility of arguable concrete review that is generally exercised in abstract is through direct individual complain to the constitutional court.\textsuperscript{553}

In the United States, abstract review\textsuperscript{554} is mainly authorized in four situations.\textsuperscript{555} First, when federal courts review acts enacted by federal agencies (administrative rules and regulations that were authorized by Congress as merely supplementing powers and that often admit pre-enforcement review by courts, albeit standing being limited to private parties).\textsuperscript{556}

The second authorized abstract review refers to the cases where state statutes clearly authorize advisory opinions by the state supreme court.\textsuperscript{557} Third, when plaintiffs pursue declaratory or injunctive relief that, once granted, suspends the application of the law despite requiring further assessment of the court regarding its constitutionality.\textsuperscript{558} Fourth, in the context of First Amendment freedoms, plaintiffs are authorized to

\textsuperscript{553} Shapiro and Stone Sweet, \textit{On Law, Politics \& Judicialization}, at 345, where it is emphasized that constitutional complaints are the least abstract forms of review in the continental system, because plaintiffs have to exhaust the totality of the applicable remedies in order to pledge to the constitutional court.

\textsuperscript{554} It is difficult to actually enumerate and determine precisely all the hypotheses, to the extent that we have to research in a case-by-case basis. This is so, because the American constitutionalist academics do not use the term abstract control. Accordingly, this work is not exhaustive and concerns the most cited hypotheses. Shapiro and Stone Sweet, \textit{On Law, Politics \& Judicialization}, at 352, note that: “no treatise in American constitutional law uses the term ‘abstract review’."

\textsuperscript{555} Due to its uncommon incidence, we are not including the so-called writ of certification – see discussion supra with regard to the most common avenues to the USSC. Fisher and Harriger, \textit{American Constitutional Law: Constitutional Structures}, at 143, notes that the writ of certification, although rarely used, is an inquiry submitted by an appellate court to the USSC about a question of law. The authors cite, among the reasons for being uncommon, the fact that it potentially forces the Court to provide guidance considering a legal question, only – without the factual background and the related arguments presented by the litigants.


\textsuperscript{557} This hypothesis is disputable, to the extent that the value of the decision is undermined, because state judges often stresses that advisory opinions are issued under no judicial capacity. Hence, such opinions do not have the \textit{stare decisis} effect: Tribe, \textit{American Constitutional Law}, at 329.

\textsuperscript{558} Shapiro and Stone Sweet, \textit{On Law, Politics \& Judicialization}, at 348. Specific situations are further detailed at 348–362, with analysis of two paramount cases: one about free speech and the other about abortion. The authors inform, at 352, that the American professionals have two reactions when confronted with the existence of abstract review in the United States. The first reaction is the denial of its existence, stating that claims arising out of freedom of speech or privacy rights create the case or controversy requirement by the litigation of such rights. The other reaction is to understand abortion cases and First Amendment rights as exceptions to the general rule, which rejects abstract review.
challenge the law on its face, being also allowed to claim the rights of third parties.\textsuperscript{559} The third and fourth categories often overlap.\textsuperscript{560}

With regard to abstract review exercised in the context of advisory opinions, a note must be made. The advisory opinion issued by the highest court of a state has been perceived as reducing questions of constitutionality about the enacted measure. This is so assuming that the legislative (or executive) that posed the constitutional doubt abides to the answer in an advisory opinion of the court.\textsuperscript{561} Nevertheless, for the court to answer in such an abstract context, it shall consider all the potential applications of the statute and further decide that none will be constitutional.\textsuperscript{562}

In addition, at the federal level, even the most concrete forms of judicial review are also based in abstract considerations when considering the \textit{stare decisis} effect of a particular decision. Hence, any consideration of future applications of a specific holding is, in practice, abstract.\textsuperscript{563}

The European conception of concrete review remains abstract because the constitutional court has to answer the constitutional question that was referred to it by the lower court, without having to preside in a concrete case or controversy in the U.S. sense.\textsuperscript{564} Thus, the task of the referring judge consists of a limited assessment of the facts presented and if they would support review, a correct question that will be posed to the

\textsuperscript{559} Shapiro and Stone Sweet, \textit{On Law, Politics \& Judicialization}, at 373, the authors explain that Congress delegates to administrative agencies the implementation of particular federal statutes, with such delegations having force of law. The Congressional statute authorizes pre-enforcement and thus judicial review in abstract, since private parties who have standing can sue even before the act can be enforced. In this sense, the American administrative law is said, for the Professors, to reject the general assumption that concrete review is the best and only authoritative form of review.

\textsuperscript{560} Shapiro and Stone Sweet, \textit{On Law, Politics \& Judicialization}, at 348.

\textsuperscript{561} Note, \textit{Advisory Opinions}, at 1304. In this sense, the goal of advisory opinion is to avoid the enactment of unconstitutional legislation, so potential claims of lack of biding precedent force would not be strong.

\textsuperscript{562} \textit{Idem}, at 1312. This might be not preferable by the Court. The note further counter-argues, at 1313, that judges should provide as much detail as possible about the matrix of cases that they have considered before issuing such advise.


\textsuperscript{564} Stone Sweet, \textit{Why Europe rejected American Judicial Review – and Why it may not matter}, at 2771.
constitutional court and the adjudication of the dispute based on the answer given by such specialized court.  

Finally, the analysis of the U.S. resistance in acknowledging the existence of abstract review is not unique. Recall that the continental systems where constitutional review is mainly exercised in abstract are also reluctant in admitting concrete review. Therefore, the U.S. and continental models of constitutional review are products of different conceptions of separation of powers, with both models claiming that only their own model can correctly protect the distinction between the political and judicial functions, avoiding the “usurpation of the legislative (or more broadly, of the ‘political’) function.”  

565 Idem.  

566 Shapiro and Stone Sweet, On Law, Politics & Judicialization, at 345, concluding that ultimately such distinctions are made according to how each jurisdiction understands the principle of separation of powers, being locally interpreted.
CHAPTER FIVE

ON THE EXCLUSION OR INCLUSION OF LOCAL GOVERNMENTS IN THE CONSTITUTION: U.S. AND BRAZILIAN SUPREME COURTS’ REASONING REGARDING ANNEXATION

This research compares the decisions of the U.S. Supreme Court and its Brazilian counterpart, the STF, with regard to annexation laws and local governments. It utilizes the reasoning of both Supreme Courts in annexation cases as proxy for local powers. This research discusses the Brazilian unprecedented experience of leveling local governments alongside the states and the federal union in the Constitution of 1988.\(^{567}\) In this context, implications concerning comparative constitutional design are also considered.

The comparison between both Supreme Courts’ reasoning is relevant due to several factors. Local governments in the United States levied, in taxes, $1,153 billion in 2014,\(^{568}\) whereas Brazilian municipalities’ total revenue (taxes and all the mandatory constitutional transfers)\(^{569}\) reached $149,092 million in 2011.\(^{570}\) Brazil currently has 5,564 local governments.\(^{571}\) In the United States, there were 89,004 local government entities in 2012.\(^{572}\) We compared thirty-one decisions from the U.S. Supreme Court

\(^{567}\) Stating that Brazil is the only federation to have included local governments in the federal constitutional arrangement: Cláudio Pereira de Souza Neto and Daniel Sarmento, Direito Constitucional: Teoria, História e Métodos de Trabalho (Rio de Janeiro: Forum, 2013), at 302.

\(^{568}\) The number is equivalent to 6.6% of the GDP of the United States in that year. The information referred above was accessed for the last time in January, 2015, and is available at: www.usgovernmentrevenue.com/numbers

\(^{569}\) Mandatory constitutional transfers from the Brazilian federal union and states to local governments are detailed in Part II, A, of this chapter.

\(^{570}\) Based on a currency correction factor of 2.4 from the Brazilian Real to the USD. The data collected by the National Organization of Mayors is based on the Brazilian Institute Geography and Statistics (IBGE). The data does not include the federal district (Brasilia). The revenues of local governments in Brazil are equivalent to 8.6% of the Brazilian GDP – as stated at the Panorama 2011 bulletin published by the National Organization of Mayors, at 7, last electronically accessed in June 2014, as all the data hereinafter. The information is available at: www.fnp.org.br/Documentos/DocumentoTipo107.pdf

\(^{571}\) When referring to Brazilian municipalities, we use the term as synonym to local government. The data is available at: http://www12.senado.gov.br/noticias/entenda-o-assunto/municipios-brasileiros

\(^{572}\) The current number was reduced – it used to be 89,476 in the last census of governments conducted in 2007. Local governments included counties, municipalities, townships and special districts, as stated in the official census website: https://www.census.gov/newsroom/releases/archives/governments/cb12-161.html
(from 1870 to 2013) to sixteen decisions of the Brazilian Supreme Court – hereinafter STF – from 1988 to 2013.573 Both courts are independent and have similar jurisdiction when judging local entities.574

The study of comparative constitutional law has been founded on the U.S. Constitution.575 Americans are concerned with their local governments, with this sphere of power having been traditionally viewed as a manifestation of their own democracy. Brazil is different. On the one hand, Brazil has been an exploit colony of Portugal, survived dictators and decades of military rulings, which are examples of a centralization of powers in the federal sphere. On the other hand, the democratic Constitution of 1988 innovated in having local governments explicitly named as federal actors. Setting one’s own boundaries is of key importance when it comes to local governments, from economic to democratic arguments. Hence, annexation (so controversial in the United States due to exclusion of particular individuals) is an interesting object of research to compare with Brazil, where laws concerning the procedure of annexation were also object of judicial battles.

Nowadays, in Brazil, there is still a sense that local governments should be concerned with embellishing the city. Mayors are expected to invest their time in coordinating efforts with the Governor and the President to receive additional revenue. Luckily, mayors have such revenue increased by bringing international sports events, such as the Olympics and World Cup, to their cities. Questions about the definition of boundaries of local governments remain open. Since local governments became federal actors in Brazil, there is an increased need to understand what are the issues that the STF decides about them. We contrast the current Brazilian scheme with the United States,
which did not even acknowledge the existence of local governments in the constitutional text, but understood the local sphere as inherent to democratic government itself.

The comparison illustrates the predominant conflicts among groups who are litigating in each country, offering evidence of what are the main issues being disputed in local spheres with regard to annexation. It shows how each Supreme Court balances freedom of local governments and national interests. It is worth noting that this research considers local government law in light of national (federal laws) and subnational (state laws) determinations, but it does not encompass the understanding of cities as international actors. Local governments in Brazil are not dominated by one single metropolis, as it is the case in Argentina or Mexico, with Brazilian urban centers being geographically spread out, as they are in the United States.

The rationale of the decisions and the main concerns cited by both Supreme Courts may contribute to improve our understanding of conflicts of powers between the different spheres of government. It may also improve the understanding of the Brazilian federal system as compared to the U.S. one. The comparison may indicate if the particular inclusion of municipalities in the Constitution, from a perspective grounded in constitutional design, may have benefited Brazil, but would be ineffective elsewhere.

Our research fosters the debate of U.S. federalism, while bringing a perspective grounded in local government.


578 Noting that the literature about constitutional design and engineering is vast and has as foundation the understanding of constitutionalization “as a pragmatic ‘second order’ measure,” in contrast with constitutionalization as a first order, i.e., as a direct consequence of the will of the people. In the more pragmatic conception, constitutions may contribute to “institutionalize attempts to mitigate tensions in ethnically divided polities through the adoption of federalism, secured representation, and other trust-building and power sharing mechanisms,” as argued by Ran Hirschl, “The Theocratic Challenge to Constitution Drafting in Post-Conflict States,” William and Mary Law Review 49 (2008): 1179–1211, at 1181–1182.

It has been contended that constitutional design matters for several reasons. Insights based on design sciences concluded that the scope and the size are relevant. In this sense, the comparison between Brazil and the United States is one of relevance. Both countries display continental dimensions, with complex federal systems, including several potential problems related to the implementation of policies on different levels.

The absence of constitutional provisions pertaining to local governments, as it is the case of the U.S. Constitution, has been pointed out as a failure of constitutional design relating to future matters. The Brazilian Constitution represents the apex in a system that not only opted for including local governments’ provisions in the Constitution, but also went further by securing a place for local governments as federal actors side-by-side with states and federal union.

This research uses annexation as a proxy for the powers of local governments. Based on such understanding, this research investigates if the inclusion of local

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580 We use the expression here being mindful about its intrinsic limitations, as contended by Professor Ginsburg in: Tom Ginsburg, *Comparative Constitutional Design* (Cambridge: Cambridge University Press, 2012), at 1–2.


582 Discussing problems of implementation of federal level policies: Hirschl, *The “Design Sciences” and Constitutional “Success,”* at 1344–1345. The Professor argues, at 1364, that constitutional design might be of increased impact in matters concerning: “(… ) national challenges: limiting governments to a degree, establishing electoral process, enhancing awareness of rights and liberties, and possibly providing for some institutional predictability, which in turn may promote economic growth.”

583 *Idem,* at 1348. The Professor explains: “One among many manifestations of this problem in constitutional design is the silence of most pre-twentieth-century constitutions with respect to urbanization and the emergency of the megacity. Whereas principles of federalism in a two-layer system were usually set out, local government was often overlooked by constitutional framers. The metropolis phenomenon was not known to framers of the U.S. Constitution nor to the loyalists who adopted the British North America Act in 1867 (Canada’s confederating document). This means that megacities, such as Los Angeles, New York, or Toronto, are required to provide a vast array of services to their residents while their independent taxation and legislative authority is very limited. And the problem extends beyond taxation. Because the city is not recognized as an autonomous constitutional entity, it is often not represented at pertinent public-policy bargaining forums (e.g. forums dealing with welfare, child support, housing, health care and labor). At the same time, because the megalopolis is home to so many people, it inevitably carries the brunt of governmental (in) action with respect to crime, poverty, homelessness, etc. Even more acute is the state of megacities in the developing world, where migration to the city and urban sprawl have long exceeded reasonable capacity.”

584 Article 18 of the Brazilian Constitution of 1988 determines the following: The political and administrative organization of the Federative Republic of Brazil comprises the Union, the states, the Federal District and the municipalities, all of them autonomous, as this Constitution provides.
governments would actually be an improved design. Being a product of institutional choices and continuing experiences, the better a constitutional design is, the more it should promote democracy by avoiding permanent political conflict, while refraining dockets of courts of being clogged.\textsuperscript{585} Based on the decisions analyzed and by restricting our conclusions to annexation, we contend that the U.S. experience has been quite successful.

By contrast, this research argues that the Brazilian experience cannot yet be deemed successful, to the extent that the annexation powers of local governments have been the object of two constitutional amendments as well as continuous litigation involving the STF. The constitutional modifications occurred in order to curb the abuses of local governments, which were not economically feasible and were created or annexed for the benefit of local political forces.

This research also describes how the U.S. Supreme Court changed its interpretation of local powers and the involvement of the Court in securing particular rights, concluding that there has not been strong involvement of the Court in annexation procedures, but in protecting rights. This is in sharp contrast with the Brazilian experience. In addition, the more litigation occurs, the less institutional predictability can exist, and economic growth is, therefore, jeopardized.\textsuperscript{586}

This chapter is divided in five Parts. Parts I and II refer to the U.S. and Brazilian scenarios, respectively, with sub-items in each Part discussing the most controversial topics about annexation and the pertinent decisions of U.S. Supreme Court as well as those of the STF regarding federal matters involved in state laws of annexation. Part III delimitates the definitions relevant to enable our comparison. Part IV discusses the research findings and is organized as follows: Section A addresses the comparison of the decisions of both supreme courts focusing on constitutional design. Section B provides a general analysis of the decisions (especially concerned with fundamental rights), and their related impact. Part V concludes.

\textsuperscript{585} Ginsburg, \textit{Comparative Constitutional Design}, at 10.

\textsuperscript{586} Along those lines, see, among others: Hirschl, \textit{The “Design Sciences” and Constitutional “Success,”} at 1364.
I. THE U.S. SCENARIO

A. Annexation

Annexation is the most frequent form of boundary change in the United States, where it is defined as “the territorial expansion of a municipal corporation.”\(^{587}\) There are five main forms of annexation: (1) by state legislative act, which was very common in the nineteenth century, but is currently rare;\(^{588}\) (2) by municipal action, which can occur by ordinance or resolution; (3) through petition of residents or landowners of the locality to be annexed; (4) by judicial determination; and, finally: (5) through the determination of a regional or statewide review commission specialized in boundaries.\(^{589}\) Forty-four states have general law authorizing annexation, in the absence of specific legislative measure.\(^{590}\)

Notwithstanding the form of annexation procedures, states frequently require the fulfillment of one among the following additional requirements\(^{591}\): public hearings, commencement of annexation procedures by petitions of residents or landowners in the city and/or in the area to be annexed, approval of the county authority, city ordinance or resolution.\(^{592}\) In some states, the additional requirement of previous notice (actual or not)


\(^{589}\) For the ideas mentioned in the totality of this paragraph, reference is made to: Briffault and Reynolds, *Cases and Materials on State and Local Government Law*, at 211.


\(^{591}\) In this direction: Anderson, *Mapped out of local Democracy*, at 951.

\(^{592}\) *State laws governing local government structure and administration*, at 25, *supra*. Noting that in annexations started by municipal ordinances, many states authorize the termination of that process in the cases that the majority of residents or landowners are against it: Laurie Reynolds, “Rethinking Municipal Annexation Powers,” *The Urban Lawyer* 24. N. 2 (1992): 247–303, at 278–279.
shall be sent to the owners. Therefore, there are a myriad of procedures that must be obeyed in order to start an annexation procedure.

It is worth emphasizing that annexation by state legislative act in the United States – which is the constitutional rule in Brazil – is perceived as having several problems. The most common criticism against it is the strong interference of the state in what is perceived as solely local matters, potentially jeopardizing the capacity of local governments to commit to long-term planning.

Annexation commonly becomes a judicial dispute in two scenarios. The first one unfolds when municipalities that are neighbors dispute the same area, or when a municipality aims to annex land from its own unincorporated surrounding area. Both municipalities involved argue that each one has the most suitable proper land-use classification; often both municipalities would argue that the disputed area lies in their so-called natural path of development; and state statues frequently assume that the first municipality to trigger the annexation process should be the one to succeed. The second scenario refers to a municipality tentative annexation from an area that wants to remain unincorporated.

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593 For a survey about the procedural requirements involved in annexation: Reynolds, Rethinking Municipal Annexation Powers, at 287–288. Professor Reynolds stresses that previous notice and hearings should be required, regardless of the procedure of annexation – if by municipal ordinance, by the initiative of the Board, etc.

594 Idem, at 260.

595 Idem, at 249.

596 Idem. Professor Reynolds points North Carolina as an example of the adoption of the prior jurisdiction rule, at 290. Nevertheless, she emphasizes that quick action not necessarily relates to reasoned action, at 250. Praising the Tennessee’s annexation statute, which determines that when municipalities incorporated at the same county start annexation procedures regarding the same area, the larger municipality will have precedence, and the proceeding of the smaller one will be suspended until the decision of the larger municipality is reached: Christopher J. Tyson, “Annexation and the Mid-Size Metropolis: New Insights in the Age of Mobile Capital,” University of Pittsburg Law Review 73 (2012): 506–561, at 549. According to Professor Tyson, larger cities are more suitable for continued growth and expansion – because of their own scale, if nothing else.

597 Reynolds, Rethinking Municipal Annexation Powers, at 249, where the Professor remarks that the second scenario referred above occurs frequently in areas of “residential subdivisions whose owners prefer to remain in the county with its lower tax rates, even though, to the uninformed observer, the subdivision already forms a part of the municipality whose annexation it is resisting.”
The main arguments for annexation generally rely on the ability of the municipality to provide improved public services, allocate resources more efficiently, development control of areas situated on the fringe, police and health safety regulations, more equally distributed taxes (when people who live on the borders actually spend time, work, shop in the main municipality, thus free riding at the expense of those who reside and pay taxes in the municipality), and the recognition that those situated in the fringe – once annexed – would actually become part of the city that they already belong in practical terms. In this scenario, annexation can be conceptualized as a way to accommodate municipal growth – referring to population increase and the demands it encompasses, including the necessity of a larger tax base.

Generally, state laws require impact assessments of boundary modifications, aimed at the benefits in overcoming potential losses that might occur in annexation of poor neighborhoods. Areas that intend to be annexed ought to be able to finance the development of their own infrastructure, while also levying property taxes – both being key factors in annexation decision making that may ultimately exclude unincorporated urban areas due to their inadequate services or absence of collection of potential revenue. Accordingly, most political power is vested in the municipalities, with unincorporated zones being left without bargaining power.

598 See David Rusk, Cities without Suburbs (Baltimore: Johns Hopkins University Press, 1995), for a thoroughly empirical study about Albuquerque, in New Mexico, considering metropolitan areas across the country (counties and central city), and based on data from the 1950 census until the 1990 census. The Professor argues that the more integrated an urban area is, despite being located in a overall poor area-wide, the higher are the chances of cities to succeed, with poverty and violence tending to decline. The main claim is that as cities grow and expand their boundaries, public policy should be targeted at making those cities more elastic, to use the author’s concept. This “elasticity” is vital to diminish (and ultimate abolish) the inequalities between suburbs and cities.


601 In this direction and emphasizing that, in practice, investments and the increased tax revenue in unincorporated urban areas are requirements to be met before the annexation procedure starts: Anderson, Mapped out of local Democracy, at 950.

602 Idem, at 957.

603 Idem, at 959.
There are several interests involved in annexation process. The state where the areas are located is furthered with an efficient policy for annexation. It is noteworthy that the county where the area whose annexation is intended may be disfavored by such annexation, because it may lose tax revenues. In other situations, however, the county may be better off with the annexation, because of the reduction of overall area where it has to provide services, without loss in its tax base. Regarding the interests of residents and individual landowners, those interests are usually protected before the annexation, through the principle of self-determination, with some states currently protecting those interests shortly after the annexation.

North Carolina adopted systems of extraterritorial jurisdiction that allows cities to exercise regulatory authority immediately outside the boundaries of the city, with residents of such area being involved in land use planning decisions. Extraterritorial jurisdiction, voluntary, and involuntary annexation decisions are intimately connected, because these annexations concern land that is contiguous or in the natural development of growth of a city and both – in North Carolina – must occur with a defined and official

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604 In this sense and citing the annexation statute of North Carolina as one reciting state government reasons favoring involuntary annexation: Reynolds, *Rethinking Municipal Annexation Powers*, at 254. It is noteworthy that the current statute still provides for statements of policies: see, generally: North Carolina General Statute Section 160A-58.50, of 2011.


606 Explaining that the two different outcomes above mentioned may occur depending on two scenarios, respectively: in the first one, “(...) city annexation means a loss of land base for the government units that formerly had jurisdiction over the land to be annexed. (...) In the second situation, the annexing municipalities do not acquire exclusive jurisdiction over annexed land; that is, the annexed land continues to remain within the jurisdiction of its former government and merely becomes subject to another layer of governmental control,” in Reynolds, *Rethinking Municipal Annexation Powers*, at 255.

607 *Idem*, at 256–257, where the Professor further argues that all state statues – regardless if annexation was voluntary or not – should protect such interests by having a statutory mandate providing for equal municipal services in the recently annexed area.

608 Noting that state statutes from Georgia, Michigan, Ohio, Oklahoma, Arkansas, for instance, require implementation of municipal services in the area newly annexed within a period ranging from one year to three years from annexation, depending upon the nature of the service to be provided: Anderson, *Mapped out of local Democracy*, at 954.

609 Wegner, *North Carolina Annexation Wars: Whys, Wherefores, and What Next*, at 248, informing that extraterritorial areas are likely to be annexed and work as transition occurs: at 248–250.
development plan._annexation within that state varies, and it is much more intensified in areas with substantial population and economic growth. In this scenario, it has been questioned if the same policy of annexation within a given state would be the best criteria considering the diversities that exist across the state of North Carolina. The ability of municipalities located in areas with small growth to expand their boundaries and tax bases has probably been jeopardized by the unified policy adopted by the new statutory scheme in North Carolina.

The general criticisms of involuntary annexation encompass the potential abuse of municipalities by not providing adequate service, attempts to circumvent the intent of the state statute – particularly the contiguity requirement –, and selective annexation of the most affluent areas where the not so affluent tend to be kept outside. Moreover, voluntary annexation is perceived as more in consonance with the self-determination of the people directly involved. If the annexation is involuntary, i.e., initiated by the

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611 Idem, at 254.

612 This exact question is discussed by Wegner, North Carolina Annexation Wars: Whys, Wherefores, and What Next, at 259, and more specifically: at 205–207, with the requirement of “sound urban development after annexation,” as the author quotes the principled phrase from the Supreme Court of North Carolina decision in Nollan v. Village of Marvin 360 N. C. 256, 624, S.E.2Ed 305 (2006).


614 For a deep analysis and dismissal of the main arguments against involuntary annexations: Reynolds, Rethinking Municipal Annexation Powers, at 268–271.

615 We will analyze this last problem in the context of the U.S. Supreme Court decisions. For the moment, suffices to say that the mere dismissal of involuntary annexation does not avoid potential abuses from the municipalities. See: Reynolds, Rethinking Municipal Annexation Powers, at 268.

616 Among the states that adopted involuntary annexation by 2012: Indiana, Kansas, Kentucky, Nebraska, Tennessee and Texas, as noted by Tyson, Annexation and the Mid-Size Metropolis: New Insights in the Age of Mobile Capital, at 514. For the author, the statute of North Carolina – since its reform in 2012 – no longer allows involuntary annexation, as mentioned at 557–559. For an in depth discussion about the new statute of North Carolina, including historical perspective: Wegner, North Carolina Annexation Wars: Whys, Wherefores, and What Next, at 193–227. Professor Wegner clarifies that involuntary annexation is still technically available in North Carolina, although solely the largest cities will be able to afford it, given the new costly requirements – such as extension and implementation of sewer and water services within three years and half of the effective date of the annexation: Idem, at 212–213; and at 226, concluding that North Carolina now joints those states that make involuntary annexation extremely difficult.
municipality, there is no supremacy of self-determination.617 The latter type of annexation is based on the assumption that municipalities are the best units of government in order to stimulate the development and the distribution of public services to urban areas.618 Commenting on the default choice by state statues, Professor Reynolds argues that:

Consent of those to be annexed is frequently an absolute prerequisite for annexation. As a result, in nearly all states, objections by owners or residents immunize many tracks of contiguous urbanize territory from annexation. Self-determination remains the preferred, and frequently exclusive, means by which a municipality can expand its borders. Even in those states that do grant unilateral annexation powers to municipal governments, stringent statutory provisions usually limit involuntary annexations to very narrow circumstances.619

Accordingly, the absolute protection of the so-called self-determination principle allows that few residents actually avoid the obligations of municipality while having its benefits.620 The majority of states do not have annexation by petition considering urbanization standards nor related legal requirements. Even where the self-determination reigns absolute, there are many ways that the majority of residents may use annexation to their own interests at the expense of one or a group of particular owners.621

617 For the use of the term supremacy of self-determination: Reynolds, Rethinking Municipal Annexation Powers, at 292.

618 As contended by Reynolds, Rethinking Municipal Annexation Powers, at 296–297. For Professor Reynolds, residents who were annexed through involuntary proceedings should not be allowed to exercise vote rights that would be equivalent to a veto power. The current state legislation of North Carolina (North Carolina General Statute, Section: 160 A-58.50, of 2011) provides, in the recently added paragraph six: “That it is essential for citizens to have an effective voice in annexations initiated by municipalities.”

619 Reynolds, Rethinking Municipal Annexation Powers, at 261–262.

620 Idem, at 266, where the Professor discusses the unfairness and inefficiencies of the principle of self-determination in the context of annexation.

621 Reynolds, Rethinking Municipal Annexation Powers, at 267.
As municipalities become more empowered, there ought to be measures about the impact of annexation on the remaining governmental units in the state. The legislative ought to create a formula to equally allocate the contractual obligations in the new scheme, while the state ought to consider the gradual transference of revenue from the city to the county, allowing the latter to adapt to the reduction of its tax base.

Considering that city boundaries should include urban land – regardless of its relative wealth – cities should not be the only governmental body with a say in annexation procedures. Those should not be completely detached from the political process. Counties cannot initiate annexations by themselves, although prominent research argues differently. There are important arguments considering a stronger role played by counties in annexation procedures:

Indeed, certain existing features of county government make it an attractive negotiating partner over annexation, even from the perspective of city interests. Residents of incorporated areas enjoy the same voting rights in county government as those held by unincorporated area residents. Political accountability to city interests is thus built in to county governance. When it comes to interlocal negotiations and regional decision making (…) stronger counties do not necessarily mean weaker cities.

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622 Remarking that back to 1992, several aspects of the statutes of North Carolina were considered to be models by other states, specially the provisions about involuntary annexation: Wegner, *North Carolina Annexation Wars: Whys, Wherefores, and What Next*, at 176.


624 *Idem*.


627 Anderson, *Mapped out of local Democracy*, at 952. The Professor remarks that the exception to this general rule is Arizona, where counties are authorized to initiate annexation procedures as long as falling in very small parcels of land completely surrounded by a city.

628 Anderson, *Mapped out of local Democracy*, at 985, where the Professor argues that counties should be allowed to start annexation procedures. She also contends that counties (or unincorporated communities) should actually be authorized to start involuntary annexation, as long as the state law authorizes involuntary annexation by the city. For a detailed discussion about when those involuntary annexations should occur: *Idem*, at 985–986.

A related topic is the scope of judicial review in annexation procedures, which varies across states. Some of them have determined that courts should play a minor and specific role, whereas others require courts to engage in the analysis of reasonableness of the intended annexation. As an example of the latter, Wisconsin courts have been using the so-called Rule of Reason, which enables them to “examine the propriety and reasonableness of annexations despite compliance with the statutory requirements.” It has already been argued that courts should not engage in policy discussions, which should be considered essentially by the legislative; therefore, violation of the determinations of the state statute addressing annexation should be the sole basis for the judiciary to invalidate annexations.

In addition to incorporation and annexation, other far less frequent forms of boundary changes exist in the United States, such as: consolidation (also known as merger), when two or more municipalities merge; deannexation (also referred as detachment) of an existing territory from an existing municipality; and disincorporation of a municipality. The latter occurs through annexation by another municipality; or


631 The current Rule of Reason in Wisconsin has a three prong test establishing the following: first, exclusions and irregularities in boundary lines must not be the result of arbitrariness; secondly, there must be some present or demonstrable future necessity for the annexation; finally, thirdly: prohibition of other factors configuring abuse of discretion by the municipality, as explained by: Robert D. Zeinemann, “Overlooked Linkages Between Municipal Incorporation and Annexation Laws: An In-depth Look at Wisconsin’s Experience,” *The Urban Lawyer* 39 (2007): 257–317, at 286. Under this Rule of Reason, if the municipality is not the petitioner (nor if it did not exercise control over the petitioner), the municipality is understood as being incapable of violating the first part of the test. Accordingly, Wisconsin municipalities avoid initiating annexations, preferring to wait for property owners and citizens to start annexation procedures: Zeinemann, *Overlooked Linkages Between Municipal Incorporation and Annexation Laws: An In-depth Look at Wisconsin’s Experience*, at 287. For an analysis of the requirements of this rule: *Idem*, at 287–292; and also at 303–305.

632 *Idem*, at 285, also noting that there is a controversy about the nature of this Rule of Reason, i.e., whether it is constitutionally based or merely a judicial doctrine that could be modified by the legislative branch.


with the surrounding municipality having its obligations superseded by the county or township.\textsuperscript{635}

\textbf{B. Specific Decisions of the U.S. Supreme Court}

This Section focuses on the federalism issues that the U.S. Supreme Court (USSC) has addressed when deciding matters related to annexation of local governments.\textsuperscript{636} It investigates the limits of annexation in state law enunciated by the Court, pertinent arguments relating to state powers, and how the highest court developed its interpretation over time. This part is a necessary step to be later supplemented by a comparison and contrast approach considering the decisions of the Supremo Tribunal Federal under the Brazilian Constitution of 1988.

We used Lexis Advance in a detailed online research executed during the first weeks of January of 2014. We ran three searches, all of them combining annexation with municipality, county, and local government, respectively.\textsuperscript{637} On the one hand, there were cases that did not appeared in our search because they do not address annexation, but we

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{635} Idem, at 241. It is worth emphasizing once again that the focus of this article is annexation and we briefly mention other forms of boundary changes in the United States merely for the potential impact they may have as to annexation matters.
\item \textsuperscript{636} We are interested in the progression of the United States Supreme Courts dockets, as well. Our research encompasses all the cases that met the search criteria further detailed, being systematic and coherent with the parameters used for the Brazilian STF. In this direction, our research is a departure from the use of the “most difficult cases,” because a relevant part of our study is to compare the dockets of both Supreme Courts. For a survey about studies using the approach of the “most difficult cases,” see: Ran Hirschl, “The Question of Case Selection in Comparative Constitutional Law,” \textit{American Journal of Comparative Law} 53 (2005): 125–155, at 144–146.
\item \textsuperscript{637} Specifically, in the first search we used as key words: “annexation and municipality,” obtaining forty-two cases. In the second, our key words were “annexation and county,” reaching a total number of one hundred and five results. In our last search, our criteria were: “annexation and local and government,” and we reached ninety-one cases. Those are the three most common denominations referring to local governments as translated to the Brazilian “municipios.” Tables 5.3, 5.4, and 5.5 display the raw results for each search, with the cases listed in chronological order. The tables show all the cases of the search, even when the words were not used in the context we were investigating. For instance, several cases referred to annexation of states to the federal union (Texas, Hawaii and Louisiana), which is not the annexation that is the object of this research. Hence, those cases were excluded. We also did not include school districts in our final table (Table 5.1), because they do not carry similar functions in Brazil. After the pertinent exclusions, we found thirty-one decisions solely based on the Lexis Research. Notwithstanding this number, we will further address cases that are relevant (and that were cited by scholars in the field that might be directed related to the discussion), but that do not appear in in our final list of cases of the electronic search as consolidated in Table 5.1.
\end{itemize}
\end{footnotesize}
commented on them for purposes of completeness. On the other hand, there were cases that appeared in our search, but were excluded because they did not directly address annexation (or state and local government powers) in light of this specific form of boundary change.

At this point, we turn to the analysis of the U.S. cases, which were classified according to the main issues involved in the litigation. The cases of each set are grouped in chronological order, and the issues touching annexation were considered by preponderance. This division intends to facilitate further discussion. The annexation cases were assembled in the following five groups: police power of states over municipalities, succession of liability of counties, judicial review of state statute, general decisions about due process of law, and racial discrimination in connection with the right to vote.

The first set of cases addresses police powers of the state over municipalities. In the Slaughter-Houses cases, the USSC held that the state had the exclusive right under its police power to determine the localities where slaughtering was allowed to occur. The USSC also found that the laws of the federal Constitution (in particular, Thirteenth and Fourteenth Amendments) were not applicable. There were, however, vigorous dissents, and we quote the following passage:

It is true that (the Supreme Court of Illinois) in this opinion was speaking of a municipal ordinance and not of an act of the legislature of a State. But (...) a legislative body is no more

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638 The two cases that we also discuss, because they refer to the application of the equal protection clause to states (despite not dealing with annexation, directly), are the following: Avery v. Midlan County, 390 U.S. 474 88 S. Ct. 1114 20 L. Ed. 2d 45 (1968) and Allegheny Pittsburgh Coal Co. v. County Com., 488 U.S. 336 109 S. Ct. 633 102 L. Ed. 2d 688 (1989).

639 There were several instances where annexation was not used in accordance with the technical meaning object of this research, but as mere vernacular synonym of inclusion or addition. It is worth reiterating that we excluded from our analysis all the cases dealing with Board of Education, special districts and similar entities to the extent that they are not encompassed by municipalities in Brazil.

640 The Slaughter-House Cases, 83 U.S. 36, 21 L. Ed. 394 (1872). Technically, the decision in the Slaughter-House Cases rejected the application of the Privileges and Immunity clause as well as the Equal Protection and Due Process contained in the Fourteenth Amendment. For a discussion of how the Court modified the interpretation regarding the latter: Erwin Chemerinsky, Constitutional Law: Principles and Policies (New York: Aspen, 2006), at 494–498.

641 For a review of previous cases securing state power to regulate domestic affairs – including local governments – and contending that the Fourteenth Amendments was not applicable: Raul Berger, Federalism: The Founders’ Design (Norman: University of Oklahoma Press, 1987), at 158–161.
entitled to destroy the equality of rights of citizens, nor to fetter the
industry of a city, than a municipal government. These rights are
protected from invasion by the fundamental law.\textsuperscript{642}

The Slaughter-Houses cases represent the pioneer effort to challenge the former
understanding of the Court about federalism occurring for the first time in light of the
amendments of the Reconstruction.\textsuperscript{643} Under the premises of the traditional (Founding)
federalism, such monopoly remains within the purview of the state. After the
Reconstruction era, there was a valid challenge, even though the majority’s decision
denied the departure proposed by the plaintiffs.\textsuperscript{644} The majority decision has been
criticized on the grounds that it ultimately made the Privileges or Immunities Clause
meaningless.\textsuperscript{645}

Another case dealing with the police powers arising out of the protection of health
and morals was Holden, where the Court determined that state police power might validly
limit the right of contract. For the Court, the sheriff of Salt Lake County was merely
executing the state law.\textsuperscript{646}


642 The Slaughter-House Cases (1872), dissent opinion by Justice Field, at 108. All the internal citations to
cases hereinafter are omitted, unless it is stated differently.

643 Bruce Ackerman, We the People: Foundations (Cambridge: The Belknap Press of Harvard University
Press, 1993), at 94.

644 Idem, at 95. Professor Ackerman contends that the Court refused to apply the Reconstructions
amendments beyond the limited scope of race: Idem, at 115.

that the final decision made the Privileges or Immunities Clause meaningless, and emphasizing that the
Court changed its opinion of the Equal Protection Clause from The Slaughter-House Cases, but have not
done so as to the Privileges or Immunities Clause.

646 In dicta, Justice Rehnquist, writing for the majority of the Court, affirmed, at 73–74: “Appellants
suggest a number of ‘constitutionally preferable’ governmental alternatives to Alabama’s system of
municipal police jurisdictions. (…) From a political science standpoint, appellants' suggestions may be
sound, but this Court does not sit to determine whether Alabama has chosen the soundest or most practical
form of internal government possible. Authority to make those judgments resides in the state legislature,
and Alabama citizens are free to urge their proposals to that body. See, e.g., (…) Hunter. The Alabama
subjecting residents within three miles radius of a city’s corporate limits to the city’s police powers as well as to the criminal jurisdiction of city’s courts – despite not extending the right to vote in the city’s election – was not in violation of the understanding of “government without franchise being a fundamental violation of the Due Process Clause.”

The cases comprised in that first set touch a core question of the U.S. federalism – namely, police powers. As a rule, protection of health and safety can be regulated by the state under its police powers. The Slaughter House cases show that it was not always the case, in a time when freedom of contract was perceived as unlimited. *Holt* authorizes the city to exercise police powers even outside its borders, further blurring the division lines. It also provides an example of the geographical, economic, political, and social functions of the U.S. boundaries, which justified the expansion of police powers based on the effect that the lack of regulation could have in the boundaries of a city.

The second set of cases addresses the question of succession of liability of counties. *In Commissioners of Laramie County*, the USSC decided that absent a state constitution – or organic law, if it is a territory – the legislature has the power to reduce or enlarge the area of a county, whenever the public necessity or convenience requires so. The Court specifically stressed that if a part of the territory of a town and its inhabitants is separated by annexation to another town (or by creation of a new corporation), the former corporation retains all its property, powers, rights, and

Legislature could have decided that municipal corporations should have some measure of control over activities carried on just beyond their ‘city limit’ signs, particularly since today’s police jurisdiction may be tomorrow’s annexation to the city proper. Nor need the city's interests have been the only concern of the legislature when it enacted the police jurisdiction statutes. Urbanization of any area brings with it a number of individuals who long both for the quiet of suburban or country living and for the career opportunities offered by the city's working environment. Unincorporated communities like Holt dot the rim of most major population centers in Alabama and elsewhere, and state legislatures have a legitimate interest in seeing that this substantial segment of the population does not go without basic municipal services such as police, fire, and health protection.” Emphasis added.

649 Holt Civic Club v. City of Tuscaloosa (1978), at 75.

650 Commissioners of Laramie County v. Commissioners of Albany County, 92 U.S. 307 23 L. Ed. 552 (1875). This case was cited as precedent for City of Worcester v. Worcester Consolidated Street Railway Company 96 U.S. 539 25 S. Ct. 327 (1905), at 548–549: “The city is a creature of the State. (...) a municipal corporation is not only a part of the State, but is a portion of its governmental power.”
privileges, remaining subject to all its obligations and duties, unless some new provision was made by the act authorizing the separation. 651

Along that same line of reasoning, the USSC affirmed that new towns formed by annexation of parts of an old town remained severally liable for the bonds of the dissolved town. 652 Therefore, when a municipal corporation is dissolved and a new corporation is created and predominantly composed of the same community, it becomes the successor of the old corporation, liable for its debts. The status of being the same community was defined as relating to the taxable property being substantially the same, and having the same purposes of the former municipal corporation. Furthermore, the Court determined that any legislative enactment that withdraws or limits the remedies for the enforcement of obligations assumed by a municipal corporation, where no substantial equivalent is provided, is forbidden by the U.S. Constitution. 653

In another decision, the USSC held that, upon annexation, authorities of town or villages entitled to receive contractual benefits ceased to be authorized to do so. For the Court, the grant was nonexistent, because the underlying obligation no longer exists, with the ordinances of the city being extended over the territory immediately at the moment of the annexation. 654 In addition, the famous principle of interpretation concerning public grants was emphatically mentioned:

The rules of construction which have been adopted by courts in cases of public grants of this nature by the authorities of cities are of long standing. It has been held that such grants should be in plain language, that they should be certain and definite in their nature, and should contain no ambiguity in their terms. The legislative mind must be distinctly impressed with the unequivocal form of expression contained in the grant, in order that the privileges may be intelligently granted or purposely withheld. It is matter of common knowledge that grants of this character are usually prepared by those interested in them, and submitted to the legislatures with a view to obtain from such bodies the most liberal

651 Commissioners of Laramie County v. Commissioners of Albany County (1875), at 310–311.
grant of privileges which they are willing to give. This is one among many reasons why they are to be strictly construed.\textsuperscript{655}

With regard to annexation of a township to a city and the contractual expiration of reduced fairs, the USSC cited \textit{Blair v. Chicago}, reiterating that grants must be interpreted strictly, with no contractual rights being enlarged by implication and no violation of contractual obligations by the city, or take of property without due process of law.\textsuperscript{656} The USSC later distinguished and reduced the scope of this interpretation by considering the facts underlying such contract, ultimately determining that an extension of the diminished price would violate Article 1, § 10 of the Constitution, and the general prohibition of states impairing the obligation of contracts.\textsuperscript{657}

The second ensemble of decisions illustrates the interpretation of the Court regarding contractual claims modified due to annexation. The Court distinguished the annexation effects when considering bonds (which, as a rule, had to be honored by the new entity) from the general contractual benefits. Those benefits should be interpreted as nonexistent after the annexation, if legal doubt existed. From the rationale of the decisions, the Court considered values of morality and transparency, which should inform public actions, even when they occurred in the closest sphere to the public (local government).

In a third set of cases, our classification was primarily based on the possibility of review by the judiciary of state statues about annexation. The first case addressed procedures pertinent to annexation.\textsuperscript{658} It considered the annexation of counties to the state of West Virginia after the Civil War, determining that such annexation was valid, provided that the counties’ population voted for it in an election. The USSC held that it had jurisdiction over the lawsuit between the new state of West Virginia and the state of

\begin{itemize}
\item \textsuperscript{655} \textit{Idem}, at 471.
\item \textsuperscript{656} \textit{Detroit United Railway v. Detroit}, 229 U.S. 39 33 S. Ct. 697 (1913), at 44.
\item \textsuperscript{658} \textit{Va v. W. Va.}, 78 U.S. 39 20 L. Ed. 67 (1870).
\end{itemize}
Virginia, with allegations of fraud in the election not being relevant, to the extent that the governor had certified the annexation in good faith.659

In a different case, the decision affirmed that the validity of proceedings under a statute for the annexation of a territory to a city was a determination of judicial nature, not a matter solely of legislative cognizance.660 The Court explained:

It may be true that the general rule is that the determination of the territorial boundaries of municipal corporations is purely a legislative function, but there is nothing in the Federal Constitution to prevent the people of a State from giving, if they see fit, full jurisdiction over such matters to the courts and taking it entirely away from the legislature. The preservation of legislative control in such matters is not one of the essential elements of a republican form of government which, under section 4 of Article 4 of the Constitution, the United States are bound to guarantee to every State in this Union. And whenever the Supreme Court of a State holds that under the true construction of its constitution and statutes the courts of that State have jurisdiction over such matters, the Federal courts can neither deny the correctness of this construction nor repudiate its binding force as presenting anything in conflict with the Federal Constitution.661

In addition, the USSC decided that despite the legislature having acted validly in annexing new territory to a city, the jurisdiction of the Court was not dependent upon the form that legislative action is expressed, “but rather upon its practical effect and operation as construed and applied by state court of last resort, and this irrespective of the process of reasoning by which the decision is reached, or the precise extent to which reliance is placed upon the subsequent legislation.”662

Considering matters related to annexation of federal territory by a city, the Supreme Court has previously stated that it has jurisdiction to decide the case with the


660 Forsyth v. Hammon, 166 U.S. 506 17 S. Ct. 665 41 L. Ed. 1095 (1897), at 515.

661 Idem, at 519.

majority of the justices authorizing the tax income levied on employees of the federal plant.\textsuperscript{663}

In another decision addressing the relationship between federal law and state powers with the potential effect in annexation,\textsuperscript{664} a unanimous Court held that the purchase of a hospital by the local government entity to which the state granted power to purchase hospitals (and which already owned the only other hospital in town) was not subject to state action immunity, thus unacceptable under antitrust law.\textsuperscript{665} In a different context removed from annexation, but also referring to limits of state power, the Court had determined that the Equal Protection Clause of the Fourteenth Amendment should apply to state action that selects the party for discriminatory treatment by subjecting the party to taxes not imposed on others in the same class.\textsuperscript{666}

The cases above are relevant because they reiterate the judicial review of state law regarding annexation. The first case stated that the political question doctrine does not preclude the Court from deciding claims arising out of boundary disputes between states, even when such lines have been determined in an agreement by both states and Congress.\textsuperscript{667} It advanced the power of the governor over the counties that were present in the governor’s state. The remaining cases emphasized that judicial review did not

\textsuperscript{663} Howard v. Commissioners of Sinking Fund, 344 U.S. 624 73 S. Ct. 465 97 L. Ed. 617 (1953).

\textsuperscript{664} FTC v. Phoebe Putney Health System, 133 S. Ct. 1003 185 L. Ed. 2d 43 (2013). The case is not directly about annexation, but effects of this boundary change were considered in the rationale developed by the Court.

\textsuperscript{665} FTC v. Phoebe Putney Health System, (2013), at 1013, the Court held, in \textit{dicta}: “For example (…) Wisconsin statutory law regulating the municipal provision of sewage services expressly permitted cities to limit their service to surrounding unincorporated areas. While unincorporated towns alleged that the city's exercise of that power constituted an unlawful tying arrangement, an unlawful refusal to deal, and an abuse of monopoly power, we had no trouble concluding that these alleged anticompetitive effects were affirmatively contemplated by the State because it was ‘clear’ that they ‘logically would result’ from the grant of authority. As described by the Wisconsin Supreme Court, the state legislature 'viewed annexation by the city of a surrounding unincorporated area as a reasonable \textit{quid pro quo} that a city could require before extending sewer services to the area.' (…) Without immunity, federal antitrust law could have undermined that arrangement and taken completely off the table the policy option that the State clearly intended for cities to have.”


\textsuperscript{667} Va v. W. Va., 78 U.S. 39 20 L. Ed. 67 (1870), at 60–61.
jeopardize separation of powers – a claim that has been recurrent since *Marbury v. Madison*\(^ {668}\), concluding that it is a prerogative of the judiciary, regardless of the form or content of the act (including taxes, for instance).

Considering, specifically, *FTC v. Phoebe Putney Health System*, the interpretation of the Court was consistent with the state action doctrine, which fosters federalism by reserving an area of state sovereignty.\(^ {669}\) State action doctrine considers that the government has to obey the Constitution, regardless if it resorted to a corporate form.\(^ {670}\) The doctrine of state action, however, has many exceptions, with the most pertinent being the public function one.\(^ {671}\) Such function refers to services that have been traditionally within the exclusive prerogative of the government.\(^ {672}\) Ultimately, the decision did not encompass the hospital in that exception.

The fourth set of cases comprises alleged violations to the due process of law protected by the Fourteenth Amendment. In the first case, the USSC decided that there was no violation of federal law or the Constitution in a lawsuit arising out of an annexation case that plaintiffs argued had occurred in violation of their due process of law.\(^ {673}\) The Court dismissed the case, noting that it had no jurisdiction because the claim did not show a real and substantial dispute with regard to the effect or construction of the Constitution, or under color of federal law. In another case, the Court ruled that the discrimination between individuals and corporations regarding the annexation to a city of lands held for agricultural purposes cannot be attacked as unconstitutional in order to defeat the annexation of lands of a corporation that are not held for agricultural

\(^ {668}\) *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, (1803).


\(^ {671}\) For a complete review of the exceptions: *Idem*, at 517–538.

\(^ {672}\) *Idem*, at 519, where the author cites that utility companies are not a public function, so the Constitution does not have always to apply.

\(^ {673}\) McCain v. Des Moines, 174 U.S. 168 (1899), emphasizing the existence of state constitution determining the issue, and the absence of violation to the United States Constitution. The Court later cited the case, albeit outside the annexation concept, in Swafford v. Templeton, 185 U.S. 487 (1902), at 493, where it stresses that a federal question exists whenever the subject matter of the litigation is federal.
purposes.\textsuperscript{674} Hence, discrimination between agricultural lands and other lands considering the right of a city to annex them is not in violation of constitutional guaranties of due process of law and equal protection of the laws because it is within the power of the state to classify objects of their legislation.\textsuperscript{675}

Still considering annexation and potential violation of the due process of law clause of the Fourteenth Amendment, the USSC held in \textit{Hunter}:

Municipal corporations are political subdivisions of the state, created as convenient agencies for exercising such of the governmental powers of the state as may be entrusted to them. For the purposes of executing these powers properly and efficiently they usually are given the power to acquire, hold, and manage personal and real property. The number, nature and duration of the powers conferred upon these corporations and the territory over which they shall be exercised rests in the absolute discretion of the State. (…) In all these respects the state is supreme, and its legislative body, conforming its action to the State Constitution, may do as it will, unrestrained by any provision of the Constitution of the United States.\textsuperscript{676}

Both cases in the fourth set deal with claims arising out of the Fourteenth Amendment, showing how restrictively the Court has interpreted them. Accordingly, municipalities ended up being empowered through the interpretation developed by the Court, who understood them as extension of the states.

\textsuperscript{674} Clark v. Kansas City, 176 U.S. 114 20 S. Ct. 284 44 L. Ed. 392 (1900).

\textsuperscript{675} The Court peremptorily affirmed in Clark v. Kansas City (1900), at 120–121: “We think that the distinction is justified by the principle of the cases we have cited. That principle leaves to the State the adaptation of its laws to its conditions. The growth of cities is inevitable and in providing for their expansion it may be the judgment of an agricultural State that they should find a limit in the lands actually used for agriculture. Such use it could be taken for granted would be only temporary. Other uses, certainly those to which the plaintiff puts its lands, can receive all the benefits of the growth of a city and not be moved to submit to the burdens. (…) We think, therefore, that within the latitude which local government must be allowed the distinction is not arbitrary, and infringes no provision of the Constitution of the United States.”

\textsuperscript{676} Hunter v. City of Pittsburg: 207 U.S. 161 28 S. Ct. 40 52 L. Ed. 151 (1907), at 178–179. It is noteworthy that state law provided for the annexation of cities, with the smaller being annexed to the larger. The majority of both cities approved the annexation, but the majority of voters in Allegheny (the smaller city) opposed to the annexation. The lower courts and the USSC affirmed the consolidation decree, also based on the nonexistence of a contract between the citizens and the city of Allegheny for a given taxation – which would be against the nature of municipal corporations. Moreover, the Court decided that there was no deprivation of property without the due process in light of the increased taxation applicable after the incorporation.
The final set of cases focuses on the decisions of the USSC with regard to racial
discrimination and the right to vote. Those decisions have been examined previously, but
this research aims to address the federalism perspective involved in those annexation
cases. Chronologically, our study starts with *Gomillion*, when the Court, for the first
time in the context of annexation cases, limited the absolute power of states conceived in
*Hunter*. The Court affirmed:

Thus, a correct reading of the seemingly unconfined dicta of *Hunter* and kindred cases is not that the State has plenary power to manipulate in every conceivable way, for every conceivable purpose, the affairs of its municipal corporations, but rather that the State’s authority is unrestrained by the particular prohibitions of the Constitution considered in those cases. The *Hunter* opinion itself intimates that a state legislature may not be omnipotent even as to the disposition of some types of property owned by municipal corporations (...). Further, other cases in this Court have refused to allow a State to abolish a municipality, or alter its boundaries, or merge it with another city, without preserving to the creditors the old city some effective recourse for the collection of debts owned to them.

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678 *Gomillion v. Lightfoot*, 364 U.S. 339 81 S. Ct. 125 5L. Ed. 2d 10 (1960), at 342, where the USSC stated the following: “The complaint amply alleges a claim of racial discrimination. Against this claim the respondents have never suggested (...) any countervailing municipal function which Act 140 is designed to serve. The respondents invoke generalities expressing the State’s unrestricted power – unlimited, that is, by the United States Constitution – to establish, destroy, or reorganize by contraction or expansion its political subdivisions, to wit, cities, counties, and other local units. We freely recognize the breadth and importance of this aspect of the State’s political power. To exalt this power into an absolute is to misconceive the reach and rue of this Court’s decisions in the leading case of *Hunter v. Pittsburgh*, and related cases relied upon by respondents.” The Court further stressed that *Lamarie* was only authoritative as for the general nonexistence of a constitutionally protected obligation arising between a state and its subordinate governmental entities exclusively as the result of their relationship: *Gomillion v. Lightfoot*, at 343.

679 For reference and discussion about *Hunter*: see supra, where the USSC held that municipal corporations were merely political subdivisions of the state and created upon states discretion.

680 *Gomillion v. Lightfoot* (1960), at 344, where the conclusion of this quote ended with reference being expressly made to *Mobile v. Watson* – that is previously cited in this research in footnote 653, supra.
The USSC further remarked that legislative control of municipalities, as any state power, is limited by the U.S. Constitution.\textsuperscript{681} The fact that in the excerpt above the Court had made an analogy with contractual rights in order to secure the right to vote bears emphasis. The Court considered that the new boundaries were a violation to the Fifteenth Amendment, depriving the citizens of the right to vote due to their race.\textsuperscript{682} It was reaffirmed that state power is immune of judicial review if such power was exercised completely within the domain of state interest – thus differently than the case at bar, where the state power was used to circumvent a federally protected right.\textsuperscript{683} In addition, in \textit{Avery v. Midland County}, the Court stated that the Equal Protection Clause applies to the exercise of state power, regardless if it was directly exercised by the state or by a political subdivision.\textsuperscript{684}

In another decision, the USSC upheld the modifications of Virginia’s reapportionment statute for elections of members of the House and Senate, which determined that legislative districts should not change, despite the resulting boundaries of the political subdivisions might have been modified after annexation.\textsuperscript{685} According to the majority opinion, the reapportion plan did not violate the Equal Protection Clause of the

\textsuperscript{681} Gomillion v. Lightfoot (1960), at 344–345.

\textsuperscript{682} Gomillion v. Lightfoot (1960), at 345–346. The Court observed, at 347, that: “A statute which is alleged to have worked unconstitutional deprivations of petitioners’ right is not immune to attack simply because the mechanism employed by the legislature is a redefinition of municipal boundaries. According to the allegations here made, the Alabama legislature has not merely redrawn the Tuskegee city limits with incidental inconvenience of the petitioners; it is more accurate to say that it has deprived the petitioners of the municipal franchise and consequent rights and to that end it has incidentally changed the city’s boundaries. While in form this is merely an act redefining metes and bounds, if the allegations are established, the inescapable human effect of this essay in geometry and geography is to despoil colored citizens, and only colored citizens, of their therefore enjoyed voting rights.”

\textsuperscript{683} Gomillion v. Lightfoot (1960), at 347–348. It is worth noting that the concurring opinion by Justice Whittaker located the federal protection right within the Equal protection Clause of the Fourteenth Amendment to the Constitution, at 349.

\textsuperscript{684} Avery v. Midland County, 390 U.S. 474 88 S. Ct. 1114 20 L. Ed. 2d 45 (1968), at 479. Importantly, this litigation was about an election for County Commissioners in Texas – not a direct annexation procedure, but it was included because it addressed annexation in dicta. It further stated that the Fourteenth Amendment guaranteed that citizens have equal representation in political subdivisions that exercised policy-making functions: \textit{Idem}, at 481.

Fourteenth Amendment. In another similar decision, the Court also found no violation of such clause, justifying its holding in *Hunter*.  

In *Perkins v. Matthews* the USSC considered violations to § 5 of the Voting Rights Act of 1965 (42 U.S.C.S. § 1973c) in the context of annexations and related changes of boundaries of adjacent areas that aimed to expand the number of eligible voters. The Court noted that the modifications of boundaries through those annexations was:

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686 The Court held that there was no violation of the principle of one person, one vote, because it understood the state’s objective of preserving the integrity of political subdivision as rational, to the extent that it corroborated the legislative goal of facilitating enactments of statutes referring solely to local matters: *Mahan v. Howell* (1973), at 326–328. Nevertheless, Justice Brennan partially dissented – joined by Justices Douglas and Marshall – citing that the deviation of sixteen point four percent between the most overrepresented and the most underrepresented legislative districts in a state’s lower legislative house is constitutionally impermissible and cannot be justified on the ground that the state adhered to political subdivisions lines when designing the districts: at 345–349.

687 In a case for a new county charter that required approval, under New York law, by a referendum of separate majorities of the voters who lived in the city within the county, and of those who lived outside city boundaries: *City of Lockport v. Citizens for Community Action at Local Level, Inc.*, 430 U.S. 259 97 S. CT. 1047 51 L. Ed. 2d 313 (1977).

688 The Court held in *City of Lockport* (1977), at 271: “The ultimate question then is whether, given the differing interests of city and non-city voters in the adoption of a new county charter in New York, those differences are sufficient under the Equal Protection Clause to justify the classifications made by New York law (…). If that question were posed in the context of annexation proceedings, the fact that the residents of the annexing city and the residents of the area to be annexed formed sufficiently different constituencies with sufficiently different interests could be readily perceived. The fact of impending union alone would not so merge them into one community of interest as constitutionally to require that their votes be aggregated in any referendum to approve annexation. Cf. *Hunter*, (…) Yet in terms of recognizing constituencies with separate and potentially opposing interests, the structural decision to annex or consolidate is similar in impact to the decision to restructure county government in New York. In each case, separate voter approval requirements are based on the perception that the real and long-term impact of a restructuring of local government is felt quite differently by the different county constituent units that in a sense compete to provide similar governmental services. Voters in these constituent units are directly and differentially affected by the restructuring of county government, which may make the provider of public services more remote and less subject to the voters’ individual influence. The provisions of New York law here in question no more than recognize the realities of these substantially differing electoral interests. Granting to these provisions the presumption of constitutionality to which every duly enacted state and federal law is entitled, we are unable to conclude that they violate the Equal Protection Clause of the Fourteenth Amendment.”

689 *Perkins v. Matthews*, 400 U. S. 379 91 S. Ct. 431 27 L. Ed. 2d 476 (1971). The case arose out of a Mississippi’s city statute changing the location of polls, modification of boundaries changes – among others – in an election for mayor and aldermen, and it emphasized that the city was covered by the Voting Rights Act of 1965.

690 Justice Harlan dissented in part from the opinion of the Court, arguing that section five of the Voting Rights Act should not apply to annexations, because, in his view, “it affected voting incidentally or peripherally”, as written at Perkins v. Matthews (1971), at 399.
… A change of standard, practice, or procedure with respect to voting that impacted voting rights in two forms: by inclusion of some while leaving others outside and thus determining who may exercise the right to vote; and by dilution of the weight of the voter of electors to whom the vote was limited before the annexation.691

The USSC further explained the meaning of § 5 of the Voting Rights Act of 1965692 in City of Richmond v. United States,693 a lawsuit that arose out of a post-

691 Perkins v. Matthews (1971), at 388. The USSC further stressed that section five was conceived to address changes that have a potential for racial discrimination in voting – with the Court also citing Gomillion.

692 In the most relevant part for this research, the text of the Voting rights Act of 1965, as amended of 42 USCS § 1973c determined the following: (a) Whenever a State or political subdivision with respect to which the prohibitions set forth in section 4(a) [42 USCS § 1973b(a)] based upon determinations made under the first sentence of section 4(b) [42 USCS § 1973b(b)] are in effect shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1964, or whenever a State or political subdivision with respect to which the prohibitions set forth in section 4(a) [42 USCS § 1973b(a)] based upon determinations made under the second sentence of section 4(b) [42 USCS § 1973b(b)] are in effect shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1968, or whenever a State or political subdivision with respect to which the prohibitions set forth in section 4(a) [42 USCS § 1973b(a)] based upon determinations made under the third sentence of section 4(b) [42 USCS § 1973b(b)] are in effect shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1972, such State or subdivision may institute an action in the United States District Court for the District of Columbia for a declaratory judgment that such qualification prerequisite, standard, practice, or procedure neither has the purpose nor will have the effect of denying or abridging the right to vote on account of race or color, or in contravention of the guarantees set forth in section 4(f)(2) [42 USCS § 1973b(f)(2)], and unless and until the court enters such judgment no person shall be denied the right to vote for failure to comply with such qualification, prerequisite, standard, practice, or procedure (…) (b) Any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting that has the purpose of or will have the effect of diminishing the ability of any citizens of the United States on account of race or color, or in contravention of the guarantees set forth in section 4(f)(2) [42 USCS § 1973b(f)(2)], to elect their preferred candidates of choice denies or abridges the right to vote within the meaning of subsection (a) of this section. (c) The term "purpose" in subsections (a) and (b) of this section shall include any discriminatory purpose.

693 City of Richmond v. United States, 422 U.S. 358 95 S. Ct. 2296 45 L. Ed. 2d 245 (1975). The Court referred to its prior decision, at 368, affirming: "Perkins v. Matthews held that changes in city boundaries by annexation have sufficient potential for denying or abridging the right to vote on account of race or color that prior to becoming effective they must have the administrative or judicial approval required by section five. But it would be difficult to conceive of any annexation that would not change a city’s racial composition at least to some extent; and we did not hold in Perkins that every annexation effecting a reduction in the percentage of Negroes (sic) in the city’s population is prohibited by section five. We did not hold, as the District Court asserted, that ‘if the proportion of blacks in the new citizenry from the annexed area is appreciably less than the proportion of blacks living within the city’s old boundaries, and particularly if there is a history of racial bloc voting in the city, the voting power of black citizens as a class is diluted and thus abridged’ and that the annexation thus violates section five and cannot be approved." The Court further cited Gomillion and affirmed, at 378, that any official action, whether an annexation or
annexation statute that reduced the African American population by 10% in comparison with the pre-annexation electoral base.\textsuperscript{694} \textit{City of Richmond} was later used as precedent to validate other actions with similar impacts, despite not being related to annexation.\textsuperscript{695}

In addition, the USSC determined that political units of a state that is covered within the jurisdiction of the Voting Rights Act of 1965 had to comply with the mandatory preclearance procedures of § 5 of the Act,\textsuperscript{696} holding that the city failed to prove that there was no discrimination.\textsuperscript{697} Along those lines, the Court determined that

\begin{quote}
not, taken purposely to discriminate against African Americans on account of their race was not acceptable under the Constitution nor under the statute.
\end{quote}

\textsuperscript{694} By contrast, the dissenting opinion in City of Richmond v. United States (1975) written by Justice Brennan, with whom Justice Douglas and Justice Marshall joined dissenting, cited the District Court reversed opinion, at 386: “\textit{Perkins} left implicit the obvious: if the proportion of blacks in the new citizenry from annexed area is appreciably less than the proportion of blacks living within the city’s old boundaries, and particularly if there is a history of racial bloc voting in the city, the voting power of black citizens as a class is diluted and thus abridged.” The dissent also addressed the strategic behavior involved is such litigation, at 389–390: “More than five years have elapsed since the last municipal elections were held in Richmond. Hopes which were lifted by the District Court decision over a year ago are today again dashed, as the case is remanded for what may prove to be several additional years of litigation; Richmond will continue to be governed, as it has been for the last five years, by a slate of councilmen elected in clear violation of section five. The black population of Richmond may be justifiably suspicious of the ‘protection’ its voting rights are receiving when these rights can be suspended in limbo, and the people deprived of the right to select their local officials in an election meeting constitutional and statutory standards, for so many years. I would affirm the judgment below, and let the United States District Court for the Eastern District of Virginia set about the of fashioning an appropriate remedy as expeditiously as possible.”

\textsuperscript{695} Citing specifically \textit{City of Richmond} in such context: United Jewish Organizations, Inc. v. Carey, 430 U.S. 144 97 S. Ct. 996 51 L. Ed. 2d 229 (1977), at 160.

\textsuperscript{696} City of Rome v. United States, 446 U.S. 156 100 S. Ct. 1548 64 L. Ed. 2d 119 (1980). Technically, the annexations are in reference to elections for City Commission and Board of Education. It is worth noting that the decision in \textit{City of Rome} asserts: “Congress plainly intended that a voting practice not be precleared unless both discriminatory purpose and effect are absent.” Emphasis in the original, at 172.

\textsuperscript{697} The Court concluded: “The District Court properly concluded that these annexations must be scrutinized under the Voting Rights Act. See \textit{Perkins v. Matthews}. By substantially enlarging the city's number of white eligible voters without creating a corresponding increase in the number of Negroes (sic), the annexations reduced the importance of the votes of Negro (sic) citizens who resided within the pre-annexation boundaries of the city. In these circumstances, the city bore the burden of proving that its electoral system ‘fairly reflects the strength of the Negro (sic) community as it exists after the annexations.’ \textit{City of Richmond}. The District Court's determination that the city failed to meet this burden of proof for City Commission elections was based on the presence of three vote-dilutive factors: the at-large electoral system, the residency requirement for officeholders, and the high degree of racial bloc voting. Particularly in light of the inadequate evidence introduced by the city, this determination cannot be considered to be clearly erroneous.”
the new boundaries resulting from two consolidations and one annexation in Texas\textsuperscript{698} were in violation of § 5, due to insufficiently neutralizing the adverse impact upon minority voting.\textsuperscript{699}

In another landmark decision, the USSC concluded that annexation of inhabited land by a municipality was also subject to the preclearance requirement of § 5, because it constituted a change in the voting practices.\textsuperscript{700} The Court also draw attention to the nonexistence of African Americans in the previous annexation configuration as not being relevant, because the impermissible purpose under § 5 referred to contemporary as well as future circumstances.\textsuperscript{701} In another case of reapportionment in light of the Voting Rights Act, the Court ruled that the scheme was so irrational on its face that it could be solely understood as an effort to segregate districts on the basis of racial classifications.\textsuperscript{702}

Notwithstanding the previous case law concerning the Voting Rights Act, the Court decided that the Act was not applicable to the changes made in the allocation of powers of the county commissions.\textsuperscript{703} According to the majority of the USSC, § 5 was solely applicable to changes that affected voting, candidacy requirements and qualifications, or the composition of the electorate.\textsuperscript{704} The Court proclaimed:

\begin{quote}
Neither the appellants nor the United States has pointed to anything we said there or in the statutes reenacting the Voting Rights Act to suggest that Congress meant other than what it said when it made section five applicable to changes “with respect to
\end{quote}

\textsuperscript{698} City of Port Arthur v. United States, 459 U.S. 159 103 S. Ct. 530 74 L. Ed. 2d 334 (1982).

\textsuperscript{699} City of Port Arthur v. United States (1982), at 162. The Court considered two previous plans and related findings of their discriminatory effect in order to determine that the third plan at bar was also tainted: at 168.

\textsuperscript{700} Pleasant Grove v. United States 479 U.S. 462 107 S. Ct. 794 93 L. Ed. 2d 866 (1987), specifically citing City of Rome, where the majority of the annexations were of vacant land, at 467.

\textsuperscript{701} Pleasant Grove v. United States (1987), at 471.

\textsuperscript{702} Shaw v. Reno, 509 U.S. 630 113 S. CT. 2816 125 L. Ed. 2d 511, at 640–652, in particular. This case does not encompass any annexation procedure directly, but it is included because the majority decided that appellants were able to state a cause of action (citing annexation in \textit{dicta}), and the case appeared in our online search.


\textsuperscript{704} Presley v. Etowah County Commission (1992), at 501–509.
voting” rather than, say, changes “with respect to governance.” If federalism is to operate as a practical system of governance and not a mere poetic ideal, the States must be allowed both predictability and efficiency in structuring their governments. Constant minor adjustments in the allocation of power among state and local officials serve this elemental purpose. Covered changes must bear a direct relation to voting itself. That direct relation is absent in both cases now before us. The changes in (the counties of litigation) affected only the allocation of power among governmental officials. They had no impact on the substantive question whether a particular office would be elective or the procedural question how an election would be conducted. Neither change involves a new “voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting.”


In a case involving dilution of votes of governing authorities of counties in Georgia, the Court distinguished the application of § 2 of the Voting Rights Act from § 5. In another case, the Court decided that there was no dilution of minority votes in a reapportionment plan from the Florida legislative.

This research considered the decision of Shelby v. Holder, to the extent that the Court discussed the federalism pact in order to rule § 4(b) of the Voting Rights Act

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707 The Court held in Holder v. Hall (1994), at 884–885: “Retrogression is not the inquiry in section 2 dilution cases. 42 U.S.C. § 1973(a) (whether voting practice ‘results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color’; … Plaintiffs could not establish a section 2 violation merely by showing that a challenged reapportionment or annexation, for example, involved a retrogressive effect on the political strength of a minority group’). Unlike in section 5 cases, therefore, a benchmark does not exist by definition in section 2 dilution cases. And as explained above, with some voting practices, there in fact may be no appropriate benchmark to determine if an existing voting practice is dilutive under section 2. For that reason, a voting practice that is subject to the preclearance requirements of section 5 is not necessarily subject to a dilution challenge under section 2. This conclusion is quite unremarkable. For example, in Perkins v. Matthews (1971), we held that a town's annexation of land was covered under section 5. Notwithstanding that holding, we think it quite improbable to suggest that a section 2 dilution challenge could be brought to a town's existing political boundaries (in an attempt to force it to annex surrounding land) by arguing that the current boundaries dilute a racial group's voting strength in comparison to the proposed new boundaries.”

708 Johnson v. De Grandy, 512 U.S. 997 114 S. Ct. 2647 129 L. Ed. 2d 775 (1994), at 1019, where the majority of the Court emphasized that Richmond v. United States (1975) referred to territorial annexation designed to dilute African American votes was forbidden by section five of the VRA, regardless of its actual effect.
unconstitutional. According to the majority, the formula used in the Act was forty years old and no longer reflected the realities in the states covered by it. The USSC asserted:

The Voting Rights Act of 1965 employed extraordinary measures to address an extraordinary problem. Section five of the Act required States to obtain federal permission before enacting any law related to voting—a drastic departure from basic principles of federalism. And section four of the Act applied that requirement only to some States—an equally dramatic departure from the principle that all States enjoy equal sovereignty. This was strong medicine, but Congress determined it was needed to address entrenched racial discrimination in voting (...). As we explained in upholding the law, “exceptional conditions can justify legislative measures not otherwise appropriate.”

In light of the U.S. federalism, the Court explained that the federal government is not generally authorized to review and veto state enactments before they go into effect—despite such power being considered at the time of the Convention, it was denied in favor of the Supremacy Clause and related potential challenges occurring after the effect of state law. The Court also reaffirmed that the Tenth Amendment grants to the states all the powers not specifically granted to the federal government, and that “(...) not only do States retain sovereignty under the Constitution, there is also a ‘fundamental principle of equal sovereignty’ among the States.”

709 Shelby County v. Holder, 133 S. Ct. 2612 186 L. Ed. 2d 651 (2013).

710 The decision emphasizes that African American voter turn out actually increased in five of the six states originally covered by the VRA, of 1965: Shelby County v. Holder (2013), at 2619. Shelby County is located in Alabama. The following states were originally covered by section five: Alabama, Georgia, Louisiana, Mississippi, South Carolina and Virginia. Arizona and Texas were included in 1972, also in their totality. The majority of the Court noted in Shelby, at 2628, that by 1965 the Act divided the states among those which have literacy tests (coupled with low voter registration and turn out) and those which did not; nowadays, for the Court: “(...) the Nation is no longer divided along those lines, yet the Voting Rights Act continue to treat it as if it were.” At the time of the Shelby decision, Florida, New York, North Carolina, South Dakota and Michigan were partially included, according to data from the Department of Justice of the United States. There is no information available with regard to the current jurisdictions covered after Shelby (and its potential bail out effect) in the official website of the Department of Justice, last accessed March, 2014, available at: http://www.justice.gov/crt/about/vot/sec_5/covered.php

711 Shelby County v. Holder (2013), at 2618.

712 For all the references and quote in this paragraph: Shelby County v. Holder (2013), at 2623.
based on the remaining necessity of differentiated treatments for the states mentioned in the Act.\footnote{713}

The majority holding in *Shelby* can be understood as aligned with the current trend of using tradition to limit judicial review of democratic process at state and local levels.\footnote{714} Nevertheless, tradition itself has been subject to criticisms, because the U.S. experience is founded in multiple traditions.\footnote{715} In addition, the assurance of legislative representation of minorities has been the core of the Act, and it is unclear, as of today, how the decision of the Court affects those to whom the protection was designed.\footnote{716}

Still considering the *Shelby* decision, a related topic of particular interest for our comparison with Brazil is the fact that the USSC determined that Congress did not act – or did not consider doing so – despite the warning given by the USSC in a decision\footnote{717} dating back to 2009, determining that the formula of § 2 must be updated.\footnote{718}

\footnote{713} The dissent opinion written by Justice Ginsburg – joined by Justices Breyer, Sotomayor and Kagan – specifically addresses annexation as a form of discrimination in different passages: at 2535, and also at 2646, where it was emphasized that Pleasant Grove, a city in a neighbor county of Shelby, acted with purposeful discrimination when annexing all white areas and denying the annexation request of an adjacent black neighborhood, citing Pleasant Grove v. United States (1987).

\footnote{714} Cass R. Sunstein, *Designing Democracy: What Constitutions Do?* (New York: Oxford University Press, 2001), at 80–81. The author argues as potential explanations for such approach: the fact that the United States Constitution is better understood for the Court if being preservative, and that the due process clause is better interpreted in a very restrictive form. According to the Professor, both understandings would reduce the Court’s discretion.

\footnote{715} The American experience regarding race, for example, is controversial. Along those lines and criticizing the use of tradition itself: Sunstein, *Designing Democracy: What Constitutions Do?*, at 82–87.


\footnote{717} The Shelby decision (Shelby County v. Holder, of 2013), at 2615, refers to the following case: Northwest Austin Municipal Utilities Number One v. Holder, 557 U.S. 193, 129 S. Ct. 2504 174, l. ed. 2d 140, which was decided in 2009. The Shelby decision emphasized, also at 2615, that Congress could have updated such formula, when it extended the Voting Rights Act of 1965 through its reauthorization in 2006.

\footnote{718} The Court stated: “Our decision in no way affects the permanent, nationwide ban on racial discrimination in voting found in section two. We issue no holding on section five itself, only on the coverage formula. Congress may draft another formula based on current conditions. Such a formula is an initial prerequisite to a determination that exceptional conditions still exist justifying such an ‘extraordinary departure from the traditional course of relations between the States and the Federal Government.’ (Presley, 502 U.S., at 500–501, 112 S. Ct. 820, 117 L. Ed. 2d 51). Our country has changed, and while any racial discrimination in voting is too much, Congress must ensure that the legislation it passes to remedy that
II. THE BRAZILIAN SCENARIO

A. Brazilian Constitutional Order after 1988

Brazilian re-democratization process started in 1979, with the appointment of the moderate Joao Figueiredo as President, with the gradual ending of the overcentralized military rule. In 1982, the first direct election for governors since the 1964 coup d’état was held.\(^1\) After a long deliberation,\(^2\) the Constitution of the Brazilian Republic was approved on October 5, 1988 by a Constitutional Convention that included deputies and senators.\(^3\)

Mayors and governors were among the most powerful actors in lobbying for decentralization\(^4\) and thus encouraging a constitutional order that developed a “center-constraining federation unprecedented in Brazilian history.”\(^5\) In addition, municipalities

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\(^{1}\) For information concerning Brazilian elections for state governors, federal deputies, and senators from 1945 until 1990, see: http://www.tse.jus.br/eleicoes/eleitos-1945-1990/cronologia-das-eleicoes. David Samuels, *Ambition, Federalism, and Legislative Politics in Brazil* (Cambridge: Cambridge University Press, 2003), at 169, emphasizes that direct elections brought a “dramatic change in the executive-legislative relations (even though a military president remained in office until 1985).” The author details how the democratic elections pressured the president and conquered more decentralization of revenues, concluding that 1982 was the year that the military ruling actually ended.

\(^{2}\) The constitutional convention met between February 1987 until September of 1988. Explaining that the Brazilian convention was not elected nor formed by delegates directly elected to write the Constitution, and that this fact was a compromise during the transition period from the military ruling to democracy: Souza Neto and Sarmento, *Direito Constitucional: Teoria, História e Métodos de Trabalho*, at 156–170.

\(^{3}\) The less populated states of North and Center West were favored in the unbalanced representation of their states’ senators in the convention, because all states are equal in the Brazilian Senate. The non-updated number of federal deputies per state (disregarding population growth in the Southeast) also disfavored the southeast states. See, for example, Souza Neto and Sarmento, *Direito Constitucional: Teoria, História e Métodos de Trabalho*, at 160.

\(^{4}\) The Brazilian recent democracy had the federal revenues from the union reduced in more than eight percent and that change of revenues towards states and municipalities was not accompanied by administrative responsibilities, which contributed to fiscal crisis. In this sense: Kurt Weyland, “The Brazilian State in the New Democracy,” in *Democratic Brazil*, ed. Peter R. Kingstone and Timothy J. Power (Pittsburg: University of Pittsburg Press, 2000), at 42.

\(^{5}\) Celina Souza, “Brazil: The Prospects of a Center-Constraining Federation in a Fragmented Polity,” *Publius: The Journal of Federalism* 32 (2002): 23–48, at 31–32. This observation is particular relevant, because Brazil has had lasting periods with state governors being very empowered, such as during the Old Republic. For a historical analysis of that period, during which federalism was marked for the preponderance of state interests: Joseph L. Love, Federalismo y Regionalismo en Brasil, 1889-1937, in
were also secured financial autonomy and levy of revenues in an unprecedented fashion.\textsuperscript{724}

The decentralization implemented by the constitutional text with the municipal revenue sharing brought significance to the “elevation of municipalities to separate federal status” under the Constitution of 1988.\textsuperscript{725} In addition, such decentralization had disproportionately increased powers of mayoral officers, thus replicating, at the local

\textsuperscript{724} The Brazilian Constitution established a complex system of revenues for municipalities. Exclusive municipal taxes are in article 156 of the Constitution: “The municipalities shall have the competence to institute taxes on: I - urban buildings and urban land property (“IPTU”); II - \textit{inter vivos} transfer, on any account, by onerous acts, of real property, by nature or physical accession, and of real rights to property, except for real security, as well as the assignment of rights to the purchase thereof (“ITBI”); III - services of any nature not included in article 155, II, (state “ICMS” tax) as defined in a complementary law (“ISS”).” Article 158 further determines the municipal revenue sharing: “The following shall be assigned to the municipalities: I - the proceeds from the collection of the federal tax on income and earnings of any nature, levied at source on income paid on any account by them, by their autonomous government entities and by the foundations they institute and maintain (“IR”); II - fifty percent of the proceeds from the collection of the federal tax on income and earnings of any nature, levied at source on income paid on any account by them, by their autonomous government entities and by the foundations they institute and maintain (“IR”); II - fifty percent of the proceeds from the collection of the federal tax on rural property, concerning real property located in the municipalities, or the totality of the proceeds, in case the municipality exercises the option mentioned by article 153, paragraph 4, III (“ITR”); III - fifty percent of the proceeds from the collection of the state tax on the ownership of automotive vehicles licensed in the municipalities (“IPVA”); IV - twenty-five percent of the proceeds from the collection of the state tax on transactions regarding the circulation of goods and on rendering of interstate and intermunicipal transportation services and services of communication (“ICMS”). Article 159 supplements the mandatory transfers from the union: “The Union shall remit: I - of the proceeds from the collection of taxes on income and earnings of any nature and on industrialized products, forty-seven percent as follows: (…) b) twenty-two and a half of one percent to the Revenue Sharing Fund of the Municipalities.” Municipalities can also levy: article 145, II: “fees, by virtue of the exercise of police power or for the effective or potential use of specific and divisible public services, rendered to the taxpayer or made available to him; III - benefit charges, resulting from public works. Article 149-A authorizes specific charges, as the following: “charges for compensation of the use of public light utility service, which is can be charged in the electric bill.” Other constitutional provisions secure more revenues for municipalities, such as article 153, paragraph five: “Gold, when defined in law as a financial asset or an exchange instrument, is subject exclusively to the tax established in item V of the caption of the present article, due on the original transaction; the minimum rate shall be one per cent, and the transference of the amount collected is ensured under the following terms: (…) II -seventy per cent to the municipality of origin.” Other revenues are authorized as compensation for the use of the natural resources of the municipality and include: electrical energy generated; mineral exploitation; oil produced in the territory or in the continental platform – the so-called oil royalties, among others.

level, the concentration of powers in the executive, as it happened at the federal level, at the expense of legislative bodies. This phenomenon was named “decentralization of hyper-presidentialism.” On the one hand, it has been criticized for the general lack of transparency and the significant increase in “patronage and public sector payrolls at the expense of public good.” On the other hand, depending on specific personal characteristics of mayors, there has been increasing popular participation, such as the famous Participatory Budgeting (PB) in Porto Alegre, in the southern region of Brazil.

Urbanization and the politics of the military ruling made the position of mayor much more attractive, contributing to weaker state governors while fostering the strong position of municipalities in the Constitution of 1988. In this sense, it would explain the reasons for the Brazilian departure of the comparative constitutional experience, with Brazilians writing their own peculiar federalism pact. Brazilian increased number of

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726 Idem, at 38.


728 See, e.g.: Brian Wampler, Participatory Budgeting in Brazil: Contestation, Cooperation, and Accountability (Pennsylvania: Pennsylvania State University Press, 2007), at 2–6. For an empirical study encompassing Porto Alegre, Blumenau, Ipatinga, Belo Horizonte, Rio Claro, São Paulo, Santo André, and Recife. The first two municipalities are located in the South; the remaining five in the South East – both regions being the most developed in Brazil. Only Recife belongs to the less developed Northeast. The study concluded that the experience in Porto Alegre’s participatory budgeting as a democratic one and capable of better distributing scarce resources to the poorest regions in the local government was not the rule. Accordingly, it is not necessarily due to participatory budgeting that poor regions in the cities will be included or have an improved democratic experience. In addition, it has been argued that Porto Alegre’s experience has been so successful because of PT’s (Brazilian labor party) self-interest and willingness in delegating some power to citizens was calculated, contributing later to the strength of the party nationally: Eaton, Decentralization and Federalism, at 40.

729 Samuels, Reinventing Local Government? Municipalities and Intergovernmental Relations in Democratic Brazil, at 78–88, where the author notes that the self-interested mayors and their career motivations contribute to the increase of municipal power. At 91, he argues that the most important modification after democratization with regard to political careers was “a revitalization not of national political parties but of politicians’ increasing efforts to secure office at the municipal level.” Developing the argument of how self-interested politicians in the Congress agreed to decentralize fiscal resources aiming at favoring their local supporters while increasing their own ambitions: Samuels, Ambition, Federalism, and Legislative Politics in Brazil, at 157–176.

730 Brazil borrowed several constitutional provisions from the U.S. experience, such as: the nomination of STF justices, the residual powers of state if the constitutional is silent, mechanisms authorizing concrete judicial review on the state level, among others. Hence, the fact that Brazil decided not to borrow the absence of local governments provisions shows how much power local actors had at the time. For a comparative constitutional borrowing analysis as a subset of the institutional design literature, explaining why borrowing may not occur due to political factors: Lee Epstein, “Constitutional Borrowing and non-
municipalities supports the understanding that in federal systems where units are heterogeneous, politicians have higher incentives to cooperate with each other at the local spheres, before working on the central level.\textsuperscript{731} This is particularly relevant in the Brazilian context, where municipalities have weak ties with their own state.\textsuperscript{732}

The Brazilian Constitution of 1988 inaugurated provisions contemplating the municipalities, which are the only form of local government,\textsuperscript{733} side by side with the states and the federal union.\textsuperscript{734} In addition, states in Brazil became authorized to create, through state complementary law,\textsuperscript{735} metropolitan regions, urban agglomerations, and micro regions of neighboring municipalities, provided those group modalities of municipalities organize, plan, and execute public functions that are common to all the municipalities involved.\textsuperscript{736}

\textsuperscript{731} Arguing such advantage for federal systems which are heterogeneous, generally, see: Horowitz, \textit{Constitutional Design: Proposals versus Process}, at 25. The idea remains influential, despite Brazil not being a divided society in terms of religion, ethnicity or race (see discussion in Part IV, \textit{infra}).


\textsuperscript{733} In Brazil, there is no distinction between corporate and unincorporated land. Every land must belong to a municipality, which is the only designation for local government. Therefore, it is noteworthy that there are no townships, counties, nor boroughs in the sense of the U.S. denominations for local governments of general purpose. We shall develop this further, when we establish the general assumptions for our comparison, at Part III of this chapter.

\textsuperscript{734} Article 18 of the Republican Constitution: The political and administrative organization of the Federative Republic of Brazil comprises the Union, the states, the Federal District and the municipalities, all of them autonomous, as this Constitution provides.

\textsuperscript{735} The creation of those regions used to be authorized by federal law instead of state law, before the Constitution of 1988, as notes: Souza, \textit{Brazil: The Prospects of a Center-Constraining Federation in a Fragmented Polity}, at 34.

\textsuperscript{736} Article 23, paragraph three, of the Constitution of 1988: “The states may, by means of a state complementary law, establish metropolitan regions, urban agglomerations and micro regions, formed by the grouping of adjacent municipalities, in order to integrate the organization, the planning and the operation of public functions of common interest.” This provision has not been modified by constitutional amendments.
In Brazil, all the electors of the involved municipalities must approve every boundary change affecting their municipalities through a previous plebiscite. Hence, involuntary annexation is not authorized by the Constitution. The process of boundary change can only be initiated if previous approval in a plebiscite consulting the population involved exists, and as long as there is a study of municipal assessment of the boundary modifications.\textsuperscript{737}

The constitutional text also determines the fulfillment of those same procedural requirements for all forms of boundary changes – i.e., regardless if those changes occur in the context of establishment, merger, fusion, or dismemberment (annexation) of municipalities. For plebiscites concerning the changes of municipal boundaries, the state legislative chamber should organize it, and voting must take place in accordance with federal and state laws.\textsuperscript{738} Importantly, annexation of municipalities in Brazil was not marked by the exclusion of particular citizens, as it occurred in the U.S. experience.\textsuperscript{739}

The Constitutional Amendment 15, of 1996, modified the provisions concerning the changes pertaining to municipal boundaries. The main reasons mentioned in the proposal for the Constitutional Amendment 15 in the House of Representatives was the vast number of small municipalities\textsuperscript{740} that were created or annexed without any

\textsuperscript{737} Article 18, paragraph four of the Constitution of 1988: The establishment, merger, fusion and dismemberment (annexation) of municipalities shall be effected through state law, within the period set forth by complementary federal law, and shall depend on prior consultation, by means of a plebiscite of the population of the municipalities concerned, after the publication of Municipal feasibility studies, presented and published as set forth by law.

\textsuperscript{738} That is the specific content of article five of the federal law 9,709, of November 18 of 1998.

\textsuperscript{739} In this direction: Samuels, \textit{Reinventing Local Government? Municipalities and Intergovernmental Relations in Democratic Brazil}, at 98.

\textsuperscript{740} Small municipality is defined as having less than ten thousand inhabitants. Noting that between the 1988 and 2000, seventy four percent of municipalities created in Brazil were small municipalities: Fabricio Ricardo de Limas Tomio, “The Creation of Municipalities After the 1988 Constitution,” \textit{Revista Brasileira de Ciências Sociais} 17 (2002): 61–89, at 63–65, specifically. Commenting that during the democratic period after the Constitution of 1946 there has also been a significant increase in the number of municipalities due to politicians’ interests in increasing their influence in public contracts and government jobs: Samuels, \textit{Reinventing Local Government? Municipalities and Intergovernmental Relations in Democratic Brazil}, at 93.
necessity, merely to earn federal assistance funds while also creating new political jobs.

Among the principal changes implemented by the Amendment 15 was the inclusion of previous municipal studies (assessments) considering the feasibility of boundary alterations. Another main modification referred to the nature of the complementary law whose compliance is mandatory by the modifying municipality. Originally, state complementary law was the only legislative act setting the requirements for those municipal changes. After the amendment, however, a federal complementary law defines those matters. At the end of 1996, President Fernando Henrique Cardoso successfully passed his fiscal policy law as part of an effort to transfer health care, housing, and social policies to subnational unities. The decentralization process has been perceived with mixed outcomes, with electoral competition at the local level being linked to a significant increase “in patronage and public sector payrolls at the expense of public goods.”

By 2007, Congress had not yet approved the federal complementary law that was demanded by the amended constitutional text. This complementary law must set the general determinations concerning the establishment, merger, fusion, and

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741 The creation of municipalities was rampant. For example: Tocantins, a small state located in the North region of Brazil and created with the Constitution of 1988, has currently 139 municipalities. Data available at: http://www12.senado.gov.br/noticias/entenda-o-assunto/municipios-brasileiros

742 The official motivation for the modification justified in the proposal for Amendment of the Constitution numbered 41, of 1991, that became later the Constitutional Amendment 15 of 1996, addressed the so-called abuse in creation and annexation of small municipalities: http://www.camara.gov.br/proposicoesWeb/fichadetramitacao?idProposicao=24965

743 The original text of article 18, paragraph four, stated the following: The establishment, merger, fusion and dismemberment (annexation) of municipalities shall preserve the continuity and the historical and cultural unity of the urban environment and shall occur through state law, in accordance with the requirements set forth by complementary state law, and upon previous manifestation of the population directly interested by plebiscite. For the current constitutional text: see footnote 737, supra.

744 The so-called Kandir Law, the Complementary Law 87/96, removed ICMS (state tax levied based on exports, aiming to foster Brazilian trade, by reducing deficit). The fiscal reform would be further developed with the Complementary Law 101/2000, which imposed limits to debts of states and local governments.


746 Eaton, Decentralization and Federalism, at 41.
dismemberment (annexation) of municipalities. During the congressional inertia after 1996, several municipalities were created, annexed, merged – all during the absence of the necessary law that was supposed to define the rules for those procedures of boundary changes. In light of the extended inaction of the legislative branch, the STF determined that the non-edition of the federal complementary law in a reasonable time was a violation of the constitutional order.\footnote{747 The leading case is the Direct Action of Unconstitutionality Number 3682, of May 05, 2007, when the STF considered that after eleven years after the Constitutional Amendment 15, of 1996, it was unreasonable for Congress to not have promulgated the federal complementary law, despite several legislative proposals. Neither the House nor the Senate actually discussed (let alone voted) the federal complementary law, as emphasized by: Gilmar Ferreira Mendes and Paulo Gustavo Gonet Branco, \textit{Curso de Direito Constitucional} (São Paulo: Saraiva, 2013), at 1160.}

The vast majority of decisions of the STF analyzed in our research refers to the evolution and further modification of the understanding of the STF. The Court has traditionally ruled that once the legislative process is started – i.e., once a bill of law is proposed in one of the houses –, there was no inertia to be attributed to the legislative branch.\footnote{748 \textit{Idem}, at 1159.} More than ten years have lapsed without the promulgation of the federal complementary law.\footnote{749 In this sense, Justice Gilmar Mendes clarified that the \textit{inertia deliberandi}, the absence of discussion and voting, was an omission capable of unconstitutionality attributable to the inaction of the legislative branch: Mendes and Branco, \textit{Curso de Direito Constitucional}, at 1160.} There were decisions in which the STF determined that Congress had eighteen months, although other decisions established twenty-four months, to approve the federal complementary law mentioned in article 18, paragraph 4, of the Constitution.\footnote{750 Noting that the STF declared the unconstitutionality without nullity of the municipalities created during the lapse between the Constitutional Amendment 15 of 1996 and the inaction of Congress for the first time in May, 2007: Alexandre de Moraes, \textit{Direito Constitucional} (São Paulo: Atlas, 2012), at 312, where the Professor points to the discrepancies of the time granted to Congress to promulgate the federal complementary law. Justice Gilmar Mendes also notes those time discrepancies: Mendes and Branco, \textit{Curso de Direito Constitucional}, at 1164–1165.} It is noteworthy that, according to our research in the official database of the federal executive office, the federal complementary law has not been approved yet.\footnote{751 As of January 10, 2015, there was no federal complementary law edited in compliance with article 18, paragraph four, of the Constitution of 1988, according to the official database of the Presidency, containing the totality of Brazilian legislation: http://www4.planalto.gov.br/legislacao/legislacao-1/leis-complementares-1#content}
Paradoxically, Congress opted for not approving the federal complementary law\textsuperscript{752} determined in the new wording of article 18, paragraph four, of the Constitution, but passed a Constitutional Amendment to the Transitory Dispositions of the Constitution, in 2008, determining that all the municipalities whose boundaries were changed by state laws published until December 31, 2006, and provided that those changes occurred in accordance with the then valid state complementary law at the time are deemed as being legal.\textsuperscript{753}

Recently the House and Senate approved a project of complementary law about boundary changes. Among the advantages of the modification procedures of local boundaries of municipalities whose rules were approved by the Senate in August 2014, after extensive negotiations with the federal government, the Senate mentions: reducing regional inequalities, greater presence of government, and growth in employment generation.\textsuperscript{754} The substitute to Senate Bill (PLS) 104/2014 establishes criteria for financial viability, minimum population (6,000 inhabitants in the North and Midwest, 12,000 in the Northeast, and 20,000 in the South and Southeast regions), rules for submitting the proposal to the state assemblies, and for consulting the people through referendum. Furthermore, it requires territory with minimum area of 200 square kilometers in the North and Midwest, and 100 square kilometers in the other regions (South, South East, and Midwest). The bill prohibits the creation, merger, annexation, or split, if this jeopardizes existing municipalities. Despite criticism from some quarters that new cities (and new boundaries generally) mean more public spending, the bill passed with fifty-two votes in favor and only four against it.

\textsuperscript{752} The Constitution determines that the quorum for approval of complementary laws is of absolute majority, in its article 69. Absolute majority is considered as the first non fraction number above half of the total of deputies and, in practice, it means that two hundred and fifty seven deputies must approve the project of federal complementary law. The quorum for Constitutional Amendments requires three fifth approvals in both Houses, as determined in article 60, paragraph second.

\textsuperscript{753} Article 96 of the Act of Transitory Constitutional Dispositions, included by the Constitutional Amendment 57, of 2008, determines: “Hereby are validated the acts of establishment, merger, fusion and dismemberment of municipalities whose law has been published until December 31, 2006, in accordance with the requirements under the state legislation at the time of its establishment.”

\textsuperscript{754} For the official view of the Senate and access to the text of the proposal, we used the text available at: http://legis.senado.leg.br/sicon/#/pesquisa/lista/documentos
The project (bill) of complementary law regarding municipal boundaries that has been approved by the Congress was vetoed in its entirety by the current President Dilma Rousseff. She argued that the project was against public interest because it authorized change in boundaries and the expenses that accompanied it without parallel increase in revenues.\textsuperscript{755} The President has already vetoed a previous project of complementary law in 2013 in its entirety.\textsuperscript{756} It is worth mentioning that the most recent project had more demanding requirements for boundary changes. Authoritative press has contended that the actual political reason for the presidential veto was the 2014 elections (and the support that the President anticipates in a run off).\textsuperscript{757} The mayor lobby ultimately made the President veto a bill that her own government has helped draft.\textsuperscript{758}

We turn next to investigate the decisions of the STF concerning the constitutionality of annexation cases.

\textit{B. The Analysis of the STF Decisions}

This research was conducted using the STF website.\textsuperscript{759} It is limited to the decisions that occurred during the Constitution of 1988 – thus after October of 1988 until February of 2014.\textsuperscript{760} The reasons for choosing this time period are threefold. First, the

\textsuperscript{755} The presidential reasons for the veto cited the technical opinion of the Finance Minister, which stated that the fiscal deficit problem concerning boundary changes remained detrimental to the country. See: http://www.planalto.gov.br/CCIVIL_03/_Ato2011-2014/2014/Msg/Vet/VET-250.htm

\textsuperscript{756} In addition, a similar project containing less demanding requirements for boundary changes, according to the Finance Minister’s technical opinion, had already been subject to a total veto based on public interest, in November 2013: http://www.planalto.gov.br/CCIVIL_03/_Ato2011-2014/2013/Msg/Vet/VET-505.htm

\textsuperscript{757} For authoritative press, see, for example: Folha de São Paulo, version online of August, the twenty seventh of 2014, available at: http://www1.folha.uol.com.br/poder/2014/08/1506722-dilma-veta-criacao-de-novos-municipios-e-abre-crise-com-congresso.shtml

\textsuperscript{758} \textit{Idem}.

\textsuperscript{759} We used the search mechanism of case law (“jurisprudência,” in Portuguese), which is available at: http://www.stf.jus.br/portal/jurisprudencia/pesquisarJurisprudencia.asp

\textsuperscript{760} Table 5.2 contains the final decisions of the STF. We ran four searches. The first one considered as criteria the following words: “municipio,” “incorporação,” and “inconstitucionalidade;” the second search altered the last word to “constitucionalidade.” The third search used as key words: “municipio,” “anexação,” and “inconstitucionalidade;” whereas our final search implemented the same modification of the second one by altering the last word for “constitucionalidade.” It is worth reiterating that we did so as a
Constitution of 1988 modernized the Brazilian tradition, as previously mentioned, by elevating municipalities to the status of federal actors (with states and the federal union). Second, the Constitution of 1988 technically ended the transition phase from the end of the military rule (1985) to democracy. Third, new constitutions are most susceptible to risk of replacement within their first nineteen years, so our study covers longer than such critical period.\textsuperscript{761}

It is worth noting that the U.S. concept of annexation is equivalent, in effect, to the concept of “dismemberment through annexation” in the Brazilian constitutional text. According to such Brazilian modality, both municipalities remain in existence.\textsuperscript{762} Establishment, merger, fusion, and dismemberment of municipalities appeared together in the search mechanisms of the STF, due to the writing of the constitutional provisions and the less technical terminology used by litigants.\textsuperscript{763}

With regard to the composition of lawsuits in our dataset,\textsuperscript{764} only direct actions of unconstitutionality (Adins) are included because annexation is a matter of state law, and it is only litigated in the STF if the claim arises out of arguable offenses to the federal Constitution. The STF, in Adins, has to pronounce the unconstitutionality of the norm in abstract as opposed to the concrete cases of U.S. review\textsuperscript{765} – and their related requirement cautionary design, because annexation appears coupled with incorporation in the search tools of the website of the STF. We solely researched the decisions of the plenary, namely, the Court \textit{en banc}. No singular or panel decisions were considered, because only the Court \textit{en banc} has jurisdiction to decide a unique and novel constitutional question or to departure from previous orientation.

\textsuperscript{761} Zachary Elkins, Tom Ginsburg and James Melton, \textit{The Endurance of National Constitutions} (Cambridge: Cambridge University Press, 2009), at 129–130, noting that even after the first nineteen years, constitutions remain threaten, albeit in a reduced rate.

\textsuperscript{762} For a detailed analysis of the definitions of fusions and dismemberment in the context of state law: Moraes, \textit{Direito Constitucional}, at 308–310.

\textsuperscript{763} Annexation (“anexação”, in Portuguese) exists in the Constitution, among the hypothesis of dismemberment. The cases of our search cites all the terms referring to boundary changes, i.e., establishment, merger, fusion, and dismemberment of municipalities because the STF uses the constitutional provision of article 18, paragraph four, for purposes of indexation of search tools in its website. As emphasized earlier, we also researched for the word annexation (“anexação”) itself. After the appropriate exclusions (mainly referring to annexation and incorporation in the context of commercial law), this research analyzed sixteen decisions, which are detailed in Table 5.2.

\textsuperscript{764} See Chart 5.2, which illustrates the lawsuits over time.

\textsuperscript{765} For the precise discussion about the concept of abstract review and concrete review in Brazil: see chapter three of this thesis.
of existing case or controversy for standing. The fact that the STF decided the cases in Adin does not impact the jurisdiction of the Court, which is similar to the USSC in matters of annexation. Our dataset shows that the STF was not called to decide cases involving fundamental rights. The issues at bar relate to the application (including clarification) about the objective constitutional requirements to the Brazilian annexation. The regions that presented the highest number of lawsuits were the Northeast (mainly because of Bahía) and the Center West (Mato Grosso).766

Concerning the dynamics of the federative pact, we note that the vast majority of the Adins were started either by the Attorney General of the Republic767 or by national parties.768 Only one Adin was filed by direct board of a legislative assembly of a state.769 Hence, the litigation became a national one, no longer being possible to remain restricted to the local level.

At this point, our focus is the discussion of the STF decisions. The Court has denied to rule on the constitutionality of a resolution of state assembly of the state of Rio de Janeiro770 specifying that for the annexation of municipality the previous plebiscite must occur in accordance with the federal Constitution, while declaring that the municipality was also a creature of the member state.

After the Constitutional Amendment 15, of 1996, the STF determined, in an action of abstract control started against the state Assembly of Rio Grande do Sul,771 that

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766 Bahía is the third state in number of municipalities. Mato Grosso is within the national average. For data about each state, and the federal district: http://www12.senado.gov.br/noticias/entenda-o-assunto/municipios-brasileiros

767 The Attorney General of the Republic filed the following ten Adins: ADI 1372 MC/RJ; ADI 1373 MC/PR; ADI 2702/PA; ADI 2632/BA; ADI 2994/BA; ADI 3149/SC; ADI 3489/SC; ADI 3316/MT; ADI 3682/MT; and ADI 4992 MC/RO.

768 Political parties started five Adins: ADI 2381MC/RS; ADI 2632MC/BA; ADI 3615/PB; ADI 2240/BA; ADI 3689/PA.

769 ADI 2395 /DF.

770 ADI 1372 MC/RJ, of 1995. Also determining that the plebiscite must occur before the changes in the municipal boundaries: ADI 1373 MC/PR, of 1995. Attention should be paid to the fact that those decisions have occurred before the Constitutional Amendment 15, of 1996, although the necessity of previous plebiscite has been maintained by the amended text.

all the procedures referring to the establishment, merger, fusion, and dismemberment (thus, annexation) must be suspended until the federal complementary law was approved.

The Court also distinguished the role of municipality as autonomous under article 18 of the Constitution of 1988. In this decision, the STF stressed that municipalities could no longer be matters of the private interest of the state, as in previous constitutions of the first Republic. The STF also dismissed allegations attacking the constitutionality of the Constitutional Amendment 15. Those allegations were based in an arguable violation of the federative pact – in which protection is granted among the immutable clauses of the Constitution (article 60, paragraph 4, I). The STF decided that the amendment 15/96 did not violate the essential nucleus of the autonomy of the member states when the amendment modified from state complementary law to federal law.

Several later decisions conditioned the modifications of municipal boundaries to the promulgation of the federal complementary law and the previous approval by plebiscite of the involved population. There have been decisions explicitly mentioning that the popular vote without the occurrence of plebiscite was a direct violation of the constitutional text.

The change of paradigm in the understanding by the STF occurred in 2007, when the Court judged several direct actions of unconstitutionality on the same date, despite

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772 In this direction: ADI 2381 MC/RS, of 2001; ADI 2395/DF, of 2007.

773 In this sense: ADI 2632 MC/BA, of 2002 (in limine, i.e., by preliminary injunction); ADI 2702/PR, of 2003; ADI 2632/BA, of 2004 (final decision); ADI 2994/BA, of 2004. Along those lines, but in the specific context of annexation of small municipalities: ADI 3149/SC, of 2004.

774 ADI 3615/PB, of 2006.
those actions presented different justices as rapporteurs (reporters). Importantly, further decisions reiterated the new position of the Court.

The most recent decisions of the STF still deny annexation of municipalities when based on state laws, if those boundary changes were enacted after the Constitutional Amendment 57, of 2008. The Court stressed that the Constitutional Amendment 57, which modified the Act of Transitory Dispositions of the Constitution, validated solely the boundary changes enacted by municipalities between the Constitutional Amendment 15, of 1996, and December of 2006. Accordingly, the Court has interpreted the modification of the Transitory Acts quite literally, and as restrictively as possible in order to protect the constitutional order as a whole.

III. LIMITING THE DEFINITION OF LOCAL GOVERNMENTS IN THE U.S. EXPERIENCE IN ORDER TO ENABLE OUR COMPARISON

The U.S. federalism has two actors: states and the federal Union, with the U.S. Constitution being silent about local governments. Local government entities – regardless of their denomination, which varies across the country from boroughs, counties, townships, and municipalities – are created by their states. Those entities

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775 ADI 2240/BA, of May 5th, 2007, whose rapporteur was Justice Eros Grau, granted twenty-four months for the Congress to legislate. ADI 3489/SC was also judged on the same day and with the same rapporteur, but determined eighteen months for Congress to act. All the decisions were unanimous as far as the unconstitutionality goes, although decided by majority as to the unconstitutionality of the boundaries change. This was so, because there was no federal complementary law due to the unconstitutional inaction of the legislative. Another case decided in the same date and with Justice Eros Grau as rapporteur, but establishing eighteen months: ADI 3316/MT. In the direct action of unconstitutionality by omission, ADI 3682/MT, from the same date, but having as rapporteur Justice Gilmar Mendes, it was emphasized that the inaction of Congress was unconstitutional and that the twenty four months deadline did not refer to Congress to act, but solely to the state laws altering the boundaries of the municipalities to remain valid.

776 ADI 3689/PA, of 2007.

777 ADI 4992 MC/RO, of 2013.

778 In this sense: Briffault and Reynolds, Cases and Materials on State and Local Government Law, at 8.

779 Tocqueville noted, in 1835, the distinguished denominations of local governments, although he emphasized the following: “(…) the organization of towns and counties in the United States is everywhere based on the same idea, namely, that each is the best judge of what pertains only to itself and best equipped to provide for its own particular needs. Town and counties are therefore responsible for looking after their own special interests.” in Alexis de Tocqueville, Democracy in America, translated by Arthur Goldhammer (New York: The Library of America, 2004), at 91–92.
exist to execute state functions on the local level, being subject to control from the local population as well as to the state control – hence the so-called top-down and bottom-up aspects. Nevertheless, U.S. local governments engage in public services that in Brazil would be exclusive of a member of the federation – as judicial functions exercised by county courts, for instance. There is no municipal county or local judiciary in Brazil. It is worth reiterating that in Brazil local governments only have one form: municipalities.

Another relevant distinction between the two countries is the existence of special purpose local governments in the United States. Counties, municipalities, and towns are considered to be of general purpose because those local government unities provide services and regulations in a broad scope, including: safety, health, land use, transit and transportation, among others. Special purpose local governments, by contrast, are responsible for one or a few very limited functions – the most current example of special purpose being the school district. Special districts may be of multiple functions, as it is the case with special districts involved in sewerage, water supply, and natural resources. It has been argued that special districts lack accountability, if general-purpose entities, such as counties and municipalities, are used as a parameter, because special districts are often governed by boards that may not be completely impartial.

Notwithstanding the criticisms, special districts remain public in their nature, as opposed to homeowners’ associations in gated communities that deliver services from a private perspective. Due to the increasing number of residents opting for subdivisions

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781 *Idem*, at 11.

782 This study shall not discuss decisions arising out of litigation concerning special districts, since they do not exist in similar fashion in Brazil.

783 Briffault and Reynolds, *Cases and Materials on State and Local Government Law*, at 13, where the Professors stated that special districts became the most common species of local government currently in the United States.

784 *Idem*.

785 Wegner, *North Carolina Annexation Wars: Whys, Wherefores, and What Next*, at 186. The Professor states that special district board members are either appointed by governmental or other constituent entities, or elected from stakeholders with associated interests – as, for example, property owners or benefited parties.

786 *Idem*, at 187.
located outside the boundaries of municipalities, those communities have to rely on contracts with private providers for essential services, such as water, sewer, solid waste removal, and security – but the nature of those contracts remains private.\textsuperscript{787} Along the exclusions of special districts and homeowners’ associations, this research also disregards agreements between municipalities and private parties in the context of the annexation agreements because they are not present in all the states in the United States.\textsuperscript{788} A related reason for this exclusion is the fact that such annexation agreements are not authorized in Brazil.\textsuperscript{789}

Every land in the United States belongs to some multipurpose local government, which usually is the county,\textsuperscript{790} although some states use boroughs or townships.\textsuperscript{791} County governments include incorporated and unincorporated lands.\textsuperscript{792} Counties commonly have two main functions: running of countywide services to all residents (e.g., judicial and penal systems) and delivery of general services related to government

\textsuperscript{787} Idem, at 188.

\textsuperscript{788} For a review of annexation agreements – including states where they are treated as development agreements, allowing zoning – see, e.g.: Wegner, \textit{North Carolina Annexation Wars: Whys, Wherefores, and What Next}, at 245–247.

\textsuperscript{789} It is noteworthy that the Brazilian Constitution of 1988 admits agreements between municipalities, provided they have common public functions, as stated in article 25, paragraph third, \textit{supra}. For reference about North Carolina’s municipalities agreements: Wegner, \textit{North Carolina Annexation Wars: Whys, Wherefores, and What Next}, at 245.

\textsuperscript{790} Anderson, \textit{Cities Inside Out: Race, Poverty, and Exclusion at the Urban Fringe}, at 1103–1104. In addition, the Professor distinguishes the existence of the following: consolidated city county governments (as, for instance, San Francisco, Denver, and Honolulu); “independent” cities, which are the exception, i.e., cities which are not included within a county’s territory (as occur, for example, in Baltimore City, St. Louis City, and thirty-nine cities in Virginia); areas where one or more county government has been subsumed within a city government and all land is incorporated in that city (as it is the case in New York City, Jacksonville, and Indianapolis); and states with county nomenclature, although all territory lies within a municipality, without actual unit of county government (Rhode Island, Connecticut, and the majority of Massachusetts).

\textsuperscript{791} For the concepts of county, townships and boroughs, reference is made to: Briffault and Reynolds, \textit{Cases and Materials on State and Local Government Law}, at 9–12.

\textsuperscript{792} Tyson, \textit{Annexation and the Mid-Size Metropolis: New Insights in the Age of Mobile Capital}, at 513, where the Professor notes that: “… Throughout New England, New York, New Jersey and Pennsylvania, all territory is divided among a myriad of cities, villages, boroughs, towns or townships, and there is no unincorporated land.”
function (e.g., police, road maintenance). Hence, counties exist as creatures of the state, to serve state administrative purposes and are not the result of local decisions, as it is the case with decisions concerning the creation of a new municipality. Counties are legally responsible for the initial land-use approvals as well as for services of unincorporated areas. In this sense, municipal underbounding – annexation policies and practices designed by growing municipalities aiming to exclude low-income minority communities of city voting rights and municipal services – and general formulations of municipal exclusion are explanations that disregard the role played by counties in contributing to such exclusions.

Attention should be paid to the fact that the United States has unincorporated land, i.e., land that is not located within the boundaries of a municipality. Brazil, on the contrary, does not feature similar distinction between the levels of autonomy and range of powers as the one that exists in the United States among counties, boroughs, or townships. Remarkably, in Brazil, every parcel of land must be located in a municipality.

Another pertinent distinction refers to the creation of municipalities. The question of necessity in creating a municipality is distinguished from the requirements of Brazilian Constitution because, in Brazil, all municipalities have to be created in accordance with the general requisites stated in the Constitution. In the United States, however, thirty-

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793 Reynolds, *Rethinking Municipal Annexation Powers*, at 255. The Professor notices, at 258, the tendency of counties across the nation to provide general municipal services to unincorporated despite urbanized area, and, as a consequence, county governments became engaged in activities that traditionally belonged to the cities.


795 Anderson, *Cities Inside Out: Race, Poverty, and Exclusion at the Urban Fringe*, at 1114, where the author stresses that the legal responsibility involved – including but not limited to the eligibility and desirability for annexation – belongs to counties not to municipalities.


797 For criticisms about the unincorporated areas and how historically the federal and state governments legitimized racially, national origin, and class related discrimination: Anderson, *Cities Inside Out: Race, Poverty, and Exclusion at the Urban Fringe*, at 1125–1133, in particular.

798 Article 18 of the Brazilian Constitution, cited *supra*, regulates those matters.
six state statutes required a minimum population threshold in order to justify a new local government.\textsuperscript{799} Importantly, the creation of a local government in the United States occurs where none existed before, and thus usually implicates the increase in taxation and regulation – both of which are far reduced in comparison with counties.\textsuperscript{800} Frequently, governments of unincorporated areas do not provide public services of the same level of quality as those available in a municipality.\textsuperscript{801} In addition, it is not evident whether the existence of a second tier of local government in the United States – namely, the existence of municipalities – is an actual advantage in upper-class areas.\textsuperscript{802} On the other hand, in low-income communities, potential advantages of nonincorporation would not attach.\textsuperscript{803}

In the United States, annexation varies across the states,\textsuperscript{804} with these changes of boundaries being rare in some, while very common in others.\textsuperscript{805} It has also been argued that race and class biases are present in annexation, reflecting seminal conflicts relating to property rights and redistribution.\textsuperscript{806} In this sense, the boundaries of a municipality have a remarkable exclusionary function, which determines who is entitled to participate in the redistribution of the resources of a given community and, by doing so, political discourse

\textsuperscript{799} According to the data measured until 1990 and published on pages 22–23 of the report of the Advisory Commission on Intergovernmental Relations: \textit{State laws governing local government structure and administration}, supra.

\textsuperscript{800} Briffault and Reynolds, \textit{Cases and Materials on State and Local Government Law}, at 197, where the Professors note that decisions about taxes and regulations tend to be made by majority rule, and that those decisions may ultimately burden minorities.

\textsuperscript{801} Reynolds, \textit{Rethinking Municipal Annexation Powers}, at 251.

\textsuperscript{802} Anderson, \textit{Cities Inside Out: Race, Poverty, and Exclusion at the Urban Fringe}, at 1143–1144. According to this line of reasoning: municipalities would charge higher property taxes and impose less regulations – both being among the advantages for affluent citizens to prefer unincorporated areas, where they can purchase the services they prefer and not pay for services that they will not use.

\textsuperscript{803} \textit{Idem}, at 1145, arguing that this would be the case in unincorporated areas that are not assisted by basic public services as well as in those areas suffering because of damaged land or non-authorized land used.

\textsuperscript{804} As stated by Zeinemann, \textit{Overlooked Linkages Between Municipal Incorporation and Annexation Laws}, at 311, where the author emphasizes that annexation has been used strategically: “… as tools to strive for or protect territory and tax base.”

\textsuperscript{805} \textit{Idem}, at 258–259.

\textsuperscript{806} Tyson, \textit{Annexation and the Mid-Size Metropolis: New Insights in the Age of Mobile Capital}, at 519.
mistakenly starts to address notions of private property rights through modifications of city boundaries.\textsuperscript{807} The core of the USSC decisions referring to annexation address questions related to such exclusion.

In Brazil, the main topics litigated in the STF are of a formalistic and procedural nature. Brazil has experienced fierce litigation regarding annexation, due to lack of the federal complementary law that was supposed to regulate such matters (annexation and creation of municipalities).

Finally, we clarify some relevant features concerning the jurisdiction of both courts. The mechanism of appointments for the STF was transplanted from the U.S. Constitution in 1891. While the STF has eleven justices who are subject to mandatory retirement at the age of seventy years old, the remaining provisions are similar to the U.S. Constitution. In particular, justices are nominated by the President and subject to confirmation by the Senate.\textsuperscript{808} Both Courts are independent and have the same jurisdiction with regard to annexation because in Brazil\textsuperscript{809} and in the United States such subject matter is generally dealt with at the state level, and the Courts have jurisdiction only if specific violations to the federal Constitution occur.\textsuperscript{810}

IV. DISCUSSION ABOUT OUR RESEARCH FINDINGS

This Part is divided in two sections. Section A addresses the comparison of the decisions of both supreme courts based on constitutional design. Section B focuses on the general analysis of the comparison, including fundamental rights, and related consequences.

\textsuperscript{807} Idem.

\textsuperscript{808} For a comparison about the mechanisms of access to both Courts: Maria Angela Jardim de Santa Cruz Oliveira and Nuno Garoupa, “Choosing Judges in Brazil: Reassessing Legal Transplants from the United States,” \textit{American Journal of Comparative Law} 59 (2011): 529–561.

\textsuperscript{809} Even in light of the constitutional amendments that occurred in Brazil in 1996 and 2008 (see supra, Part II, A), the annexation of municipality occurs in the field of state law – albeit obedient to general guidance that will be determined in a federal complementary law, one which does not exist yet.

\textsuperscript{810} We refer to independence in the sense that there is no external and direct interference with each Supreme Court’s final decision in a given case, generally.
A. Insights Based on Constitutional Design

Since its inception in the U.S. constitutional scheme, federalism has been a complex concept. Federalism and judicial review are often named along the structural provisions of the U.S. Constitution that have been very influential abroad. This research considers the different federal experiences of the United States and Brazil, being mindful of the traditional resistance of the USSC to comparative law insights. Federalism itself has been associated to the success of the U.S. Constitutionalism.

Federalism is traditionally defined as an arrangement in which a written constitution expressly determines powers of the central as well as regional spheres of

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811 The following has been remarked about the U.S. federalism: “Law and legal institutions, as conceived by the Revolutionary generation, were aids in the process of balancing the virtues and excesses of the sovereign people against the virtues and excesses of their government. A first premise of the Founding Fathers, including Marshall, was that the sovereign people were not above the laws, although they have the power to change them. Marshall and his contemporaries to operationalizing this principle in the form of a national government devoted considerable time and thought. Their solution was the creation of a series of balanced but often ambiguous power relations between the branches of the government and between those branches and their sovereign constituency. The term federalism has been characteristically used to describe this solution, but the term has difficulties.” Reference is made to: G. Edward White, The American Judicial Tradition (New York: Oxford University Press, 2006), at 19. Accordingly, federalism itself is not separated from the system of checks and balances among coordinate branches and the dual spheres of power, with judicial review being inherent to the constitutional system.


813 For an overview of the different instances when the USSC has considered Comparative Constitutional Law: Mark Tushnet, “The Possibilities of Comparative Constitutional Law,” Yale Law Journal 108 (1999): 1225–1309, at 1230–1238, specifically. At 1231, the Professor notes how comparative law arguments grounded on the denial of the capital punishment in the developed world have been dismissed by the Court, based on the understanding that the U.S. conceptions shall be dispositive when judging a case. Emphasizing this interpretation as among the factors that have been reducing the influence of the U.S. Constitutionalism internationally: Law and Versteeg, The Declining Influence of the United States Constitution, at 852.

814 Keith S. Rosenn, “The Success of Constitutionalism in the United States and its failure in Latin America: An explanation,” University of Miami Inter-American Law Review 22, N.1 (1990): 1–50, at 9–20. The author stresses that federalism, among other constitutional features (such as separation of powers and a system of check and balances that does not allow the preponderance of any branch), was key to the success of the American experience. He contends that one of the failures of Latin America Constitutionalism is the transplant of constitutional provisions without considering the particular realities of the country that is importing them.
governments, with direct elections for national and regional governments, with the
distinguished spheres of government being able to act independently from each other, and
a high court being independent to decide conflicts among them.\textsuperscript{815}

Federalism is, therefore, a response to concrete political tensions. It is often
addressed among the constitutional design choices that impact power sharing – namely,
the participation of representatives of the totality of the relevant groups of society in
political decision making.\textsuperscript{816} With regard to the choice of a federal constitutional scheme,
it has been remarked that:

Generally, it is advisable that the federation be relatively
decentralized and that its component units (states or provinces) be
relatively small – both to increase the prospects that each unit will
be relatively homogenous and to avoid dominance by large states
on the federal level. Beyond this, a great many decisions need to be
made regarding details that will vary from country to country (such
as exactly where the state boundaries should be drawn). Experts
have no clear advice to offer on how much decentralization is
desirable within the federation and there is no consensus among
them as to whether the American, Canadian, Indian, Australian,
German, Swiss, or Austrian model is most worthy of being
emulated.\textsuperscript{817}

Part of the literature on constitutional design targets divided societies. Despite the
political tensions that exist in Brazil and the United States, both countries are not
considered divided societies.\textsuperscript{818} The precise concept of divided societies itself is disputed.
Based on political and constitutional analysis, a divided society is one where ethnic,
religious, or cultural cleavages have political impact. Because political conflicts in Brazil (nor in the United States) are not generally coincident with ethnocultural conflicts, this research does not consider those countries as divided societies.

There have been limited attempts in the literature to “evaluate the success of the design choices made by different federations.” This study aims to mitigate the parochialism in the current U.S. scholarship. Classical studies of federalism draw comparisons between countries of the developed world, such as Australia, Canada, Switzerland, and the United States. In this context, the comparison with Brazil brings a new perspective, because the Brazilian federalism has been classified as extreme, due to the many differences across the different states.

The role of the U.S Supreme Court being a safeguard of federalism has been recently questioned. Our research provides evidence of the U.S. Supreme Court

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819 Choudhry, Bridging Comparative Politics and Comparative Constitutional Law, at 4. The Professor states, at 4–5: “As a category of political and constitutional analysis, a divided society is not merely a society which is ethnically, linguistically, religiously, or culturally diverse. Indeed, whether through conquest, colonization, slavery or immigration, it is hard to imagine a state today that is not diverse in one or more of these dimensions. The age of ethnoculturally homogenous state, if there ever was one, is long over. Rather, what marks a divided society is that these differences are politically salient – that is, they are persistent markers of political identity and bases for political mobilization. Ethnocultural diversity translates into political fragmentation. In a divided society, political claims are refracted through the lens of ethnic identity, and political conflict is synonymous with conflict among ethnocultural groups.”

820 Choudhry and Hume, Federalism, Devolution and Secession: from classical to post-conflict federalism, at 359.


822 Choudhry and Hume, Federalism, Devolution and Secession: from classical to post-conflict federalism, at 356.


824 Acknowledging the existence of the debate in the U.S. constitutional scheme, see, for instance: Weissert, Beyond Marble Cakes and Picket Fences: What U.S. Federalism Scholars can Learn from Comparative Work, at 968.
playing the safeguard role in the context of annexation. The Brazilian Constitution explicitly determines that the STF has the duty to safeguard the Constitution, with federalism being listed among the constitutional immutable clauses. It is worth noting that the jurisdiction of the STF encompasses conflicts among the states and/or among states and the union, but not among municipalities. As addressed earlier, the USSC controls its own dockets, i.e., it chooses what it hears and when. The STF, by contrast, has to judge all the cases that reach the Court. Nevertheless, because only the STF sitting as a Court en banc (not in panels and not in chambers of single justices) can change the case law or decide a new constitutional issue in a given claim, the lack of certiorari does not impact the STF’s jurisdiction in order to make it significantly different from the USSC with regard to the constitutionality of annexation cases.

The U.S. Constitution does not mention local governments, but they are perceived as the core of the U.S. citizenship. Such understanding has not been immune from controversy. The absence of constitutional provisions pertaining to local governments

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825 It is noteworthy that the United States and Brazil are secular countries, so federalism is not expected to be used to override local religious manifestations, as it has happened in Malaysia and Nigeria, as mentioned by: Hirschl, The Theocratic Challenge to Constitution Drafting in Post-Conflict States, at 1209.

826 Article 102 of the Brazilian Constitution of 1988 states that: The Supremo Tribunal Federal is responsible, essentially, for safeguarding the Constitution.

827 Article 60, paragraph four of the Brazilian Constitution of 1988 declares that: no proposal of amendment shall be considered which is aimed at abolishing: I – the federative form of State.

828 Article 102, f, of the Brazilian Constitution of 1988 determines that: f) disputes and conflicts between the Union and the states, the Union and the federal district, or between one another, including the respective indirect administration bodies.

829 Reference here is made to Part III of this chapter, where we addressed the similar jurisdiction of both supreme courts in annexation matters.

830 Tocqueville remarked, in 1835, how local government was key for the principle of popular sovereignty in America: Alexis de Tocqueville, Democracy in America, at 62–63, where the author notes: “(…) From the beginning, the principle of sovereignty of the people was the fundamental principle of most of the English colonies in America. It was nevertheless far from dominating the government of society then as it does now. (…) It could not manifest itself openly in law, because the colonies were still constrained to obey the metropolis. It was therefore reduced to taking refuge in provincial assemblies and above all in town governments. There it spread in secret.” Further, at 69, Tocqueville contends: “In the town as elsewhere the people are the source of all social power, but nowhere do they exercise their power more directly.”

831 Although this vision is far from being unanimous, as, for instance, argued by: Frug, The City as a Legal Concept, at 1067, where he states: “… There is a widespread belief that although cities are supposed to
has been pointed out as a failure of constitutional design relating to future matters.\footnote{832} It is relevant that in the U.S. experience, cities only have the powers that were delegated to them by states and that were not limited by judicial interpretation.\footnote{833} The power to tax granted to municipalities is significantly constrained\footnote{834} by state rules as well as by the Commerce Clause.\footnote{835} In this sense, the choice of locating cities as subordinated to states was adopted in light of the federal system,\footnote{836} based on an assumption that had it been different, the unified political system under the Constitution would have been jeopardized.\footnote{837}

In Brazil, by contrast, municipalities have vast powers because they were conceived as federal actors. Consequently, much autonomy was granted to them. Taxing protect the public interest, they cannot be trusted to do so. This distrust engenders support for state and federal control of cities to prevent local abuse of power, curb local selfishness, or correct the inefficiencies resulting from ‘balkanized’ local decision making. City discretion of any kind evokes images of corruption, patronage, and even foolishness. This sense of necessity and desirability has made local powerlessness part of our definition of modern society, so that decentralization of power appears to be a nostalgic memory of an era gone forever or a dream of romantics who fail to understand the world as it really is.” Based on Professor Frug’s claim, we could understand involuntary annexation as a mechanism to turn cities less powerless, offering a potential counter-balance to this biased conception of local government as inherently poisoned by local forces.

\footnote{832} Hirschl, The “Design Sciences” and Constitutional “Success,” at 1348, and as mentioned in our introduction to this chapter. In addition, article V of the U.S. Constitution, with its rigidity towards amendments, has been perceived as much condescending to state powers while being too hostile to local interests: Azia Z. Huq, “The Function of Article V,” University of Pennsylvania Law Review 162 (2014): 1165–1236, at 1187–1188.

\footnote{833} Frug, The City as a Legal Concept, at 1062.

\footnote{834} For general constraints imposed by state powers and by the Commerce Clause, see, generally: Frug, The City as a Legal Concept, at 1064, where the author emphasizes that the abilities of cities to borrow money suffered even stronger limitations. The Professor remarks, at 1063, that even in “home rule” states (i.e., where powers of purely local matter would be granted to cities), state law considers cities as “creatures of the state,” as quoted in Hunter.

\footnote{835} Definitions regarding the application of the Commerce Clause have varied throughout the history of the United States: Chemerinsky, Constitutional Law: Principles and Policies, at 242–243.

\footnote{836} For criticisms about the consequences of locating municipalities as forbidden of exercising general governmental power, while not being capable of the freedom granted to private corporations: Frug, The City as a Legal Concept, at 1065–1067.

\footnote{837} Idem, at 1106. Noting that the states would encompass the federation (and that the unitary government was out of the picture, due to historical experiences present at the time of the Framers), and contending that the only question at the Convention with that regard was how much autonomy to confer to the central government: Robert A. Dahl, How Democratic is the American Constitution? (New Haven: Yale University Press, 2001), at 12.
powers are guaranteed in several provisions of the constitutional text, along with direct transfers of revenues from the union and the state where the municipality is located. Therefore, there is an interest in creating and annexing municipalities in order to receive such revenues – but not necessarily in excluding particular citizens, as it has occurred in annexations in the U.S.

Annexation in the United States is defined in state laws. According to principles of constitutional law, Congress may act when (implied or express) authorization exists in the Constitution. In light of such constitutional principles, powers not granted to the national government are reserved for the states. The states did not grant the federal government authority to modify municipal boundaries, and state legislatures may directly alter municipal boundaries or establish procedures that local governments have to obey when altering them. Therefore, there is no uniform national law regulating annexation.

The Brazilian Constitution of 1988 is the only one to expressly locate municipalities accompanying the federal union and states as members of the federation. Hence, the residual powers of the Brazilian states are defined not only considering the powers not granted to the federal union, but also the powers that were not conferred to municipalities. Modifications of municipal boundaries are determined in

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838 For the detailed scope of local governments powers and revenues: see footnote 725, supra.

839 Chemerinsky, Constitutional Law: Principles and Policies, at 234. Article I of the U.S. Constitution states: “All legislative powers herein granted shall be vested in a Congress of the United States which shall consist of a Senate and a House of Representatives.” The Tenth Amendment determines that: “The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.”


841 See footnote 567, supra. Noting, specifically, that Brazilian municipalities are among the most empowered in the world: Moraes, Direito Constitucional, at 296.

842 The Brazilian Constitution and its modern allocation of powers to local governments have already been observed by Hirschl, The “Design Sciences” and Constitutional “Success,” at 1348, where the Professor also cites Germany and India as countries where local governments have extended powers.

843 Article 25 of the Brazilian Constitution of 1988 determines that: “The states are organized and governed by the Constitutions and laws they may adopt, in accordance with the principles of this Constitution. Paragraph 1. All powers that this Constitution does not prohibit the states from exercising shall be conferred upon them.”
the Constitution and have been subject to recent constitutional amendments and ongoing controversies. The first controversy concerned lack of action by the legislative branch that failed to promulgate federal complementary law determined in the Constitution. Another controversy referred to whether the alteration from state complementary law, as it was the original constitutional text, to federal complementary law was unconstitutional. The STF dismissed such allegation, stating the necessity of uniformity across the union and the admissible power to amend the Constitution when exercised in accordance with the due legislative process established in the constitutional text.

As presented in Part II, Section A, the design choice in 1988 was to delegate to state complementary law the general requirements for annexation (and for any boundary change). After the Constitutional Amendment 15, of 1996, the modified constitutional requirement became one of federal complementary law. States benefitted from such deferral in the time of the writing of the original text. At the time of the convention, such requirements were not viewed as crucial. However, with local governments being entitled to the new federal status and revenue transfers from state and the federal union, it became clear that the “state complementary law” mandate could not endure. In this sense, the deferral was conditioned upon the general efficiency of the federal scheme.

Once the original scheme has been proved inadequate, it led to centralization of the general rules in the federal sphere, through a national complementary law – albeit creation and annexation shall occur through state laws in accordance with the general provisions to be determined by such federal complementary law. Nevertheless, considering the textual analysis of the Constitution after the Constitutional Amendment 15, of 1996, states lost power to the union. It is noteworthy that annexation and boundary

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844 The previous Part II, B, located and quoted all the constitutional provisions and decisions mentioned in this paragraph.

845 For specific decisions of the STF exposing this rationale: ADI 2381 MC/RS, of 2001; ADI 2395/DF, of 2007. See discussion supra, in Part II, B, of this chapter.

846 Rosalind Dixon and Tom Ginsburg, “Deciding not to Decide: Deferral in Constitutional Design,” International Journal of Constitutional Law 9 (2011): 636–672. The dataset developed by the Professors shows, at 660, that systems for local elections are among the most common provisions of deferrals to legislative law. Municipal boundaries did not appear in the list. It is worth noting that, in Brazil, issues delegated to national complementary law are quite common. This delegation occurs when the Constitution does not detail what has been perceived, at the time of the convention, as minutia.
changes are still addressed in state law, but those laws must be subordinated to a general federal complementary law that does not exist – even after more than eighteen years of the edition of the Constitutional Amendment 15.

The deferral to a “by law” clause in the Brazilian experience has been marked by political disputes involving different actors. Validating our understanding are the necessity of further constitutional amendments and the current uncertain situation concerning annexation procedures, due to the nonexistence of the national (federal) complementary law. Along those lines, despite STF’s decisions demanding the approval of such law by Congress, nothing has happened. So, the lacuna still exists. The political pressure arising out of the new constitutional text and the decisions of the STF were not sufficient to overcome the legislative inertia.847

With regard to inter-branch relations, the USSC and the STF have declared that U.S. and Brazilian congresses, respectively, have to update or enact a particular legislative act.848 The STF was considerably patient and deferent to Congress, waiting more than eleven years to declare the inertia deliberandi of Congress.849 This fact also proves how strong are local politicians who benefitted personally from the absence of a national scheme in Brazil. As previously stated, the current President of Brazil vetoed a law that her own cabinet has drafted.850 Hence, local political forces are powerful in Brazil. Local governments are not that powerful, because hostages of an uncertain legal situation that denies the minimum standards for their own existence. In Brazil, local spheres are not embedded in the democratic experience traditionally associated with the American localism experience.

847 Discussing the problems of legislative inertia in what the authors designated “by law” constitutional deferral clauses, and specifically pointing out the Brazilian legislative inertia: Dixon and Ginsburg, Deciding not to Decide: Deferral in Constitutional Design, at 665–666.

848 For the discussion about the USSC: see Part I, B, supra, footnotes 717 and 718, when the Shelby Court emphasized that the USSC has determined that Congress did not act – or did not consider so – despite previous warnings by the USSC in a decision dating back to 2009. Such decision stated the necessity of an updated formula of section two. It took forty years for the USSC to require an update formula and four years to judge Congress in mora.

849 See discussion supra, Part II, A, specifically.

850 See footnote 755, supra.
Notwithstanding specific distinctions of jurisdiction, the decisions of the STF are not necessarily lower numbered, but they present limited subject matters in comparison with the decisions of the USSC. The first explanation refers to the period of time, since the analyzed U.S. decisions date back to the inception of the Constitution. Hence, having thirty-one annexation cases in our dataset (and considering the US Constitution was signed in 1787 and ratified in 1789) does not corroborate the understating that the absence of local governments in such founding document is necessarily negative. There is no evidence that such absence nowadays contributes to the increase of litigation, according to our annexation cases. Remarkably, the bulk of litigation analyzed in the context of annexation has been after the Voting Rights Act of 1965. If we disregard such cases, the number of litigation in both courts is almost the same (twenty in the United States versus sixteen cases in Brazil). This occurs, despite the U.S. Constitution being largely the same document since 1787.

Accordingly, we argue, based on annexation cases, that the absence of provisions about local governments in the U.S Constitution van generally be considered as a successful experience. Our findings corroborate the idea that constitutional silence about issues that might be controversial at the time of the writing has a positive impact in the future. The proper relationship between state and cities was, in fact, a disputed political

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851 As claimed, for instance by Hirschl, *The “Design Sciences” and Constitutional “Success,”* at 1348, and the quote in our Introduction to this chapter, at footnote 583, *supra.*

852 For a complete list of the cases, year and main issues discussed by the USSC and the STF, see Tables 5.1 and 5.2, respectively.

853 Chart 5.1 illustrates the comparison between the decisions of the United States Supreme Court (from 1870 until 2013) and the Brazilian Supremo Tribunal Federal (from 1988, when the Constitution inaugurated the inclusion of municipalities in the federal pact, until 2013). Chart 5.2 details the Brazilian constitutional actions across time.

854 For arguments claiming that the interpretation of the USSC amounted to a complete new Constitution despite the text remaining the same during the New Deal: Bruce Ackerman, *We the People: Foundations,* at 58–80. For the opposite view: Elkins, Ginsburg and Melton, *The Endurance of National Constitutions,* at 165, considering that the amendments did not amount to a complete new Constitution.

855 Discussing incomplete theorization: Sunstein, *Designing Democracy: What Constitutions Do,* at 58, affirms: “Most of their virtues involve the constructive uses of silence (…) Especially in a diverse society, silence – on something that may prove false, obtuse, or excessively contentious – can help minimize conflict, allow the present to learn from the future and save a great deal of time and expense. What is said and resolved is no more important than what is left out.”
issue. In this sense, the lack of provisions with regard to local matters was the preferred solution, to the extent that it would increase the chances of success in the future. It would be naïve to argue that local governments should have been in the Constitution since its inception, because it would jeopardize the strength of federal union vis-à-vis the state and local forces.

Another explanation supporting the absence of local governments and municipal powers in the U.S. constitutional text – including their boundaries – arises of the relatively small number of cases heard by the USSC. One would expect the litigation to be much higher, considering the extended time period and the absence of constitutional provisions regulating local governments. This would be the case, because parties would be tempted to litigate potential changes in the traditional view of local powers.

Meanwhile, the decisions of the STF show the dynamics of detailed and flexible requisites for endurance of constitutions. Our findings support the understanding that

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856 Frug, *The City as a Legal Concept*, at 1105–1107, where the author points out the different conceptions of local government, namely the Jeffersonian view of local government as “elementary republic,” as opposed to the skeptic Madisonian view. For the latter, see the discussions by Madison on Federalists 10 and 51 regarding the advantages of the union over states to control factions, and how the federal system encapsulates a dual protection for the people: Alexander Hamilton, James Madison and John Jay, *The Federalist Papers*, ed. Clinton Rossiter (New York: Penguin Books, 1999), at 78 and at 320–322, respectively.

857 In this sense: Walter F. Murphy, “Theories of Constitutional Design: Designing a Constitution: of Architects and Builders,” *Texas Law Review* 87 (2009): 1303–1337, at 1334, where the author affirms: “Writing, if strong disagreements exist, will have a better chance of success if avoiding the contentious topic for the future.”


859 Which is not to say that there have been no cases in such direction. See footnotes 640–644, *supra*, for our discussion about the Slaughter-House Cases, and the attempt to push the Court towards a new interpretation of federalism after the Reconstruction Amendments.

860 Elkins, Ginsburg and Melton, *The Endurance of National Constitutions*, have classified the Brazilian Constitution of 1988 as fulfilling the main requirements for longevity: it is inclusive, at 79, because the convention was marked by public discussions, even having projects based on citizens’ initiatives; flexible, at 82–83, because constitutional amendments and judicial review are authorized and used; and specific, because it is a long and detailed text, at 84. The United States Constitution can be understood as having “low levels of inclusion”, at 163, with the Professors classifying it as rigid and general, at 87. Nevertheless, there was participation in the approval, as emphasized by Justin Blount, Zachary Elkins and Tom Ginsburg, “Does the Process of Constitution-Making Matter?,” in *Comparative Constitutional Design*, ed. Tom Ginsburg (Cambridge: Cambridge University Press, 2012), at 53.
specificity demands continuous “investments in the text,” increasing amendments. Our findings are aligned with the literature, because the Brazilian Constitution is very detailed, while being quite flexible with regard to amendments.

In addition, it has been contended that constitutions with built-in alteration mechanisms are preferable to rigid ones, particularly if we consider that the design science might be more effective solving past or present problems instead of future challenges. Here, the rigid rules and procedures of the U.S. Constitution, which


862 Elkins, Ginsburg and Melton, The Endurance of National Constitutions, at 87, stating that specificity and flexibility contribute to endurance of constitutions by providing incentives for the parties to monitor and update the constitutional text. The Professors also stress, at 65, that the U.S. Constitution does not feature the totality of elements that would grant longevity – namely: flexibility, inclusion and specificity, generally.

863 Idem, at 74, developing such arguments: “If, on the one hand, formal constitutional amendment is relatively simple, as in contemporary Brazil where the legislature does not have to pass its amendments to the subnational units for approval, there may be less need for judicial or other institutional reinterpretations of the constitution.”

864 Idem, at 139–140, commenting on amendment as a significant predictor of longevity of constitutions, based on their empirical multi-countries study of comparative constitutionalism.


866 Locating the U.S. Constitution among those most difficult to amend in the world, and contending its ineffectiveness as far as self-adjustments mechanisms are considered: Hirschl, The “Design Sciences” and Constitutional “Success,” at 1349. Also agreeing with the proposition regarding the difficulty to amend the U.S. Constitution: Sanford Levinson, Our Undemocratic Constitution (New York: Oxford University Press, 2006), at 21. Furthermore, Huq, The Function of Article V, at 1174, notices the tension inherent to Federalists and Whigs, arguing that Article V was a “compromise mechanism that allowed either the federal government or state institutions to be bypassed entirely.” In this sense, general undemocratic aspects of the constitutional text were the outcome of the pragmatic conception of the Framers, who had chosen to compromise: Dahl, How Democratic is the American Constitution?, at 38. The U.S. Constitution has formal inflexibility, but features informal flexibility granted by judicial review, for instance, as argued by: Elkins, Ginsburg and Melton, The Endurance of National Constitutions, at 162–167.

867 Article V of the U.S. Constitution determines that: “The Congress, whenever two thirds of both houses shall deem it necessary, shall propose amendments to this Constitution, or, on the application of the legislatures of two thirds of the several states, shall call a convention for proposing amendments, which, in either case, shall be valid to all intents and purposes, as part of this Constitution, when ratified by the legislatures of three fourths of the several states, or by conventions in three fourths thereof, as the one or the other mode of ratification may be proposed by the Congress; provided that no amendment which may be made prior to the year one thousand eight hundred and eight shall in any manner affect the first and
lead to the notion of its enormous difficult in amend the U. S. Constitution, are considerably different from the Brazilian experience.  

Our findings are consistent with the understanding that constitutional amendments are not aimed at modifications of the constitutional text, but at authorizing legislative and popular actors an increased mechanism to pressure the interpretation of the highest court regarding that design. Amendment procedures are tied to questions of judicial interpretation and the more difficult to amend a constitution is, the higher the pressure on constitutional courts to decide issues addressing challenges posed by new conditions.  

Our analysis of the U.S. Constitution validates such reasoning, because on several occasions the USSC did not even consider different interpretations of the Fourteen Amendment – as, for instance, to include rights to vote in annexation procedure within the realm of its application. With regard to the Brazilian Constitution, which is quite flexible, the STF felt empowered to declare the annexations that occurred after the constitutional amendments as in violation of the requirement of federal complementary law – even though such law does not yet exist. Clearly, the STF determined Congress to enact such law, because that congressional inertia was unconstitutional.

The specific provisions pertinent to the amendment process of the Brazilian Constitution of 1988 are stated in its article 60: “The Constitution may be amended on the proposal of: I - at least one-third of the members of the Chamber of Deputies or of the Federal Senate; II - the President of the Republic; III - more than one half of the Legislative Assemblies of the units of the Federation, each of them expressing itself by the relative majority of its members. Paragraph 1 - The Constitution shall not be amended while federal intervention, a state of defense or a state of siege is in force. Paragraph 2 - The proposal shall be discussed and voted upon in each House of the National Congress, in two readings, and it shall be considered approved if it obtains in both readings, three-fifths of the votes of the respective members. (…) Paragraph 5 - The matter dealt with in a proposal of amendment that is rejected or considered impaired shall not be the subject of another proposal in the same legislative session.” Despite the requirement of three-fifth approval in both Houses, in the Brazilian political reality it is not that difficult to obtain such quorum. The current Constitution was approved in 1988 and has, so far, seventy-seven amendments until October of 2014.


Mark Tushnet, Comparative Law and National Identity, at 1239. Arguing that the judiciary as well as other institutional players reinterpret the Constitution: Elkins, Ginsburg and Melton, The Endurance of National Constitutions, at 74.
This research corroborates that transparency is important in terms of reducing the self-interest of distinct actors\footnote{In this direction, see, for example: Blount, Elkins and Ginsburg, Does the Process of Constitution-Making Matter?, at 58.}, although the Brazilian case was far from curbing personal self-interest of mayors, in particular.\footnote{Here is relevant to distinguish self-interest on the personal level, which are negative, from group interest that may – or not – be inappropriate. Along those lines and explaining that transparency reduces the latter – as contended by: Jon Elster, “Channels of Constitution Making,” in Comparative Constitutional Design, ed. Tom Ginsburg (Cambridge: Cambridge University Press, 2012), at 22.} In this context, the constitutional amendments and the related litigation that have followed did not spare the STF from judging constitutional claims of local governments. Hence design choice matters, but is not the only variable involved if one considers the need of legal conflicts being resolved by supreme courts.

The constitutional design adopted in Brazil authorized constitutional adaptation to the extent that the amendments aimed at eliminating the existence of several municipalities created or annexed for political interests only, without any concern with the public needs. Thus, Brazil has a unique design if one considers the allocation of powers to the municipalities in the constitutional text. In practice, however, it did not lead to more power to local governments or to better services. Citizens are still excluded on economic bases from such access. Importantly, the rate of annexation cases involving Brazilian municipalities jeopardizes economic growth due to the lack of certainty of their formation or modification. Accordingly, the design of the Brazilian Constitution cannot yet be deemed as completely successful, when considered in light of the litigation involving annexation of local governments.

\textit{B. General Analysis of the Comparison and Related Consequences}

The decisions of the Supremo concerning the validity of annexations laws of the states and the Constitutional Amendments 15 and 56 contribute to the understanding that the movements of centralization and decentralization in Brazil should not be understood as a permanent dichotomy\footnote{Noting that the centralization-decentralization is not that relevant and is more useful as a continuum: Souza, Brazil: The Prospects of a Center-Constraining Federation in a Fragmented Polity, at 35.}, but as a continuous accommodation of different interests.
This understanding about Brazil also supports our claim that the decisions of the USSC do not necessarily refer to alternate visions of local governments, but as adaptive mechanisms to their own present circumstances.\textsuperscript{874}

Considering such reasoning, previous scholarship identifies different conceptions by the USSC when applying the principle of “one person, one vote” to elections concerning local governments.\textsuperscript{875} The first one is based on the understanding of local governments as merely the extension of the state, as affirmed in Hunter. The second treats local governments as forums for local democracy, and the third conception defines local governments as proprietary enterprises.\textsuperscript{876} Those models support the understanding of the federalization of local election law as being partial, with states still being entitled to significant control of local governments – including their organization and structure.\textsuperscript{877}

In our view, the different conceptualizations contended by each model are not an evolution but rather particular waves that still can be further elaborated by the Court.\textsuperscript{878} In Hunter, the Court asserted that local governments are not autonomous but merely arms of the state. This conception was further mitigated by Avery, which considered local governments as being representatives elected by the people.\textsuperscript{879} It has been argued that

\textsuperscript{874} This is the case, notwithstanding different theoretical conceptions about local governments, as pointed out in footnotes 812 and 813, supra.

\textsuperscript{875} Detailing those three models: Briffault, \textit{Who Rules at Home? One Person/One Vote and Local Governments}, at 344.

\textsuperscript{876} The view of local governments as local democracy is further explained at 347, when the Professor cites the Avery decision and the pertinent USSC’s view of local governments as being of “representatives elected by the people.” The third model refers only to special districts, and is mentioned for completeness, due to the fact that special districts are not encompassed in our research. Reference is made to: Briffault, \textit{Who Rules at Home? One Person/One Vote and Local Governments}, at 359–381, specifically.

\textsuperscript{877} Briffault, \textit{Who Rules at Home? One Person/One Vote and Local Governments}, at 339.

\textsuperscript{878} Arguing that the USSC developed the first two models as an evolution of its approach to local government itself: Anderson, \textit{Mapped out of local Democracy}, at 964. Our argument is based on the fact that evolution presupposes that the newer concept is necessarily better than the oldest one. Based on our research about the USSC case law (and considering their recent decision in Shelby, for instance), we do not agree with the proposition that newer decisions are necessarily superior.

\textsuperscript{879} Professor Briffault understands both conceptions as alternatives – therefore not as mitigation, but as if recent decisions superseded previous case law: Briffault, \textit{Who Rules at Home? One Person/One Vote and Local Governments}, at 347. In our understanding, the majority of the Court is trying to reconcile both views, to the extent that the Court also acknowledged state powers and prerogatives in Avery, at 480: “Although the forms and functions of local government and the relationships among the various units are
even the Federalists would concede the historical and legal precedence of states as well as the many efforts by the framers in secure from federal interference with state’s local affairs.

This research concerns the limits imposed by the U.S. Supreme Court in annexation cases. It demonstrates how the issues judged by the USSC evolved across time. In the beginning, the Court was mainly focused on patrimonial disputes. After the enactment of the Voting Registration Act, of 1965, its docket changed, being particularly concerned with asserting the effectiveness of federal rights. The docket also shows different actors then in previous years. This occurred because the states that were mentioned in the Act started to be object of intense litigation. Interestingly, participation in the U.S. Constitution was associated with claims for a Bill of Rights that the Anti-Federalists intended to have contemplated in the Constitution, with participation being linked to limitations on federal power.

If annexation in the United States was used to exclude specific demographics of the population from particular municipalities, in Brazil, the exclusion occurs by the lack of resources that this same population should have access – whether provided by the state

matters of state concern, it is now beyond question that a State’s political subdivisions must comply with the Fourteenth Amendment. The actions of local government are the actions of the State. A city, a town, or county may no more deny the equal protection of the laws than it may abridge freedom of speech, establish an official religion, arrest without a probable cause, or deny due process of law.” Further, at 485, it concluded: “The Court is aware of the immense pressures facing units of local government, and of the greatly varying problems with which they must deal. The Constitution does not require that a uniform straitjacket binds citizens in devising mechanisms of local government suitable for local needs and efficient in solving local problems.”

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882 This research is not focused on the economic federalism and the related literature about competitive federalism – which dates back to the Fifties, with the seminal work of Charles M. Tiebout, “A Pure Theory of Local Expenditures,” The Journal of Political Economy 64 (1956): 416–424. It is worth emphasizing that we agree with the claim that political inequalities among Brazilian states and regions are substantial obstacles to the study of competitive federalism in Brazil. In this direction: Souza, Brazil: The Prospects of a Center-Constraining Federation in a Fragmented Polity, at 45. As addressed earlier, our focus is the impact of the USSC decisions concerning local governments in the context of annexation in comparison with the decisions of the Brazilian Supreme Court (STF) in those issues and the consequences of the particular constitutional design adopted.

or by municipalities. In light of the concentration of powers at the federal level in Brazil and the existence of an increasing number of municipalities that are not financially feasible, the debate pertinent to local interests tend to be far from the citizen, in a different experience from the traditional U.S. portrayal. This research corroborates previous claims for the general creation of a national level policy in Brazil. The current chaos of decentralization enhances inequalities among Brazilian regions, neglecting the poorest segments of society.\(^\text{884}\)

Based on evidence provided by our analysis of the decisions about annexation, we contend that general-purpose local governments in the United States are more powerful than municipalities in Brazil. In this sense, we used annexation as a proxy for local powers, which in the United States derives also from the self-determination of the states. This claim is supported by the existence of involuntary annexation in the United States, as well as by the fact that the U.S. states are capable of defining their own boundary limits in general, without interference from the federal union. The mitigated self-determination principle of Brazilian states contributes to reduce access to federal resources. This is a cause of concern. This situation has held back innovation due to the lack of resources that states endure in Brazil, with small municipalities not being financially self-sustainable.\(^\text{885}\) The absence of innovation is in sharp contrast with the idea of states being used as laboratories in the United States.\(^\text{886}\)

The STF has emphasized several times, independently from the constitutional amendments, that the plebiscite involving all the interested electors must occur before the annexation of a municipality. This is a democratic rule, and its implementation lacks application.

An interesting question is if the mandatory prerequisite of plebiscite of all the citizens affected by the annexation would improve the exclusionary problems existing in

\(^{884}\) Samuels, *Reinventing Local Government? Municipalities and Intergovernmental Relations in Democratic Brazil*, at 96.


\(^{886}\) For the famous quote of the dissent opinion by Justice Brandeis considering the states as laboratories for innovation in the United States: New State Ice Co. v. Liebman, 285 U.S. 262, 311 (1932).
the United States. In our view, this plebiscite would not be an effective rule in the United States, where self-determination has been used to exclude areas that are not of economic interest of the majority of residents in a city or town. The use of mandatory assessment studies, including environmental and cultural factors (which are mandatory in Brazil), should be incentivized as a practice across the U.S. states. We note that the majority of the states already consider some previous studies of feasibility or assessments concerning annexation. This notwithstanding, our general recommendation is for such studies to encompass broader factors, including environmental impact.

After distinct constitutional amendments and changes in the case law of the STF itself, Brazil remains in a grey area – in practice as well as of legal matters –, due to the absence of general federal complementary law. Therefore, municipalities were not necessarily more empowered simply by virtue of their inclusion in the Brazilian Constitution. In this sense, the federal pact chosen was not capable of continuing as originally planned. Despite warnings by the STF, local actors are, de facto, annexing cities without the existence of federal complementary law.

Comparative constitutional law is concerned with the existence and scope of bill of rights provisions. In this sense, the constitutional architecture regarding competences, powers, and structure of the government are perceived with less enthusiasm than provisions of rights. However, as the decisions of the U.S. Supreme Court demonstrate, they are necessary for the protection of rights and the rule of law. With regard to the protection of rights, our findings corroborate that such protection increased

887 Mentioning previous studies of the assessment for boundary changes and how they are focused on fiscal policies: Anderson, *Mapped out of local Democracy*, at 950.

888 Our findings are consistent with the balanced role played by the STF in the transition to democracy. The Court has been protective of the rule of law, as it has been observed based on studies limited to the economical arena: Diana Kapiszewski, *High Courts and Economic Governance in Argentina and Brazil*, (Cambridge: Cambridge University Press, 2012), at 207, in particular.


after World War II, as the importance of constitutional adjudication increased even in the United States in order to grant protection to minorities. The decisions of the Supremo, by contrast, protect the rule of law but do not prove supportive of any protection of fundamental rights. This is different from what we expected, because the STF has a long tradition of protection of fundamental rights.

Our results also corroborate Shapiro and Stone Sweet’s hypothesis with regard to the expansionary role of courts in order to protect rights. The Supreme Court of the United States as well as the STF has expanded their role from the traditional and very restrictive separation of powers doctrine. Hence, both courts have moved the lines from what might have been considered previously as a clear separation. The U.S. Supreme Court did so by reviewing its original interpretation of the Fourteenth Amendment,

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Charles R. Epp, *The Rights Revolution: Lawyers, Activists and Supreme Courts in Comparative Perspective* (Chicago: The University of Chicago Press, 1998), at 38–39. The Professor notes that the increased presence of cases involving the due process clause and equality has actually started during the 1918 (after World War I), but the USSC rejected such claims until the sixties. Arguing, generally, that the increased litigation took place after the World War II in the United States, for instance: Mary Ann Glendon, *Rights Talk: The Impoverishment of Political Discourse* (New York: The Free Press, 1991), at 163.


The Supremo Tribunal Federal has historically been very protective of fundamental rights and has done so even during the military ruling, when the writ of habeas corpus was further suspended by the militaries. Along those lines: Igor Savitsky, “O STF e o AI-5,” in *Jurisprudência Constitucional: Como decide o STF?,* ed. Diogo R. Coutinho and Adriana M. Vojvodic (São Paulo: Malheiros, 2009), at 238–240; and at 271. For general observations of the judiciary as being protective of rights and minorities in Latin America, in particular: Cappelletti, *Repudiating Montesquieu? The Expansion and Legitimacy of ‘Constitutional Justice,”* at 25.

Martin Shapiro and Alec Stone Sweet, *On Law, Politics & Judicialization* (New York: Oxford University Press, 2011), at 364, where they contend: “…the more judges are asked to protect rights in an effective manner – the pan-European situation – or the more judges consider effective rights protection to be their constitutional duty – the American situation – the less likely judicial review will conform to, or be contained by, separation of powers doctrines that preclude abstract review. Put very differently, in systems in which the supremacy of the constitutional law within the general hierarchy of norms is defended by a authority, all separation of powers notions are contingent because they are secondary to, rather than constitutive of, judicial function.” Despite the reference to abstract review in the quote, the claim is generally applicable to our findings, regardless of the species of review used by both supreme courts. In Brazil, it was clearly abstract, because all the decisions were made through direct actions of unconstitutionality. In the United States, however, the decisions were concrete, because they were not made in the context of pre-enforcement of legislation, for instance. Nevertheless, those decisions have considered elements of abstract review, such as: potential effect on non-litigants parties, general observations about previous experiences which did not relate to the parties arguing the case at bar, future effectiveness of the prohibition of race discrimination, among others.
extending the prohibition of discriminate to states, and by upholding the constitutionality of the Voting Rights Act – at least for several years until 2013. The STF, in its turn and in a bold movement, has declared the unconstitutionality of the Legislative branch in not approving the federal complementary law determining general requirements for annexation of municipalities.

It has been argued that the impact of constitutional law in Latin America is different than in the United States due to the ease by which constitutional provisions can be ignored or changed. The existence of two constitutional amendments about annexation and the current undefined legal situation of change of boundaries, most unfortunately, prove that this is still the case. The decisions of the STF regarding annexations, however, indicate that there are reasons to be optimistic. The STF has been protecting the Constitution, striking a balance regarding the principle of separation of powers. As for the amendments, they ultimately contributed to the endurance of the constitutional democratic pact. The changes implemented by the amendments aimed at curbing the abuses that have occurred when the constitutional requirement was merely one of state complementary law – instead of a national complementary law.

Finally, historical reasons and the related differences of their democratic experiences explain the two countries’ distinct choices of constitutional design and the role played by each Supreme Court. It is clear that Brazil can no longer contend that its own local governments are among the most empowered, if the rules for their own boundaries are not even completely defined. In this direction, our analysis sheds light on potential reasons why there was not a full transplant of the U.S. federalism to the constitutional pact established in 1988. Local elites in Brazil were powerful enough to reject the general rule of the global constitutional market regarding the existence of two level spheres in federal systems – not three, as the Brazilian Constitution of 1988 created. Brazilians currently pay a high price for such innovation, despite the efforts of the STF in mitigating abuse.


896 For the concept of global constitutional market and the importance of understanding the reasons why particular provisions are transferred different to other jurisdictions for the field of Comparative Law: Frankenberg, Constitutional Transfer: the IKEA Theory Revisited, at 570–576.
V. CONCLUSION

Constitutional design is a controversial topic even in its denomination. Some will emphasize the process and the continuing idea of construction embedded in it. Nonetheless, all agree as to the importance of the debate, in particular due to the fact that “non-ideational obstacles are strong, (...) the interests affected are non-uniform, and retrogression is possible after adoption.”

This research uses the decisions about annexation made by the U.S. Supreme Court and its Brazilian counterpart, the STF, to investigate if the inclusion of municipalities in the Brazilian Constitution was actually an improved constitutional design. After two constitutional amendments and recent decisions of the STF rendering as unconstitutional the current inaction of Congress in approving the required federal complementary law, no evidence was found to support the proposition that the current design was necessarily completely superior to the current comparative trend that uses the dual spheres system of the United States federalism as paradigm. Our claim is that the federalism option made by the constitutional assembly in 1987 was a balanced one, given the transition from a centralized military ruling to a democratic and more decentralized pact. After almost thirty years, some Brazilians citizens still struggle to know where exactly their municipality ends. This uncertainty has important consequences. From the political sphere, you cannot know exactly who is your mayor, nor who are you voting for. From a more pragmatic perspective, who should you sue to provide you health or medicines? Those are constitutional rights that must be secured by all the three spheres of power, jointly liable. From public governance, it is difficult to administer, to determine spending – even approve a budget – if boundaries are not certain.

We approached the decisions of both Supreme Courts with no preconceptions. This research does not argue that one constitutional design is necessarily superior to the

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898 Idem, at 18.

899 Note that, technically, plaintiffs must sue the municipality first and then the state and by last the federal union, based on the interpretation of the following constitutional provisions: article 194, VII, article 196, and article 198, I-III.
other on itself, and in abstract. We considered the silence of the U.S. Constitution and the recent inclusion of municipalities as federal actors in Brazil as choices that reached the best feasible option at the time of constitutional writing. In that sense, as any controversial constitutional choice, it was a product of compromise. In the U.S., such compromise was between Federalists and Republicans. In Brazil, settlement was achieved by concessions of the national Union to local as well as regional forces.

The decisions of both Supreme Courts demonstrate sharp differences between their case law in subject matters of annexation. On the one hand, the USSC initial decisions were about police powers and contractual claims, with significant deference to state powers. As the docket of the Court evolved over time, protection of fundamental rights, especially equality in light of the Voting Rights Act, became the bulk of litigation. Thus, the original unlimited conception of state power was reviewed in light of the national protection granted to fundamental rights.

Therefore, this research shows that the absence of provisions about local governments in the U.S. Constitution can be generally viewed as successful, in light of the current constitutional design literature about the lack of provisions relating to controversial matters at the time of the convention. It also shows that only recently has the USSC been more involved in litigation of federal rights in the context of annexation. The Court has been acting in a careful self-constrained fashion, being vigilant of its broad interpretation of the constitutional pact that grants states significant powers. Because local governments are still perceived as a qualified extension of states, they are remarkably powerful, albeit the absence of reserved constitutional provisions about the local sphere.

The results of the comparison with the STF are counterintuitive, because we would expect the Brazilian Supreme Court to be more involved in litigation regarding the protection of fundamental rights. This would be the case, if nothing else, due to the lack of certiorari and the detailed provisions of the Brazilian Constitution. The former would ultimately grant access to the Court through extraordinary appeal, while the latter would increase the chances of litigation, because annexation procedures are treated in the constitutional text.
This research does not maintain that the U.S. system, i.e., the absence of provisions of local governments, should be transplanted to the Brazilian Constitution. It does argue, however, that local actors in Brazil must be restrained and act in accordance with the constitutional commands. Such recommended course of action consists in obeying the STF, and refraining from annexing municipalities in the absence of the pertinent federal complementary law. It also consists of obeying the specific constitutional administrative principles of legality, morality, efficiency and impersonality, which are mandatory to all public administration. Those principles will support an informed conduct, including detailed assessment of the financial feasibility of annexation.

This work argues that general-purpose local governments in the United States are more powerful than municipalities in Brazil, based on our evidence of the USSC’s decisions in annexation cases. Our study uses annexation as a proxy for local powers, which include self-determination of the states in the United States. This claim is supported not only by the fact that U.S. states have powers which were not attributed to the union, whereas the Brazilian states have residual powers defined as those which were not conferred to the union neither to local governments. The existence of involuntary annexation in the United States coupled with the states being capable of defining their own boundary limits in general, without interference of the union, demonstrates how strong state and local governments are in the United States. In Brazil, it is worth reiterating, the Constitutional Amendment 15 stipulates that state laws providing for annexation shall comply with general requisites to be determined on a national complementary law that has not yet been approved by Congress.

After distinct constitutional amendments and changes in the case law of the STF itself, Brazil remains in a grey area – in practice as well as in legal matters – due to the absence of the general federal complementary law commanded by the constitutional test. In addition, we do not argue that the constitutional design after 1988 is a failure either. This is so because legislative, executive and judicial branches have tried to curb abuses in different historical moments referring to annexation. Furthermore, the current

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900 Article 37, caput, of the Brazilian Constitution: “The direct and indirect public administration of any of the powers of the Union, the States, the Federal District and Municipalities shall obey the principles of strict legality, impersonality, morality, publicity and efficiency.”
Constitutional has less than thirty years of life – which is considerably short if compared with the more than two hundred and twenty years of the U.S. Constitution.

Therefore, it is not necessarily because municipalities were included in the Brazilian Constitution that they became more empowered. In this sense, the federal pact chosen was not capable to continue as originally designed. Despite the decisions of the STF, local governments are, de facto, annexing each other without the existence of the federal complementary law. This is a clear violation of the rule of law, and generates great uncertainty as for the legal regime applicable to those municipalities which are changing their boundaries. It also produces unnecessary litigation, a considerable burden on the allocation of resources and budget matters. This occurs because no administrator knows exactly where its municipality starts or ends in cases of annexation that have occurred after the Constitutional Amendment 15.

Accordingly, local actors were significantly empowered by the current constitutional design in Brazil, but this is not to say that local governments became more powerful. Importantly, local governments in Brazil did not turn to higher democratic spheres nationally; they are not more inclusive of the less wealthy population. The current economical deficit of municipalities proves that, in Brazil, the exclusion of certain demographics of essential services happens by the lack of resources that this same population should have access to.

The empowerment of local actors is among the consequences of the dismantling of the over-centralized system enacted during the military ruling. The decisions of the STF tried to bring balance, national uniformity, and efficiency to the current system established by the Constitution of 1988. Nevertheless, the Court has its own limitations in light of the other branches of power and influential local forces. With regard to the latter, the President has recently vetoed the project of complementary law approved by Congress and which her own team has diligently worked in the draft. Therefore, local forces cannot remain unchecked, with the municipal boundaries being altered in a clear violation of the constitutional order that all administrations swore to obey.

In conclusion, more research needs to be done concerning the constitutional design choices affecting local governments in Brazil and the United States, including empirical studies. Investigations regarding Brazil’s and the United States’ similar tax
powers in the local sphere, for instance, are of interest. In addition, we also hope to have contributed to the literature of Latin America in general, proving that the democratization process and the related topic of Brazilian constitutional design are relevant beyond Brazilian borders.
<table>
<thead>
<tr>
<th>Final List of Cases about annexation based on Lexis</th>
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<th>Issue</th>
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<td>Va. v. W. Va., 78 U.S. 39</td>
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<td>Annexation of counties in Virginia</td>
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<td>Slaughter-House Cases, 83 U.S. 36</td>
<td>1872</td>
<td>Police powers of the state</td>
</tr>
<tr>
<td>Commm'rs of Laramie v. Commm'rs of Albany, 92 U.S. 307</td>
<td>1875</td>
<td>County reduction and debt payment</td>
</tr>
<tr>
<td>Mt. Pleasant v. Beckwith, 100 U.S. 514</td>
<td>1879</td>
<td>Bonds and extinction municipality</td>
</tr>
<tr>
<td>Mobile v. Watson, 116 U.S. 289</td>
<td>1886</td>
<td>City’s legal successor</td>
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<td>Holden v. Hardy, 169 U.S. 366</td>
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<td>McCain v. Des Moines, 174 U.S. 168</td>
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<td>1916</td>
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<td>Howard v. Commissioners of Sinking Fund, 344 U.S. 624</td>
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<td>Richmond v. United States, 422 U.S. 358</td>
<td>1975</td>
<td>Voting Rights Act</td>
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<td>United Jewish Organizations, Inc. v. Carey, 430 U.S. 144</td>
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<td>Holt Civic Club v. Tuscaloosa, 439 U.S. 60</td>
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<td>City of Rome v. United States, 446 U.S. 156</td>
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<td>Port Arthur v. United States, 459 U.S. 159</td>
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<td>Voting Rights Act</td>
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<td>Pleasant Grove v. United States, 479 U.S. 462</td>
<td>1987</td>
<td>Voting Rights Act</td>
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<td>Presley v. Etowah County Comm’n, 502 U.S. 491</td>
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<td>Shaw v. Reno, 509 U.S. 630</td>
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<td>FTC v. Phoebe Putney Health Sys., 133 S. Ct. 1003</td>
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<td>Shelby County v. Holder, 133 S. Ct. 2612</td>
<td>2013</td>
<td>Voting Rights Act as unconstitutional</td>
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Table 5.2: Final decisions of the STF

<table>
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<tr>
<th>Final list of cases of STF decisions</th>
<th>Year</th>
<th>Issue</th>
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<td>ADI 1372 MC/ RJ</td>
<td>1995</td>
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<td>1995</td>
<td>Plebiscite</td>
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<td>Condition fed. complementary law</td>
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<td>Condition fed. complementary law</td>
</tr>
<tr>
<td>ADI 2632/BA</td>
<td>2004</td>
<td>Condition fed. complementary law</td>
</tr>
<tr>
<td>ADI 2994/BA</td>
<td>2004</td>
<td>Condition fed. complementary law</td>
</tr>
<tr>
<td>ADI 3149/SC</td>
<td>2004</td>
<td>Condition fed. complementary law</td>
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<td>Change STF’s case law</td>
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<tr>
<td>ADI 3682/MT</td>
<td>2007</td>
<td>Change STF’s case law</td>
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<td>ADI 4992MC/RO</td>
<td>2013</td>
<td>Denial of annexation based on CA 57</td>
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</tbody>
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**Chart 5.1:** Comparison of the decisions of the USSC and the STF: Number of lawsuits from 1870 until 2013 involving annexation of local governments

![Chart 5.1: Comparison of the decisions of the USSC and the STF](image1)

**Chart 5.2:** Decisions of the STF: Number of lawsuits from 1988 until 2013

![Chart 5.2: Decisions of the STF](image2)
Table 5.3: Search based on “annexation” and municipality (without exclusions)

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<th>Issue</th>
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<td>Slaughter-House Cases, 83 U.S. 36</td>
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<td>New Orleans v. Clark, 95 U.S. 644</td>
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<th>Issue</th>
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<tbody>
<tr>
<td>Virginia v. West Virginia, 220 U.S. 1</td>
<td>1911</td>
<td>Jurisd. of USSC: disputes btw states</td>
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<tr>
<td>Elzaburu v. Chaves, 239 U.S. 283</td>
<td>1915</td>
<td>Claim about disputed ownership</td>
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<td>Dakota Cent. Tel. Co. v. S.D., 250 U.S. 163</td>
<td>1919</td>
<td>Annexation telephone lines WW I</td>
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<td>Porto Rico R., Light and Power Co. v. Mor, 253 U.S. 345</td>
<td>1920</td>
<td>Porto Rico annexation</td>
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<td>Exchange Trust Co. v. Drainage Dist., 278 U.S. 421</td>
<td>1929</td>
<td>County court ann. Arkansas</td>
</tr>
<tr>
<td>Missouri ex rel Missouri Ins. Co. v. Gehner, 281 U.S. 313</td>
<td>1930</td>
<td>Freedom of US bonds from state tax</td>
</tr>
<tr>
<td>Hooven &amp; Allison Co. v. Evatt, 324 U.S. 652</td>
<td>1945</td>
<td>State tax after annexation</td>
</tr>
<tr>
<td>Duncan v. Kahanamoku, 327 U.S. 304</td>
<td>1946</td>
<td>Hawaii annexation</td>
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<tr>
<td>United States v. Fullard-Leo, 331 U.S. 256</td>
<td>1947</td>
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<td>Vermilya-Brown Co. v. Connell, 335 U.S. 377</td>
<td>1948</td>
<td>Fair labor relations Act</td>
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<tr>
<td>United States v. Texas, 339 U.S. 707</td>
<td>1950</td>
<td>Texas annexation</td>
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<tr>
<td>Madsen v. Kinsella, 343 U.S. 341</td>
<td>1952</td>
<td>Armed forces jurisdiction</td>
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<tr>
<td>Howard v. Commissioners of Sinking Fund, 344 U.S. 624</td>
<td>1953</td>
<td>Annexation of federal area by munic.</td>
</tr>
<tr>
<td>Reid v. Covert, 354 U.S. 1</td>
<td>1957</td>
<td>Criminal jurisdiction after ann.</td>
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<td>Perez v. Brownell, 356 U.S. 44</td>
<td>1958</td>
<td>Denationalization of Am. to German</td>
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<td>Harrison v. NAACP, 360 U.S. 167</td>
<td>1959</td>
<td>Jurisdiction conflict annexation</td>
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<td>United States v. Louisiana, 363 U.S. 1</td>
<td>1960</td>
<td>Texas annexation</td>
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<tr>
<td>Duncan v. Louisiana, 391 U.S. 145</td>
<td>1968</td>
<td>Hawaii annexation</td>
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<td>Ga. v. United States</td>
<td>1973</td>
<td>Voting Rights Act</td>
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<tr>
<td>Richmond v. United States, 422 U.S. 358</td>
<td>1975</td>
<td>Discrimination Voting Rights Act</td>
</tr>
<tr>
<td>Lockport v. Ctz. for Cm. Ac. at Ll. Lv., Inc. 430 U.S. 259</td>
<td>1977</td>
<td>NY law equal prot. City and non city</td>
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<td>United States v. Board of Comm’rs, 435 U.S. 110</td>
<td>1978</td>
<td>Voting Rights Act</td>
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<tr>
<td>Kaiser Aetna v. United States, 444 U.S. 164</td>
<td>1979</td>
<td>Hawaii annexation</td>
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<td>Port Arthur v. United States, 459 U.S. 159</td>
<td>1982</td>
<td>Voting Rights Act</td>
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<tr>
<td>Summa Corp v. California, 466 U.S. 198</td>
<td>1984</td>
<td>California annexation</td>
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<tr>
<td>Hallie v. Eau Claire, 471 U.S. 34</td>
<td>1985</td>
<td>State action and antitrust law</td>
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<tr>
<td>Presley v. Etowah County Comm’n, 502 U.S. 491</td>
<td>1992</td>
<td>Voting Rights Act</td>
</tr>
<tr>
<td>Holder v. Hall, 512 U.S. 874</td>
<td>1994</td>
<td>Dilution and Voting Rights Act</td>
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Table 5.5: cont. Search based on “annexation” and “local government” (without exclusions): Part III

<table>
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<tr>
<th>Cases concerning annexation and local gov. (Part III)</th>
<th>Year</th>
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<tr>
<td>Abrams v. Johnson, 521 U.S. 74</td>
<td>1997</td>
<td>Race as factor for county lines</td>
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<td>Miller v. Albright, 523 U.S. 420</td>
<td>1998</td>
<td>Nationality/ citizenship</td>
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<td>Rice v. Cayetano, 528 U.S. 495</td>
<td>2000</td>
<td>Voting Rights Act</td>
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<tr>
<td>FTC v. Phoebe Putney Health Sys., 133 S. Ct. 1003</td>
<td>2013</td>
<td>State legislation power and the city</td>
</tr>
<tr>
<td>Shelby County v. Holder, 133 S. Ct. 2612</td>
<td>2013</td>
<td>Voting Rights Act is unconst.</td>
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</table>
CHAPTER SIX

DO SPECIALIZED COURTS MAKE A DIFFERENCE? EVIDENCE FROM BRAZILIAN STATE SUPREME COURTS.\textsuperscript{901}

I. INTRODUCTION

Court specialization has been promoted as a significant component of legal reform worldwide. This chapter focuses on possible differences between constitutional decisions made by a nonspecialized court sitting \textit{en banc} or by a specialized court panel (\textit{órgão especial}) across the Brazilian state supreme courts.

There is a vast literature on the costs\textsuperscript{902} and benefits\textsuperscript{903} of court specialization, and how it impacts legal consistency.\textsuperscript{904} In this context, this chapter discusses the

\textsuperscript{901} A much concise version of this chapter will be published in the \textit{European Business Law Review} (Forthcoming, 2016).

\textsuperscript{902} The main criticism against specialized courts is the possibility of capture by interest groups. This is a relevant issue in the context of constitutional review. The literature points out two major moments for capture: at appointment and at adjudication. As for the appointment procedure, interest groups might exercise influence in supporting a particular candidate. At the adjudication phase, as the argument goes, the smaller and the more specialized the court, the easier monitoring becomes. Likewise, the easier it is to influence those deciding the cases. Nevertheless, the fact that specialized judges organized as a cohesive group are less likely to be accountable may be an advantage in and of itself. Importantly, in subject matters of public law (such as administrative and constitutional law), government structural bias might occur, with the government aligning its bureaucratic structure with that of the specialized court. See, generally: Rochelle Cooper Dreyfuss, “Specialized Adjudication,” \textit{Brigham Young University Law Review} 64 (1990): 377–441, at 380, emphasizing that even members of the bar would exercise capture.

\textsuperscript{903} Recurrent arguments favoring constitutional specialization include the superior quality of the decisions, legal coherence, uniformity, and diminished workload of ordinary courts. Regarding the quality, it is argued that the contents of decisions tend to be better in specialized courts, because judges are more familiar with the main claims and pertinent theories of the particular field (in our case, constitutional law). Therefore, less time is spent in debating or discovering the applicable law, with a final decision being rendered in a speedy fashion. By contrast, a common point against specialization refers to the quality of those in the specialized bench. Arguably, the repetitive nature of the work does not help to attract the most brilliant individuals of the legal profession. See, e.g., Giuseppe Dari-Mattiacci, Nuno Garoupa and Fernando Gomez-Pomar, “State Liability,” \textit{European Review of Private Law} 18 (2010): 773–811, at 800–801, and references therein.

\textsuperscript{904} Legal coherence and uniformity are often mentioned, because the aggregation of cases in a single, but smaller, constitutional court will facilitate consensus. As the argument goes, it will promote better guidance to litigants of future cases, by increasing predictability in the area of constitutional review. The workload of generalist judges will also be smaller, because the specialized panel will dislocate their initial jurisdiction on the subject matter. In this direction: Rochelle Cooper Dreyfuss, “The Federal Circuit: A Case Study in Specialized Courts,” \textit{New York University Law Review} 64 (1989): 1–78, at 8; Dreyfuss, \textit{Specialized Adjudication}, at 378; Richard L. Revesz, “Specialized Courts and the Administrative Lawmaking System,” \textit{University of Pennsylvania Law Review} 138 (1990): 1111–1175; Nuno Garoupa and Carlos Gomez-
constitutional review exercised by Brazilian state supreme courts or specialized panels of those courts.

Constitutional review is important due to its positive relation with economic and political stability. It may ultimately contribute to the assurance of political and economic liberties and, by doing so, such review enhances economic growth. Constitutional review is also relevant to the extent that the judiciary tends to be more isolated from immediate political calculation, thus enabling the courts to protect rights more effectively.

When Brazilian state supreme courts exercise constitutional review of state or municipal norms based in an alleged violation of the constitution of the state, they do so resembling preponderantly the constitutional court originally conceived by Kelsen. This understanding of state supreme courts as constitutional courts is based mainly on the fact that their adjudication occurs in a centralized fashion and in abstract. It is centralized because the state supreme court (or the specialized tribunal, where exists

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908 The centralized system of judicial review is based on the absence of *stare decisis* in Continental Europe, generally. The effect of *stare decisis* is that a decision of the highest court in any jurisdiction is biding on all lower courts of that jurisdiction. Accordingly, where there is *stare decisis*, the decision of the highest court is bidding *erga omnes* (towards all), in practice. See, e.g., Mauro Cappelletti, *Judicial Review in the Contemporary World* (Indianapolis: The Bobbs-Merrill Company, 1971), at 56. The current chapter of this thesis will further detail the jurisdiction of state courts in Brazil.
one) is the only court that has jurisdiction. By contrast, in the decentralized system (e.g., in the United States), every judge has such prerogative. The concrete system of judicial review present in the United States was perceived by Kelsen as subjecting distinct courts to interpret constitutional provisions in a different manner and, therefore, nonuniformly. In addition, it has been argued that constitutional courts are more prone to activism.

State supreme courts may also be considered constitutional courts because they rule on cases in an abstract context (i.e., without the U.S. requirement of an actual case or controversy). Hence, the unconstitutionality of a norm is the main question being decided, with predetermined persons, bodies, or institutions exclusively authorized to initiate the action and entitled to legitimate standing. Among the latter, frequently political actors or other branches of government are authorized to proceed as so.

Brazil provides an interesting context to test the relationship between specialized constitutional review and output measures, because there are variations across Brazilian state supreme courts within the same cultural and legal backgrounds.

Cross-country empirical analysis does not provide for full control of differences in cultural and legal contexts. The twenty-seven states of the Brazilian federation are organized in five regions. Those regions grouped states with similar geographical,

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910 Victor Ferreres Comella, “Comparative Avenues in Constitutional Law: Constitutional Structures and Institutional Designs: The Consequences of Centralizing Constitutional Review in a Special Court: Some Thoughts on Judicial Activism,” *Texas Law Review* 82 (2004): 1705–1736, at 1712–1720, contending that constitutional courts are more prone to activism for several reasons, including justifying their own existence. Other factors that would apply to state courts in Brazil refer to the absence of discretionary jurisdiction of the constitutional court. Because they have to decide the cases, they are not authorized to exercise the “passive virtues” or prudence when the issues at bar are the most controversial ones. Another factor applicable to Brazilian state courts refers to the difficulty in the use of partial avoidance when it comes to abstract challenges. Abstract control implies a complete decision. Due to its own broad nature, hardly a compromise is found.

historical, economic, social, and cultural experiences (Table 6.8 summarizes the Brazilian states and regions).

With the purpose of investigating how specialized constitutional review may affect output measures, an original dataset was constructed by the authors to empirically explore this question. This dataset considered the cases of abstract review judged between January 1, 2006, and December 31, 2010. It was originally designed to encompass cases of ação direta de inconstitucionalidade (or representação de inconstitucionalidade), ação declaratória de constitucionalidade, and ação direta de inconstitucionalidade por omissão across twenty-five state supreme courts of the Brazilian federation, having as a parameter of constitutional review the state constitution. Six hundred and thirty cases were included in the dataset. The aim of this

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912 The direct action of unconstitutionality (ação direta de inconstitucionalidade - Adin) is a form of direct action in which the declaration of unconstitutionality occurs in the principal form of review – i.e., the main goal of the claim is the invalidation of a state or federal norm in abstract. It is exercised under the concentrate control of constitutional review by the Brazilian Supreme Court (Supremo Tribunal Federal), when the allegedly unconstitutionality refers to violation of the Republican Constitution; or by state supreme courts, if the state or local norm is arguably violating the state constitution. Representação de inconstitucionalidade is how the Republican Constitution refers to the federal ação direta de inconstitucionalidade, i.e., direct action of unconstitutionality at the state level in article 125, paragraph second of the of the Constitution of 1988. This research focuses on the state level and uses both terms (ação direta de inconstitucionalidade and representação de inconstitucionalidade) interchangeably.

913 The declaratory action of constitutionality (ação declaratória de constitucionalidade - ADC) is also a form of direct action, with the declaration of constitutionality occurring in the so-called principal form of review. It has as object a particular federal norm in abstract – and federal norm only, according to article 102, I, a, of the Constitution of 1988. The declaratory action of constitutionality is solely exercised under the concentrate control by the state supreme courts if the state norm is arguably conflicting with the state constitution. The existence of the declaratory action of constitutionality on the state level is not unanimous across the Brazilian federation and the state supreme courts search tools did not distinguish the ADC from Adin on the state level, as detailed infra.

914 This research originally included ação direta de inconstitucionalidade por omissão – namely, direct actions by omission or lack of a particular measure. None was found in our sample, as discussed in Section III. The existence of the Adin by omission on the state level is itself controversial. Providing arguments supporting such existence: Clêmerson Merlin Clève, A Fiscalização Abstrata da Constitucionalidade no Direito Brasileiro (São Paulo: Editora Revista dos Tribunais, 2000), at 392–394.

915 Although we have researched all twenty-seven Brazilian states (including the federal district, which has its own tribunal as if it were a state), data for two states could not be gathered, because it was not available online by the time we finished this dataset (December, 2013). For further information about the states included and their data: see section referring to the Hypothesis and Dataset, and Table 6.1, infra.

916 In Brazil, “parameter” is the most common denomination referring to the distinction between the abstract control of constitutionality exercised considering the text of the state constitution or the federal one. Notwithstanding the complexity of Brazilian judicial review and potential thorns that often exist in technical legal translations, it is worth contextualizing the use of such denomination. The U.S.
research is to study the impact of the federalism choice concerning the creation of specialized panels in Brazil. This chapter also aims to identify possible sources of variance in order to explain asymmetric patterns of delay, decision-making and litigation.

The first question to consider is whether there are significant variations regarding the outcomes of the cases of abstract review. Our study of abstract review in the state level across Brazilian state supreme courts is unique. Direct actions of unconstitutionality arising out of arguable violations to the Republican Constitution, which can only be filed at the STF, have been object of study of several scholars. The second question is if there are variations, can they be correlated with the use of a specialized panel (órgão especial), the latter being frequent in the larger states (a variable to be taken into account in the empirical exercise)?

At the same time, we make a contribution to the understanding of the Brazilian judicial system, focusing on the decisions of state courts regarding the constitutionality of constitutional experience does not have an exact term to replace the Brazilian concept of “parameter of constitutionality,” due to the fact that the U.S. judicial review is traditionally exercised in concrete cases, i.e., the arguable unconstitutionality of a norm is discussed in an actual case or controversy with the plaintiff having to prove an injury in fact, generally (see chapter four of this thesis for a discussion about the existence of abstract review in the U.S.). In any event, the concrete review is strikingly different from the abstract review, where the constitutionality is the focus of the lawsuit and judged in abstract – i.e., with no injury in fact being required. In the abstract review, as said earlier, only pre-selected persons, bodies or institutions have standing to argue the constitutionality in such theoretical framework. Furthermore, the U.S. constitutional tradition refers ordinarily to “limitations” when considering the potential conflict between state and federal constitutional norms. Kenneth L. Karst, revised by James E. Pfander, ed. Kermit Hall, The Oxford Companion to the Supreme Court of the United States (New York: Oxford University Press, 2005), at 532, stating that this view is based on the general understanding that state and national spheres of sovereignty are a natural consequence of the U.S. dual federalism. See, among others: Erwin Chemerinsky, Constitutional Law: Principles and Policies (New York: Aspen Publishers, 2006), at 312–327, and at 389–473, detailing federal and state powers, the Tenth Amendment, as well as the limits on state regulatory and taxing power in light of doctrines of preemption, the Dormant Commerce Clause, and the Privileges and Immunities Clause of article IV, Section 2, of the United States Constitution. It is noteworthy that, in Brazil, depending on the exact interpretation chosen for the long and analytic Republican Constitution of 1988, the already limited scope of state competences and powers might be reduced even further, as stressed in: Gilmar Ferreira Mendes and Paulo Gustavo Gonet Branco, Curso de Direito Constitucional (São Paulo, Saraiva, 2013), at 1322.


The performance measures we analyze are the ones most obviously related to the arguments favorable and unfavorable to specialized constitutional review. If a specialized court is better than a nonspecialized court, then we should expect cases to be decided faster; therefore, we study duration. Along those lines, cases should reflect better quality of lawmaking (hence we look at length and citations of superior courts). Furthermore, because a specialized bench is expected to know better legal doctrines and their nuances, we could expect deeper legal discussions and potentially different reasoning (thus we consider dissent rates).

In light of the above, the main contributions of this research to the literature are straightforward: an original dataset designed by the authors in order to compare decisions by state specialized panels versus states without those specialized panels, across Brazilian state supreme courts. In addition, this research investigates whether the existence of specialized panels can be correlated to potential differences across states within the context of constitutional review. Hence, we address the general question of the impact of the federalism choices, namely, the discretion in the creation of specialized panels in Brazil.

This chapter proceeds as follows. An overview of the Brazilian system of judicial review and the related topic of the jurisdiction of state supreme courts are presented in Part II. The hypothesis is addressed in Part III. A regression analysis is presented in Part IV and discussed in Part V. Part VI concludes the current chapter, considering our preliminary findings.
II. THE BRAZILIAN SYSTEM OF JUDICIAL REVIEW

This Part is divided into three Sections. Section A begins with an overview of the Brazilian system of judicial review. Section B discusses the mechanisms of appointment to the STF and state supreme courts, while Section C contextualizes and generally identifies the particular requirements for the constitutional actions included in our research.

A. Overview of Judicial Review in Brazil

Judicial review in Brazil is understood based on two main criteria: subjective and procedural. The subjective criterion refers to the judicial bodies that exercise the control and is divided into diffuse or concentrate.\textsuperscript{919} The judicial review is diffuse when any judge or court – provided that they have jurisdictional power – can pronounce the unconstitutionality of a law. This is how it generally happens in the United States. By contrast, in the concentrate form, judicial review is restricted to a limited number of bodies with original jurisdictional power – that is, they do not hear the case on appeal, but as a first instance court.

The procedural criterion is based on the form under which control is exercised. It occurs in an incidental form – focusing on the concrete case, as it usually is in the United States, as opposed to occurring in a principal form. In the latter, there is no specific concrete case, and the court has to consider abstract arguments as well as the possible effects of the alleged unconstitutional law. In the incidental form, the court has to rule on the constitutionality as an incidental question related to the merits of the case. In the principal form, however, the judgment about the constitutionality is the core and the exclusive question related to the merit of the case.\textsuperscript{920}

The judicial review model adopted by the Brazilian Constitution of 1988 is a hybrid, combining the incidental and diffuse model (the U.S. system) with the principal and concentrate model (the continental European form). The principal control – namely,\textsuperscript{919} Keith S. Rosenn, “Procedural Protection of Constitutional Rights in Brazil,” \textit{American Journal of Comparative Law} 59 (2011): 1009–1050, at 1009–1013, analyzing the Brazilian system of judicial review and stating its notoriously complexity.

the one usually exercised through direct actions and in abstract – occurs in two forms. In
the first form, the direct action is initiated in the STF, where the unconstitutionality refers
to federal or state laws arguably in conflict with the Republican Constitution. The other
form is the focus of this chapter: direct actions initiated in state supreme courts and
arising out of the unconstitutionality of state or municipal laws that are potentially
violating the constitution of a given state.

B. Context and Particular Requirements for Constitutional Actions

We turn our attention to the concentrate, principal, and abstract controls of
constitutionality. This work focuses on the forms of direct action of unconstitutionality
(Adin, as they are called), direct action of unconstitutionality arising out of omission, and
declaratory action of constitutionality (ADC). We do note, however, that both actions
(Adin and ADC) have their procedural aspects determined by the federal law 9,868 of
1999. The declaratory action of constitutionality has no rigorous counterpart in
comparative experience. The Republican Constitution does not expressly mention the
declaratory action of constitutionality at the state level, but there is specialized legal
doctrine arguing its admissibility.

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922 This research distinguishes the Direct Action of Unconstitutionality based on action – also called
generic Adin – from the Direct Action of Unconstitutionality based on omission (Adin by omission). The
latter is determined under the federal law 12,063 of 2009, combined with the federal law 9868 of 1999. According
to article 103, paragraph 2, of the Constitution of 1988: When the unconstitutionality is declared
on account of lack of a measure (omission) to render a constitutional provision effective, the competent
power shall be notified for the adoption of the necessary actions and, in the case of an administrative body,
shall do so within thirty days. Hely Lopes Meirelles, Arnoldo Wald and Gilmar Ferreira Mendes, Mandado
de Segurança e Ações Constitucionais (São Paulo: Malheiros, 2009), at 500, stating that the STF also has
jurisdiction to rule on legislative omission of state courts. We reiterate that in our research across the
Brazilian state supreme courts no direct action for unconstitutionality by omission was found. We further
discuss those findings in Part III of this chapter.

923 Barroso, O Controle de Constitucionalidade no Direito Brasileiro, at 258.

924 Citing the theoretical approaches, and also advocating for the admissibility of the declaratory action of
constitutionality at the state level: Barroso, O Controle de Constitucionalidade no Direito Brasileiro, at 261;
Alexandre de Moraes, Direito Constitucional (São Paulo: Atlas, 2012), at 811; Uadi Lammêgo Bulos,
Curso de Direito Constitucional (São Paulo: Saraiva, 2012), at 318. Contending that such declaratory action
would not be very useful, to the extent that the arguable unconstitutional state norm would still be subject
to federal constitutional review: Clève, A Fiscalização Abstrata da Constitucionalidade no Direito
Brasileiro, at 395–396.
It is noteworthy that the generic Adin and ADC are very similar actions whose main difference is the need for a prior judicial controversy about the constitutionality of a law.\textsuperscript{925} The justification of such specific requirement in the case of the ADC is based on the general presumption of constitutionality of all legal norms. This requirement also impacts the effects of the decision. Hence, in Adin, the decision that recognizes the unconstitutionality has retroactive effects (\textit{ex tunc}) unless the appropriate court decides differently. In ADC, however, the decision recognizing the constitutionality has immediate effects, without retroactive consequences. Both actions admit \textit{in limine} decisions, and the final decision of the STF is binding toward all possible parties (\textit{erga omnes}).\textsuperscript{926}

Caution is recommended when analyzing those possibilities of concurrent jurisdiction of state supreme courts and the STF.\textsuperscript{927} The case law of the STF has created a special cause for suspension of the lawsuit in the state supreme court when two different lawsuits are initiated in the federal and state levels. It occurs when a lawsuit was started in the STF and another one in the state supreme court, with the challenged state norm arising out of a mandatory repetition clause of the Republican Constitution in the state constitution. In this particular hypothesis, the lawsuit filed at the state supreme court is suspended.

Notwithstanding the position of the STF with regard to the definition of the norms that should be considered of mandatory repetition,\textsuperscript{928} there is no doctrinal consensus

\textsuperscript{925} Technically, the other main distinction was mentioned in the Introduction, \textit{supra}, when emphasized that Adins arising out of potential violation to the Republican Constitution of 1988 may have as object state and federal laws or normative acts; whereas ADCs arising out of potential violation to the Constitution can only have federal laws as object.

\textsuperscript{926} This study addresses \textit{in limine} decisions as a generic term for preliminary injunction and remedies. This chapter disregards the distinction between “liminar” and “cautelar,” noting, however, that the former is a type of \textit{in limine} decisions.

\textsuperscript{927} Meirelles, Wald and Mendes, \textit{Mandado de Segurança e Ações Constitucionais}, at 429.

\textsuperscript{928} The case law of the STF has considered as being norms of mandatory repetition, among others: all the norms pertinent to the legislative procedure, including rules about who is the competent authority to draft bills; all the norms of the Republican Constitution that were aimed at the public administration – at all levels; all constitutional provisions about the Judiciary and its auxiliary functions; number of state representatives in the state assembly, term limits for governors and mayors, and reelection provisions. These constitutional norms have been perceived as a manifestation of the necessary symmetrical arrangement between state and federal levels. In this direction, for instance: Mendes and Branco, \textit{Curso de Direito Constitucional}, at 792–793, and Lammêgo Bulos, \textit{Curso de Direito Constitucional}, at 915–918.
about the full extension of those norms. The question of a constitutional norm that is reproduced in the state constitution is not simple, because there are norms in the Republican Constitution that must be repeated, identically, in the state constitutions. Those norms are called norms of mandatory reproduction. They coexist with norms that the state constitution may opt to repeat – in this case, norms of imitation.Only the first type – norms of mandatory reproduction – is subject to review by the STF in the context of extraordinary appeal. Norms of state imitation are not subject to such extraordinary review because, strictly speaking, they are state norms.

We should note that in abstract control, as opposed to in concrete control, only certain parties are allowed to initiate the lawsuit. Thus, standing is restricted to preselected persons, bodies, institutions, or groups. The current text of the Republican Constitution of 1988 is understood to be quite progressive, allowing a broad number of actors to initiate an abstract lawsuit in the STF. This extended list suggests that the

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929 Clève, A Fiscalização Abstrata da Constitucionalidade no Direito Brasileiro, at 404.

930 Idem.

931 Article 103 of the Constitution of 1988 affirms that: The following may file an action of unconstitutionality and the declaratory actions of constitutionality: I - the President of the Republic; II - the Directing Board of the Federal Senate; III - the Directing Board of the House of Representatives; V - the Directing Board of a State Legislative Assembly or of the Legislative Chamber of the Federal District; V - the State Governor or the Governor of the Federal District; VI - the Attorney-General of the Republic; VII - the Federal Council of the Brazilian Bar Association; VIII - a political party represented in the National Congress; IX - a confederation of labor unions or professional association of nationwide nature. §1 - The Attorney-General of the Republic shall be previously heard in actions of unconstitutionality and in all suits under the power of the Supreme Federal Court. §2 - When unconstitutionality is declared on account of lack of a measure to render a constitutional provision effective, the competent Power shall be notified for the adoption of the necessary actions and, in the case of an administrative body to do so within thirty days. §3 - When the Supremo Tribunal Federal examines the unconstitutionality in abstract of a legal provision or normative act, it shall first summon the Advocate-General of the Union, who shall defend the impugned act or text.

932 The original text was already quite broad, but became even more extensive after the Constitutional Amendment 45 of 2004. This amendment introduced the Governor of the Federal District, as well as its Legislative Assembly as parties entitled to standing. Presenting a detailed analysis on the extended list of parties as a particular feature of the centralization trend in the STF, see, for example: Diana Kapiszewski, High Courts and Economic Governance in Argentina and Brazil (Cambridge: Cambridge University Press, 2012), at 98–101.

933 Criticizing the centralization in the STF promoted by the súmula vinculante, inaugurated by the Constitutional Amendment 45 of 2004, and the related modification in the balance of power between the highest court and the lower courts: Daniel M. Brinks, “Judicial Reform and Independence in Brazil and Argentina: The Beginning of a New Millennium?,” Texas Law Review 40 (2005): 595–622, at 618–621. The Republican Constitution of 1988 prohibits the standing of one single body, as stated in its article 125,
intent is to strengthen the abstract control as a peculiar mechanism of correction of the more general system of concrete judicial review. It is worth noting that the vast lists of rights that are protected in the Constitution have contributed to increase the STF power.  

At the state level, by symmetric considerations concerning the federal sphere, the following actors are authorized to exercise abstract and concentrate reviews based on alleged violations of the state constitution: the state governor, the directing board of the state assembly (panel composed of the president, two vice-presidents, and four vice-secretaries elected by the state assembly), state general prosecutor (Procurador Geral de Justiça), political parties represented in the state assembly, confederation of labor unions or professional association of a statewide nature, and the state committee of the national bar association.

Along those lines, the mayor, the directing board of the municipal chamber (panel composed of the president, two vice-president, and four vice-secretaries elected by the municipal assembly), and political parties represented in the municipal assembly should...
be authorized to initiate the unconstitutionality action arising out of an arguable conflict with provision(s) of the state constitution.

C. Mechanisms of Appointment for the Brazilian Supreme Court and State Supreme Courts

The mechanism of appointments for justices of the STF was transplanted from the U.S. Constitution. Although the STF has eleven justices that are subject to mandatory retirement at the age of seventy years old, the remaining provisions are similar to the U.S. Constitution. In Brazil, justices (and state supreme court and state judges) are entitled to life tenure. The President nominates Justices to the STF subject to confirmation by the Senate.936 It has also been considered by some commentators in Brazil that the STF is “susceptible to pressures by the ruling political majority” because justices are chosen by the President, and duly confirmed by the Senate.937

In this scenario, the STF has important features of the archetypal recognition judiciary. By contrast, the archetypal career judiciary is preponderant with regard to state judges and state supreme courts judges in Brazil. This is so because state judges enter at a young age and early in their careers – most of the time immediately after fulfilling the requirement of three years of legal practice.938 About 80% of the state supreme court judges must have been admitted to the career path through a civil service entrance examination consisting of written or written and oral tests. After two years into their career path, ordinary judges are entitled to tenure, protection against reduction of their payments, and restrictions on their removability.

All state judges and state supreme court judges are subject to the same constitutional requirements across Brazilian states. Thus, there is uniformity regarding the necessity of written exams for entrance in the profession and how one progress in the


938 Cappelletti, Judicial Review in the Contemporary World, at 63, stressing that European continental judges tend to be “career judges,” with professionals entering the judiciary at a very early age, having their promotion to higher courts conferred upon a seniority basis, and with the focus of their professional training being legal-technic – in contrast to the common law judge who is policy-oriented.
career. Each state supreme court administers these exams and makes promotion decisions, as a prerogative of their federalism powers. The Brazilian national bar association participates in all stages of the public examination. The promotion from ordinary judge to judge of the state supreme court (located in the capital of each state of the Union) is made under two criteria: seniority or merit, alternately.

Regarding the composition of state supreme courts, as we have said before, 80% of the members of those courts are forged in their judicial career path. The remaining 20% are spread among public prosecutors and public defenders (that also have their own particular career path), and members of the state bar.

Because state supreme court judges are not directly appointed by governors, decisions of the state supreme courts in the context of abstract review are expected to be less politicized than their counterpart in the STF (federal level). In this fashion, lower-court judges in Brazil follow mechanisms of appointment that seek to remove political influences from that process. Such process focuses on securing a meritocratic, professionalized, and open exam, with state courts system being isolated politically. Nevertheless, there may be conflicts arising out of different conceptions of the role of the judiciary across jurisdictions. Those conflicts occur between old traditional formalistic judges and the more modern and socially conscious judges. This tension is particularly perceptive within the judicial ranks of Brazil.

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939 According to the specific command of article 93, I, of the Constitution of 1988, which determines the participation of the national bar association in every phase of the public examination.


941 In the context of continental constitutional courts compared with the U.S. Supreme Court, mechanisms of appointment have already been cited as a form to reduce diversity in the court: John Ferejohn and Pasquale Pasquino, “Constitutional Adjudication: Lessons from Europe,” Texas Law Review 82 (2004): 1671–1704, at 1701–1702. This is relevant because the more diverse is the court, the smaller the likelihood of consensus with regard to a particular issue at bar.


III. THE HYPOTHESIS AND DATASET

This research focuses on the cases of abstract review litigated before twenty-five Brazilian state supreme courts. Each party wants to maximize what can be regulated (or not), at some point enhancing its political powers. In this context, competences or attributions of one party necessarily reduces the influence of the other party. The legislation reviewed by the state supreme courts reflects a conflict that could not be solved politically within the sphere of the state. Conflicts emerge between political actors that could not be reconciled without the intervention of state supreme courts.

When judging such conflicts, the state supreme court (or specialized panel) is constrained by the Republican Constitution as well as by the clauses of mandatory repetition, which have been interpreted by the STF as safeguards of federalism. Interestingly, the judges who sit in the specialized section of state supreme courts are among the most experienced and most knowledgeable according to the election of their own peers.

The Republican Constitution of 1988, article 93, in the last part of § XI, determines that half of the positions of the specialized panel shall be occupied by the most senior members of the state supreme court, while the remaining half shall be filled by election by the state supreme court sitting en banc. This is different from state supreme courts that do not have specialized sections or panels where, theoretically, every judge of the state supreme court has a vote.

Specialized panels of state supreme courts are not a mandatory constitutional requirement. Instead, they are an option that article 93, § XI, of the Republican Constitution left to be decided for every state whose state supreme court has more than twenty-five state supreme court judges.\textsuperscript{944} The total number of judges in a state is tentatively proportional to the population of the state and the related judicial demand (article 93, § XIII, of the Constitution). The creation of the specialized panel is informed by complete discretion of the state supreme court, sitting en banc, in terms of its internal

\textsuperscript{944} For arguments supporting the discretionary nature of the creation of a specialized panel, and arguing that the Constitutional Amendment 45 of 2004 reinforced the existence of specialized panels: Alexandre de Moraes, “Órgão Especial e Delegação Constitucional de Competências Jurisdicionais, Disciplinares e Administrativas do Tribunal Pleno,” Revista de Direito Administrativo (2007): 292–305, at 294–297.
procedural law. Hence, it is based technically on a judgment of convenience and opportunity.\textsuperscript{945}

This study argues that this constitutional option was made to benefit and respect the federalism powers that remained with the states and their related jurisdiction. In order to comply with the constitutional provisions, the minimum and maximum numbers of state supreme court judges in the composition of the specialized panel shall be eleven and twenty-five, respectively.\textsuperscript{946} The composition of specialized panels of state supreme courts must respect the alternation of classes for the 20\% of the so-called \textit{Quinto Constitutional}. This percentage, in its literal translation from article 94 of the Constitution, means that one fifth of the tribunal (or specialized court) must be formed by members of the state public prosecution, public defender, and the state bar association.

A note about the jurisdiction of specialized panels is required. Specialized panels absorb all competences that originally belonged to the \textit{en banc} tribunal (plenary), having the complete jurisdiction of the subject matter.\textsuperscript{947} Therefore, there is no appeal from the decision of the specialized panel to the state supreme court. The specialized panel is a court itself. It concentrates on decisions that before its creation would have been made by the full state supreme court, i.e., by all of state supreme court judges – namely, by all those who have been promoted in the career and have the status of a court of appeals judge.

It is also noteworthy that where specialized panels have been created, solely the judges who are in such panel rule on subject matter of the abstract and concentrate control of constitutionality. By contrast, in the states lacking a specialized panel, every

\textsuperscript{945} Moraes, \textit{Direito Constitucional}, at 561–562.

\textsuperscript{946} There have been criticisms about the number of twenty-five as being too large ultimately jeopardizing deliberation, as argued by: Nagib Slaibi Filho, \textit{O Órgão Especial na Reforma da Justiça}, (2011), last accessed November of 2013, and available at: ww.nagib.net/index.php/publicacoes/artigos/constitucional, at 2. The Professor and member of the state supreme court of Rio de Janeiro notes, at 2, that the number of twenty-five judges was the determination of the Constitutional Amendment 7 of 1977 (which modified the militarily-enacted Constitution of 1967).

\textsuperscript{947} Article 93, XI, of the Constitution of 1988, and the Administrative Resolution no. 2, of the National Council of Justice, of the 14.03.2006 (\textit{Enunciado Administrativo do Conselho Nacional de Justiça-CNJ}), last accessed February, 2014, and available at http://www.cnj.jus.br/atos-administrativos/atos-da-presidencia/314-enunciados-administrativos/ 11158 enunciado-administrativo-no-2, establishing that where it is created, the specialized panel has the delegated competences of the state supreme court \textit{en banc}, with the quorum for decision by the panel being one of absolute majority of its members.
state supreme court judge has a vote, while cumulating other judicial functions with such state constitutional review.

Furthermore, there is a particular requirement of reserve of judgment by the plenary that must be fulfilled when the state supreme court (or when a specialized panel) decides the unconstitutionality of a law – as opposed to a single judge. The requirement of plenary is essentially a constitutional command determining that only the absolute majority of all the judges of a given court – i.e., considering the full bench or the court *en banc* – can declare the unconstitutionality of a law, as determined at article 97 of the Brazilian Constitution.

The requirement of reserve of judgment by the plenary applies exclusively to the declaration of unconstitutionality, but not to declare the constitutionality of a law or normative act. The declaration of constitutionality dismisses the plenary requirement due to the general legal presumption of constitutionality of laws. According to this requirement, only the absolute majority of the members of the court sitting *en banc* – or the specialized panel, in the states where they exist – can declare a norm to be unconstitutional. In the current Brazilian constitutional text, the plenary requirement also applies to the principal and concentrate forms of judicial review as long as such unconstitutionality has not yet been recognized by the state supreme court (or its specialized panel) or the STF sitting *en banc*.

The requirement of plenary (or full bench) trial applies regardless of whether previous acknowledgment occurred in principal or incidental forms. This requirement is particularly important to this research, because it focuses on the principal, concentrate, and abstract controls exercised by the state supreme courts across the Brazilian federation.

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948 Barroso, *O Controle de Constitucionalidade no Direito Brasileiro*, at 120.

949 The current writing of article 93, of the Constitution of 1988 is the following: “A complementary law, proposed by the Supremo Tribunal Federal, shall provide for the Statute of the Judiciary, observing the following principles: (…) XI - in courts with more than twenty-five judges, a special body may be constituted, with a minimum of eleven and a maximum of twenty-five members, to exercise the administrative and jurisdictional duties delegated by the full court, one half of the members being chosen by seniority, and the other half by voting of the full court.”

950 Barroso, *O Controle de Constitucionalidade no Direito Brasileiro*, at 120, stating that the requirement initially was applicable only to the incidental and diffuse review. Nowadays, the Professor argues, there is no distinction, and the requirement applies to all hypotheses of review.
At this stage, we can hypothesize, primarily based on the constitutional arrangement, that specialized panels would affect the performance of the state supreme court judges, because only states with more than twenty-five appeal judges are allowed to have specialized panels. Considering those institutional arrangements, we elaborated the following null hypothesis:

H0: The existence of a specialized panel has no effect on performance measures across state supreme courts.

Our dataset includes all the cases of abstract review decided between January 1, 2006 and December 31, 2010 (mainly cases of ação direta de inconstitucionalidade or representação de inconstitucionalidade) across twenty-five state supreme courts – also named Court of Appeals in some Brazilian states. Our dataset is summarized by Table 6.1 (detailed information can be found in Table 6.2).

We researched the twenty-seven states of the Brazilian federation. Most unfortunately, the websites of Goiás and Espírito Santo were not able to run the pertinent search for this research, i.e., the selection of cases decided by the state supreme courts between January 1, 2006 and December 31, 2010. We did not consider the claims of mere incidental declaration that are converted in abstract, as ruled by state tribunals. In states

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951 Due to the fact that this research is focused on the abstract control, we limited our analysis to the following types of lawsuits: direct action of unconstitutionality (ação direta de inconstitucionalidade or representação de inconstitucionalidade, as some states call the ação direta de inconstitucionalidade at the state level); direct action of unconstitutionality based on the lack of particular measure (ação direta de inconstitucionalidade por omissão) and declaratory action of constitutionality (ação declaratória de constitucionalidade). All the information was gathered between March of 2012 and December of 2013, and was available in the website of each state supreme court. It is noteworthy that the search mechanisms of the websites are not uniform across Brazilian state supreme courts. Hence, in some states (such as in Bahia), there was no specification of the type of lawsuit involved. In this instance, we read the references of each lawsuit in order to determine if it was a lawsuit concerning: Adin, ADC or Adin by omission. In addition, in some states (as it occurred with Rio de Janeiro), the search tools of the website did not distinguish among the classes of action, listing all the cases of constitutional review which the specialized panel decided. In those hypotheses, we had to read the summary of the judgment to determine if it was not a case that the specialized panel has decided based on the concrete review. Recurrent examples of concrete review adjudicated by state courts are: incidental declaration of unconstitutionality (a procedural action that occurs in the course of another lawsuit, which is the main legal action), and writ of injunction (mandado de segurança).
where the absolute number of abstract actions was larger than forty, we used a random sampling.\textsuperscript{952}

For each case, we obtained the following information divided in ten factors: (1). Decision favorable or unfavorable to the petitioner. (2). Identity of the petitioner (governor, state congress, other political actors, other). (3). Nature of the claim (administrative, tax, contractual, election law, environmental law, procedural constitutional law, or other). (4). Number of dissent votes. (5). Length of decision (measured by number of words). (6). Time lag (from the moment the petition was filed with the court until the decision \textit{in limine} or the final one). (7). Distinction if the decision was final or \textit{in limine}; and, if it was final, whether the lawsuit was extinguished with or without merits. In the former case, we also searched whether there was a modification of the decision made \textit{in limine} or the court ordered an interim measure (namely, if the injunction was granted and the final decision ruled on the constitutionality of the law), and if the injunction was denied, whether the final decision has considered the norm constitutional. We also researched whether the effects of the final decision were modulated (i.e., whether the decision did not follow the general rule of retroactive effect applicable to Adins from the date when the decision was published). We should emphasize that the Republican Constitution and the federal law 9868, of 1999, are silent about the possibility of modulation of effects when the arguable violation of constitutionality arises out of the state constitution. Hence, we investigate if state supreme courts were using this alternative. (8). Whether the decision recognized the normative act of the state or municipality as a mandatory clause of repetition (as mirroring the federal constitution) or is the decision silent? This is relevant because such repetition of the federal constitution works as a pragmatic check on the state constitution. (9). Number of judges involved in the deciding panel. (10). If there were citations to other courts, we looked at which court they cited (STF; the \textit{Supremo Tribunal de Justiça} – STJ,

\textsuperscript{952} Table 6.1 illustrates the information we gathered for twenty-five states of the Brazilian federation. Importantly, if a particular state had more than a total of forty actions of abstract review, we effectuated a random sampling. Aiming at maintaining a proportional number of actions in each state, we utilized a random sampling procedure in order to assure such final proportional representation in our dataset. The random selection operated as the following: Mato Grosso, Pará, Pernambuco and Rio Grande do Norte: one in every two decisions was analyzed and coded; Santa Catarina: one in every three decisions was analyzed and coded; Federal District and Minas Gerais: one in every five decisions; São Paulo: one in every six decisions; Rio de Janeiro: one in every eight decisions was analyzed and coded.
which is the supreme court of Brazil for infra-constitutional law, or other state supreme court). This is particularly relevant because the number of decisions by lower courts following the STF lacks systematic research. Moreover, the Constitutional Amendment 45, of December 2004, which established the *súmula vinculante* – a mechanism akin to biding precedent – became effective before the period researched. In this direction, we test if the centralization that the STF tried to achieve with the Amendment is actually effective.

From Table 6.1, some important variations across Brazilian states can be noticed. Some states have a small number of decisions in 2006-2010, and therefore play a less important role in our dataset. However, in reference to those states with a considerable number of decisions, we can see significant differences.

Starting with the existence of dissents, we can see that DF, Minas Gerais and São Paulo seem to be less prone to unanimous decisions than Rio de Janeiro, Mato Grosso, Santa Catarina and Pará. Concerning delays, we can see that they are less significant in DF, Minas Gerais, Mato Grosso and São Paulo, while being more significant in Pará and Pernambuco. Rio de Janeiro is quite close to the national average. Finally, length (number of words) indicates shorter decisions in Rio de Janeiro and Mato Grosso and longer in DF.

Out of the twenty-five state supreme courts for which we have information, ten currently have a specialized panel (Ceará changed in 2010), with the remaining fifteen deciding *en banc* (the two missing states also decide *en banc*). The question to be empirically researched is the extent to which these variations are explained by the option for a specialized panel.

As previously mentioned in this Part, article 93, § XI, of the Republican Constitution of 1988 does not determine which states should or should not have specialized panels. It merely grants the discretion to each state supreme court in order to create such panels, provided the state supreme court has twenty-five judges (or more). The size of the court involves a difficult balance between the time necessary to reach a decision and the quality of the accuracy of the award. Accordingly, the larger the number of judges in a constitutional court, the higher the costs of deliberation – although with

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fewer possibilities of mistake than if the court only had a single judge.\textsuperscript{954} In light of the above, out of the twenty-five state supreme courts for which we have information, ten currently have specialized panels and fifteen decide \textit{en banc} (i.e., do not have a specialized panel).

Among those fifteen state supreme courts deciding \textit{en banc}, ten (approximately 67\%) do not meet the constitutional requirement of having more than twenty-five judges sitting in the state supreme court. Out of the fifteen states researched that do not have specialized panel, five states (33\%) have more than twenty-five judges sitting in the state supreme court. This data is compiled in Table 6.1. Despite meeting the general requirement for creation of specialized panel, those five states decided not to create such panels.

According to our data, as compiled in Table 6.1, the states that have more than twenty-five judges sitting in the state supreme court but do not have a specialized panel are the following: Bahía, Ceará (which created a specialized panel in 2011), Maranhão, Goiás, and Mato Grosso. The first three are located at the northeast; and the last two are located in the center-west region. Article 93, XIII of the Constitution of 1988 requires that the population and the demand for the judicial service to be high in order to justify the creation of new positions for judges, but the provision does not specifically address state supreme court judges.

Our dataset shows that Ceará has an average lag of more than forty-seven months to decide a case of abstract review. Thus, it is not surprising that the state supreme court decided to, using their discretion, create the specialized panel recently (2011). Bahía, with more than thirty-six months as average lag, is also far above the national average of almost nineteen months. Bahía, however, opted for not creating such panel so far. It is still an open question as to how the state supreme court will deal with the issue. The remaining states (Goiás, Maranhão, and Mato Grosso) are far below the national average of lawsuits, and they do not meet the threshold regarding the volume of actions in the state judiciary.

Brazil provides a fascinating context to test the relationship between specialized constitutional review and output measures, due to variations across Brazilian state supreme courts within the same cultural and legal backgrounds. In this scenario, this research also considers that Brazilian federalism is embedded with substantial asymmetry among the states. Importantly, such asymmetry does not refer to local cultural differences, which are linked with significant economical gaps among the several states of the Brazilian federation. States located at the southeast and southern regions tend to contribute more significantly to the GDP, whereas states located at the remaining regions, particularly the North, contributed less.\textsuperscript{955}

Accordingly, all the researched states located at the south and southeast regions have specialized panels. Their performance measures are all below the national average in terms of duration and extension of the decisions. Hence, the most developed states in Brazil perceive specialized panels as efficient and their performance measures generally corroborate such understanding when compared with the national average indicators, as illustrated in Table 6.1.

At this point, we turn our attention to the types of cases (legal actions) that are presented in the dataset. Although the research encompasses cases of Adin (also called representation of unconstitutionality on the state constitutions), Adin by omission and ADC, the vast majority of our dataset comprises Adins. This is the case for three main reasons. The first one is a technical explanation: most search mechanisms in each website of the state supreme courts list Adins as the sole action of unconstitutionality. Second, the STF jurisprudence, as discussed in Part II, considers Adins and ADCs as equal actions, albeit the negative side of unconstitutionality. This understanding results in a mitigation of the general presumption of constitutionality of norms, which is so precious to civil law jurisdictions.

Therefore, state supreme courts, following the lead of the STF, do not distinguish between Adins and ADCs on the state level.\textsuperscript{956} Third, the STF website’s search only

\textsuperscript{955} According to the official statistics of Brazilian Institute for Geographic and Statistics: IBGE, based on the last census (2010), last accessed November, 2013, and available at: http://www.ibge.gov.br/estadosat

\textsuperscript{956} The case law of the STF has approached the general direct action of unconstitutionality and the direct action of unconstitutionality based on omission – even before the law 12063, of 2009 – as similar lawsuits.
recently started to differentiate between the ordinary Adin and Adin by omission – the latter being quite rare in the federal level. Thus, it is not surprising that the state supreme courts’ websites did not contain differentiation within types of Adins, until 2010.

In spite of the doctrinal admission of Adin by omission and ADC, these actions barely appear at the state level. A central issue is that not all state constitutions actually consider those types of actions by specifically mentioning them in their texts. Our findings concerning the lack of Adin by omission and ADC corroborates the understanding that state constitutions are not particularly relevant in the current national context, due to the fact that limited subject matters are left to be determined in the state constitutions.957 Our findings also validate the fact that the importance of state constitution has been mitigated.

At this stage, a note about how we define our approach to state constitution is necessary. This research was agnostic about the relevance of state constitutions, despite the reduced literature about the topic. As a matter of fact, the few authors who have briefly considered this issue had limited their claims to the reduce relevance of state constitutions in general, without detailing such understanding.958 It is noteworthy that we gathered data about each state constitution959 also in order to verify if extended standing norms regarding abstract review would significantly impact the parties who actually sue (they do not, as we will discuss further in this section).

The website of the Court itself, in its search mechanisms, did not distinguish both actions, until October of 2008, as noted by Justice Gilmar Mendes in Mendes and Branco, Curso de Direito Constitucional, at 1156. The authors point out the difficulties of knowing the exact number of direct actions of unconstitutionality arising out of omissions.


958 Reference is made to the most famous Brazilian constitutional treaties: Moraes, Direito Constitucional, at 605–607, criticizing decisions of the STF removing from state constitutions specific competences; citing the several instances that the STF declared state constitutional norms as violating the federal Constitution: Mendes and Branco, Curso de Direito Constitucional, at 791–797; arguing the application of the symmetry principle on the state level: Lammêgo Bulos, Curso de Direito Constitucional, at 917, Clève, A Fiscalização Abstrata da Constitucionalidade no Direito Brasileiro, at 394, and Barroso, O Controle de Constitucionalidade no Direito Brasileiro, at 205. In addition, there are no empirical studies encompassing the totality of Brazilian states and corroborating this understanding about state constitutions. For a discussion about symmetry and the mandatory federal constitutional norms that shall be repeated in state constitutions: see footnote 928, supra, and references therein.

959 See Table 6.8 (with three pages) at the end of this chapter.
Policymakers are generally not concerned with the contents of state constitutions. This reduced relevance of state constitutions is not necessarily constant in the Brazilian constitutional experience, to the extent that during the República Velha, from 1889 to 1930, state constitutions played a remarkable role.\textsuperscript{960} Despite the jurisdiction of state supreme courts being perceived as an essential component of Brazilian federalism, the role played by state supreme courts has actually diminished in the absence of state constitutional writs and/or remedies to assure their jurisdiction.\textsuperscript{961} Hence, our findings corroborate the general understanding of the reducing importance of state constitutions on their own.

Considering the general composition of the cases in our dataset, we observe that the main types of actions litigated are related to public matters. The two most frequent types of actions are related to tax law (including competences for budget matters) and administrative law (from police powers to zone regulations and traffic). The fact that tax and administrative laws are the most litigated matters replicates the federal dockets of the STF regarding Adins, because those matters are commonly litigated at the federal level as well.

The number of legitimate persons or entities entitled to have standing does not seem to affect the overall number of actions, because the main actors who actually challenge a given legislative act in court are generally the same in all the states. Importantly, the fact that particular state constitutional provisions might be broader or stricter does not appear to influence those petitioners (parties with potential standing) who actually challenge the act.\textsuperscript{962} We observe that the parties who challenged state legislative measures are the same across the dataset, namely: the governor, public

\textsuperscript{960}In this direction: Souza Neto and Sarmento, \textit{Direito Constitucional: Teoria, História e Métodos de Trabalho}, at 335–336, where the authors stress the importance of state constitutions in the U.S., and the fact that the USSC does not consistently block departures from the constitutional federal text – as often occurs in Brazil.

\textsuperscript{961}Brazilian federalism pact is considered among the so-called immutable clauses of the Constitution, as determined by article 60, paragraph four, I, of the Brazilian Constitution of 1988.

\textsuperscript{962}Rio de Janeiro, Rio Grande do Sul, and Mato Grosso would be the three states with the most flexible, i.e., most extended list for standing. This is so according to the information gathered (see Table 6.8) and considering the most flexible state constitutions as those authorizing two of the following three actors to have standing to sue in Adins: the general State Attorney, the General Public Defender, and local labor union (or local class entity), without further restrictions.
prosecutor, and legislative assembly. This probably indicates that the governors are working as a check on legislative assemblies and vice-versa, with the public prosecutor of the state being an effective agent in checking both.

Remarkably, political parties, class entities, or unions do not appear to be active in comparison with the percentage of actions on the national level. For a comparison with the national level, the percentages of Adins filed between 1988 and 2002 are the following: political parties (34%), professional unions (20%), and associations (15%). Therefore, those actors filed 69% of all the Adins.963 We argue that our preliminary results corroborate the view that understands the constitutions of the Brazilian states (and their related state legislation) as not being sufficiently relevant in practice.964 Otherwise, those active actors in the federal level would have been engaged in more aggressive litigation at the state level.

We further argue that another related explanation to the lower numbers reached when compared with the federal level refers to the role exercised by courts. We suggest that those controversial disputes at the state level are simply not arriving at the state judiciary. In this sense, those specific political actors were able to reconcile their interests without the intervention of the state supreme court, solving their disagreements politically. This is consistent with the understanding that state political actors are powerful on their own, i.e., each having their own bargaining power. Therefore, fewer conflicts are heard by the judiciary.

With regard to the conflicts actually being heard, we note that the strongest cases end up in court. We conclude so, because plaintiffs win 70.47% of the cases.965 We attribute this percentage to the fact that litigation is exercised for highly competent public legal actors, such as the governor and the general state prosecutor. Accordingly, the selection of cases seems to operate before the parties actually decide to initiate a claim.


964 Stating the lack of importance of state constitutions: Barroso, O Controle de Constitucionalidade no Direito Brasileiro, at 261.

965 Emphasis is made to the absence of similar research to which we could compare our dataset. This rate encompasses preliminary injunctions as well as final decisions.
In addition, we argue that this significant rate of success (70.47%) may be viewed as a more efficiently conducted litigation, because only parties with vast legal resources file Adins.966 This is a sharp contrast with the federal level, where associations and political parties are important litigants.967 It may also be explained by the less politicized composition of state supreme courts and specialized panels, because there is no direct political appointment by the governor, as it happens with the president in the federal level for the STF.

Accordingly, our findings corroborate the assumption that by removing political influences from the appointment mechanisms for state supreme court judges (and specialized panels), the politicization in judging state Adins was considerably mitigated. Hence, federalism choices matter because they minimize politicization of the state judiciary, allowing it on the federal level.

Furthermore, we clarify that the Priest and Klein model for litigated disputes and disputes that were settled before or during litigation in the United States does not seem applicable to the decisions in abstract control of constitutionality.968 The main justification for our understanding is that the adopted procedural rules bar desistence by the party who initiated the Adin, which precludes settlements.969 There are claims in the U.S. literature that defend any litigation rate favoring the plaintiff is possible, to the extent that the 50% winning prediction defended by Priest and Klein has very difficult requirements for validation.970

966 The governor and the general state prosecutors the general state attorney office and state prosecutors, respectively, working to support their interests. There is no economical cost for such actors to use their legal team – some times also known as their famous “legal army.”

967 For instance: Taylor, Judging Policy: Courts and Policy Reform in Democratic Brazil, at 79, indicates that plaintiffs on federal Adins have around 25% chances of victory in the STF, if preliminary injunctions and final decisions are combined.


969 In that direction: article 5 of law 9,868, of November of 1999. Notice that the procedural rules of this law are also applicable at the state level.

IV. REGRESSION ANALYSIS

Our dependent variables to test our hypothesis are: length (extension of the decision measured by number of words), lag (time lag from the beginning of the action until the decision – either final or in limine), rate of dissents among the judges of the state supreme court, whether or not the decision favored the plaintiff, and whether or not the court that issued the final decision cited other courts (STF, STJ, or other state supreme court). If a state supreme court (also known as court of appeals) of a given state was cited, we recorded the data.

The performance measures above referred relate directly to the alleged benefits of specialization addressed in our Introduction. In this direction, quicker and better constitutional review should be observed in terms of shorter time lag, longer decisions (with deeper discussion of legal doctrines), and more citations (as part of more elaborated legal doctrines). It should also be observed an increase of dissents, since a smaller group of specialized judges has more time to develop and consider varying interpretations of the law.

Improved legal doctrine and speedy results are also mentioned as advantages of specialized courts, because judges are more familiar with the main arguments and pertinent theories of the particular field. Consequently, less time would be spent in debating or discovering the applicable law. As far this line of argument goes, a final decision would be rendered faster if a specialized panel were the issuing authority.971

The remaining variable relates directly to whether or not the decision favored the plaintiff. This is so to identify any possible bias. According to this argument, if smaller specialized courts are easier to capture, as suggested by the literature, we could expect them to be against plaintiffs more often. Importantly, this research focuses on the abstract control of constitutionality. Among the implications of this control is the fact that only preselected political actors along with institutions are authorized to have standing to sue.

971 See, e.g., Dreyfuss, Specialized Adjudication, at 378, contending that the continuous involvement of the court with the specialized field would contribute to enhance quality; listing among the benefits of specialization: speed, economy of scale applications, and efficiency concretized by streamlining of repetitive tasks: Jeffrey W. Stempel, “Two Cheers for Specialization,” Brooklyn Law Review 61 (1995): 67–128, at 88–89; arguing that specialized courts have a higher probability to correctly decide complex fields – as in cases involving tax law: Revesz, Specialized Courts and the Administrative Lawmaking System, at 1117.
Therefore, the nature of the specific constitutional review researched (i.e., abstract) would facilitate the detection of bias across our dataset.

Empirical research considering such constitutional adjudication is often questioned in light of potential selection bias. Our goal is not to simply examine which tribunals decide faster or produce better law, in general. After all, the state judiciary of the most organized states would be expected to have such panels. This research investigates the consequences of having a specialized panel. Had we merely focused on the existence of specialized panels, it would make no difference.

According to our preliminary findings, however, had the state of Bahía enacted specialized panels, the decisions would be faster, while presenting an increased likelihood of dissent and dissent rates.

This is so, because our preliminary findings show that the existence of a specialized panel is significant relevant for the duration of the procedure and dissent (rate and likelihood). Importantly, there are no dataset to which we are capable to compare ours.

In addition, as emphasized earlier, the specialized panel is created merely as an administrative measure, and upon the discretion of each state supreme court, provided that the number of lawsuits is high enough to justify such creation, and as long as there are twenty five members in the state supreme court.

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972 For data about Bahía, please see our discussion on the previous section, pages 220 and 221, supra.

973 The current article 93, XI, states that half of the specialized panel shall be formed by the most senior members of the state supreme court and the remaining half shall be determined through election by all members of such state supreme court. Noting that before the Constitutional Amendment 45 of 2004, the composition of the specialized panel was controversial, and that reasonability and efficiency ought to be considered in the creation of specialized panels: Moraes, Órgão Especial e Delegação Constitucional de Competências Jurisdicionais, Disciplinares e Administrativas do Tribunal Pleno, at 292–293.

974 As stated in article 93, XI, of the Republican Constitution and our discussion in Part III, supra. Furthermore, the creation of specialized panels must occur in public sessions of the Court, in accordance with Article 93, X of the Constitution. Notice that our dataset starts in 1st January, 2006. By that time, the Constitutional Amendment 45 of 2004 had already clarified the composition of specialized panels. Hence, there has been no discussion or controversy when Ceará created its new specialized panel, in 2011. Efficiency is the reason cited for creating Ceará’s specialized panel, as stated in: http://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=10&ved=0CGYQFjAJ&url=http%A7%FC%Fwuw.tjce.jus.br%2Finstitucional%2Fpdf%2FDISCOUSOR_ORGAO_ESPECIAII.pdf&ei=wOgVfS18K6sACjjoAw&usg=AFQjCNEyxbCEajjU9dFIFxjZWXuDQbYwUA&sig2=mms_HKT7q-uqTZHVk5Xng&bvm=bv.89947451,d.cXY (accessed April, 2015).
Table 6.2 presents simple correlations with the most important results being highlighted in yellow. They indicate that a specialized panel is positively correlated with the existence of dissent opinions (which we can intuitively assign to the Federal District, Minas Gerais, and São Paulo on Table 6.1). Likewise, they are negatively correlated with time lag, i.e., the duration of the lawsuit measured in months. Length (number of words) seems positively correlated with the existence of dissents, which appears plausible. Finally, citations are positively correlated with length and dissent – two results not very surprising. Those findings are consistent with the idea that the more citations a decision has, the longer (in terms of words) and more likely it would be to cite other courts.

We turn next to our regression analysis, for which we consider several independent variables. As controls, we include specialized panels (which is the variable we want to discuss), number of judges in the deciding court for each specific case (to control for variations since not all judges are present in all cases), decision in limine and decision on rejecting the petition due to the inexistence of merits (reflecting the work demanded from the court), type under constitutional review (namely administrative, tax, contract, election, and procedure), and existence of citations (in reference to STF, STJ, or other state supreme courts). We also include type of plaintiffs and defendants and the existence of retroactive effect in other specifications, but the results are largely consistent.\footnote{These additional regressions are presented in Table 6.7.}

Table 6.3 reports the correlations across control variables in order to identify potential problems with multicollinearity, with the main results highlighted in yellow. We observe that few controls are correlated. Type of law under constitutional review presents some negative correlations (when a case is about tax law, the same case is not about administrative law or procedure). A specialized panel seems to be correlated with decision in limine (positively) and constitutional procedural law (negatively).

All regressions include fixed effects in reference to states. Our additional findings, based on our main regressions presented in Table 6.4, show that the existence of specialized panels appears to be positively correlated with dissent (likelihood of dissent and dissent rates). Because there were 103 dissents in a universe of 630 decisions, we
note that specialized panels increase the likelihood of dissent as well as the rate of dissent. This increased likelihood remains valid, even when controlling for the states which are heavily represented in the sample (fixed effects for the states of Rio de Janeiro, São Paulo, Santa Catarina, DF, and Minas Gerais are included, but not reported in Table 6.4 for all regressions).

Concerning the duration of the lawsuit (our dependent variable called “lag”) and the length of the decisions, the existence of specialized panels has a positive effect on length (but not statistically significant) and a negative effect on duration (which is statistically significant). In both regressions, the dependent variables seem to be quite random. Therefore, we should not put a lot of emphasis on the controls that seem statistically significant (number of judges, decision in limine, citation STF, citation STJ, non-merit decision, types of law). The duration – our time lag variable –, by being negatively affected by the existence of specialized panels, corroborates the claim that specialized courts decide cases quicker. Accordingly, specialized panels reduce the duration of lawsuit.

In addition, citations of other courts and the outcome of the case (the decision being pro-plaintiff) do not appear to be affected by specialized panels. Although, in these two cases, the quality of the regressions seems consistent. Number of judges seems to increase, while non-merit decision seems to decrease the likelihood that the decision is pro-plaintiff; non-merit decision appears to decrease the likelihood of citations. For a specific illustration of the citations of state supreme courts, see Table 6.6.

The main explanation for specialized panels being related to an increase in the existence of dissent and its rates refers to the composition of the panel itself, in light of the career archetypal that we detailed in our previous Section. There is no political indication for state supreme court judges – if one considers the composition of at least 80% of the court being of career state judges.

With regard to the remaining 20%, it is composed of public prosecutions and public defenders (both having their own career path, respectively), and members of the state bar. Hence, political appointments have been generally removed from the

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976 Dreyfuss, *Specialized Adjudication*, at 378.
nomination process for state supreme court judges.\footnote{977} It is also noteworthy that the particular composition of specialized panels as mainly a career judiciary supports the rebuttal of potential unattractiveness of the work. As we have discussed earlier, a common point against specialization is the quality of those in the specialized bench. The repetitive nature of the work would not help to attract and retain the most brilliant minds of the legal profession.\footnote{978} This argument, however, does not apply to specialized constitutional panels in Brazil, because of its archetypal career composition.

Due to the fact that all judges who sit in the specialized panel are among the most senior and most reputable, it might be expected that they have less incentives to compromise (i.e., accept the other opinions of other well-known judges). By contrast, one could argue that life tenure and the stability of judicial financial compensation ultimately lead to judges being “(…) kept in line if at all mainly by informal norms of judicial propriety and restraint, and informal norms are likely to be more effective the smaller the group in which they are operative.”\footnote{979}

This understanding has been cautioned as valid for federal district courts that first hear cases in panels, but not necessarily for constitutional courts in general.\footnote{980} Also, with regard to federal courts, it has been previously contended that consensus would be expected, because specialized panels should be small enough for the court to speak in “one single voice.”\footnote{981}

A counterargument to such rationale is the fact that dissent opinions in specialized panels are not perceived as necessarily against the court itself. All the judges sitting in the

\footnote{977} Article 94 of the Constitution of 1988 determines that one fifth of the State Supreme Court (or specialized panels) must encompass public prosecutors with more than ten years in the career, and lawyers with reputable legal knowledge and unquestioned character, with more than ten years of legal practice. Each class (public prosecutor or the state subdivision of the national bar association) designates six names for the State Supreme Court. The latter will choose three names of such list, and forward the short list to the Governor. Hence, the tribunal (State Supreme Court or specialized panel) is directly involved in the appointment of their new member also with regard to those joining the court through the clause of the Quinto Constitucional.

\footnote{978} See supra references in footnote 903.


\footnote{981} Dreyfuss, \textit{Specialized Adjudication}, at 378.
specialized panel are experts in the constitutional field. They also have more time and resources to study the law in depth, so dissents may appear higher.

A recurrent counterargument is that all judges in Brazil – whether they sit in the state supreme court or not – are entitled to the federal constitutional protections of tenure and stability. Moreover, one usual incentive for compromise is to reduce the number of appeals. This incentive is not present because, in practice, specialized panels operate as the court of last resort. Importantly, they operate in such fashion, while also being the court with original jurisdiction over abstract state constitutional control.

Another common incentive for agreement has its impact reduced in this context: the prospect of promotion. Appeal judges who sit on the specialized panel are not further promoted at the state level because, in terms of the state judicial structure, they have reached the apex of their careers (and there is very little tradition of state supreme court judges being appointed to the STF). Therefore, the main reasons that are usually presented as supporting consensus are overall not present in the specific cases of specialized panels.

As for as the outcome of the cases and the existence of specialized panels, our preliminary findings do not show a significant correlation. The results actually support the view that appellate judges on specialized panels are more independent than originally thought.

The conventional perception suggests that it would be easier for the government (or interested groups) to convince a small number of judges sitting in panel than it would be if there were the full numbers of state supreme court judges.

The traditional conception is not validated by our data. The possibility of capture by interest groups to the reduced number of specialized panel does not seem applicable.982 We contend that the archetypal of career judiciary and their meritocratic selection explain this result.

Also supporting the view that specialized panels are more independent than originally thought is the fact that it would be easier for the public administration to be aligned with the state supreme court judges in cases relating to public matters, such as

982 For the distinct moments when capture has been pointed out to occur: see footnote 902, supra.
administrative and constitutional procedural law. This would be the case, due to the potential for occurrence of government structural bias.\textsuperscript{983}

Accordingly, it would be less difficult for the administration to convince fewer judges of the administration’s own interests – with the administration succeeding in such cases. Nevertheless, more research needs to be done to provide further insights. It is worth reiterating that even in the field of administrative law, there was no statistical significance regarding the success of the administration.

The fact that citations of other courts do not seem to be directly related to the existence of specialized courts is counterintuitive.\textsuperscript{984} One would expect that, in an effort to convince their equal peers, the simple mention of how other courts decided in similar cases might be perceived as a valid strategy. However, it may be that citing other courts that are hierarchically superior – STF and STJ – ultimately would work as an authority argument instead of mere persuasion. In addition, it is unclear how much access state supreme courts have to past decisions of other state courts. State courts decisions, if not polemical, are limited to publication in the state official repository, not being published nationally.

We address the specific citations of other courts next. According to Table 6.5, the influence of the STF in cases of constitutional review is quite remarkable because the STF is mentioned in 56% of the decisions by state supreme courts. The courts citing the STF are widespread in our dataset, not being concentrated in particular regions. Consequently, it may be understood as one possible effect of the current system akin to precedent in Brazil in constitutional matters.

\textsuperscript{983} E.g., Dari-Mattiacci, Garoupa, Gomez-Pomar, State Liability, at 801–802.

\textsuperscript{984} Ferejohn and Pasquino, Constitutional Adjudication: Lessons from Europe, at 1692–1693, where the Professors argue that internal deliberation in constitutional courts in Europe – based on persuasion and reasoning to achieve a common course – are preponderant over external deliberation, which focuses on convincing actors outside the group, i.e., external to the court. Along these line of reasoning, despite the sessions of the specialized panels or tribunals being open to the public in Brazil, it is expected that due to the lower numbers of state supreme court judges in a specialized panel, face to face debates would be easier, with probably a higher chance of consensus to be achieved. This would be the case, because rarely anyone watches the specialized panel (or tribunals) sessions.
There have been discussions about the existence of precedent and the scope of it in Brazil.\textsuperscript{985} We shall emphasize that such discussion has occurred even before the Constitutional Amendment 45, of 2004,\textsuperscript{986} officially brought mechanisms that may be characterized as having the legal effect of \textit{stare decisis}, which in Brazil is implemented under a procedural institute named \textit{súmula vinculante}.\textsuperscript{987} The Court has sparsely utilized this institute.

Therefore, the doctrines of symmetry between state and federal constitutions and limitations of standing requirements by the STF have both operated to not only reduce the caseload of the STF, but also to centralized the guidance regarding the pertinent decisions of abstract control in the STF. As stressed earlier, such doctrines precede the Constitutional Amendment 45. Nevertheless, the implementation of the reform of the judiciary by that amendment may have increased the number of citations. Hence, state supreme courts cite the STF in abstract review, but do so as bound, in practice, by hierarchical precedent.

Only 3.7\% of the decisions mention the STJ, which is consistent with the subject matter being researched – namely, abstract constitutional review of state and municipal laws in light of the state’s constitution. It was not expected to have state supreme courts citing the STJ, because constitutional law and related conflicts are within the realm of the jurisdiction of the STF.

As for citation of decisions of other courts of appeal, the percentage is quite low. A small percentage of 8\% of the total decisions of state courts of appeal in our dataset – also named state supreme courts – actually mentions other state supreme courts. This may be indicative of isolation across the state supreme courts. Such understanding is also coherent with the lack of incentives for state supreme courts (or specialized panels) to


\textsuperscript{986} Notice that the STF has established legal doctrines aiming to reduce the cases heard by the Court, by requiring litigants in extraordinary appeals to show the constitutional question (and specific constitutional textual provisions) that directly influenced the case, since the judgment at the trial instance (the so-called \textit{prequestionamento}).

\textsuperscript{987} With regard to the number of \textit{súmula vinculante}, the Court has been very considerate to lower courts, enacting few \textit{súmulas}.
research or cite previous decisions of other courts that are situated at the same hierarchical level in the legal order.

Notwithstanding the low number of citations to specific supreme courts (8%), the one of Rio Grande do Sul is the most cited across the dataset.\textsuperscript{988} The court of Rio Grande do Sul has a strong tradition of acknowledging the existence of abstract review of state and municipal norms that precedes any constitutional provisions.\textsuperscript{989} The court, located in the South region of Brazil, has a reputation of being modern and independent. This reputation dates back to the \textit{Direito Alternativo}, a strong legal movement emphasizing the effectiveness of fairness in the case at bar – instead of concerns related to legal formalities.\textsuperscript{990} This trend is controversial. It has been argued that the \textit{Direito Alternativo} was not the general rule and that the traditional view of the majority of judges may have had a chilling impact on the filling of rights claims.\textsuperscript{991}

Rio de Janeiro and Minas Gerais are cited, and, to a lesser degree, São Paulo. All of those courts are in the Southeast region of Brazil. The state supreme courts of Roraima, Pernambuco, and Rio Grande do Norte were all cited once. Because Brazil is not a common law jurisdiction, the fact that judges in a given state supreme court cited another state supreme court is definitely a greater sign of prestige and knowledge for those being cited. Those cross-state supreme courts citations are not mandatory by the Brazilian civil law system, thus increasing the value of those citations.

In conclusion, we do not find specialized panels having an important effect on several performance measures while impacting dissents (likelihood and rate) as well as duration. Therefore our empirical analysis provides mixed results in terms of confirming

\textsuperscript{988} Ferejohn, and Pasquino, \textit{Constitutional Adjudication: Lessons from Europe}, at 1680–1681, note that there is a tendency for judges in different courts to mention the reasoning of past courts on related issues – which would increase legitimacy of the decisions. Nevertheless, if state supreme courts and specialized panels do not have access to other state courts decisions in general, it increases the difficulties for citing courts at the same hierarchical level albeit not close located geographically.

\textsuperscript{989} Clève, \textit{A Fiscalização Abstrata da Constitucionalidade no Direito Brasileiro}, at 391.

\textsuperscript{990} Amilton Bueno de Carvalho, \textit{Magistratura e Direito Alternativo} (São Paulo: Acadêmica, 1992).

the theoretical literature on the benefits of specialized constitutional review to the extent that they do not seem to be better. Still, there are statistically significant differences.

V. Conclusion

This research tests for the effect of the existence of specialized tribunals when state supreme courts rule in the abstract form of judicial review – namely: Adins and ADCs. There are four main contributions of this research to the literature. First, we constructed an original dataset comparing the decisions by state specialized panels to those of states without specialized panels across the Brazilian federation. Second, we further test whether the existence of specialized panels can be correlated to potential differences of court performance across Brazilian state supreme courts. Third, our preliminary findings corroborate legal treaties claiming the reduced importance of state constitutions. Finally, a natural development of our empirical analysis is that federalism choices such as the discretion granted to state tribunals in creating a specialized court are relevant, because they reduced politicization in the state judiciary.

Our empirical analysis focuses on the existence of specialized panels to rule in those abstract forms of judicial review. The results seem to point out that the existence of special panels in state supreme courts does impact performance by increasing the number and likelihood of dissents as well as by reducing the duration of the lawsuit. The outcome of the case (the decision being pro-plaintiff), the length of the decision (in number of words), and the number of citations of other courts do not appear to be related to the existence of specialized panels. The outcome of the case has been proved different from the federal level, where politicization is intense. Thus, based on our preliminary findings about plaintiff’s successful litigation rates in abstract review in Brazilian states, we argue that federalism choices are relevant, because they minimize politicization of the state judiciary.

Considering Brazilian constitutional law and limited to our preliminary findings, this research corroborates the understanding that state constitutions have reduced importance in contemporary Brazil. Even where state constitutions were more detailed in authorizing standing, the same parties remained suing across the dataset. Therefore, having a more flexible (and democratic) understanding of standing does not prove to impact litigation, so far.
Although our empirical analysis shows important impacts on performance, they do not seem substantially related to the cost-benefit analysis of court specialization. From that viewpoint, our results do not suggest that specialized panels necessarily produce better constitutional law than *en banc* decisions. However, by finding some statistical variations in court performance (number and likelihood of dissents as well as duration), we argue that a particular institutional design (specialized versus non-specialized) cannot simply be ignored.
Table 6.1: Dataset of the Brazilian State Court of Appeals for Abstract Judicial Review

<table>
<thead>
<tr>
<th></th>
<th>Number of Observations</th>
<th>Number of Cases with Dissent</th>
<th>Number of Cases with Pro-Petitioner Decision</th>
<th>Average Lag (In months)</th>
<th>Average Length (In words)</th>
<th>Has the Court of Appeals 25 or more Appellate Judges?</th>
<th>Existence of Specialized Panel</th>
</tr>
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<tr>
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<td>103</td>
<td>444</td>
<td>18.62</td>
<td>2316</td>
<td>-</td>
<td>-</td>
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<td>Decision Pro-Plaintiff</td>
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Table 6.3: Simple correlations (control variables)

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<th>ContractLaw</th>
<th>Election Law</th>
<th>Const, Proc, Law</th>
<th>Citation STF</th>
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### Table 6.4: Regressions (with state fixed effects)

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<th>Regression Four: (LOGISTIC)</th>
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The asterisk (*)/(**)/*** indicates statistical significance at ten/five/one percent. Standard deviations in parentheses.
**Table 6.5:** Percentage of Decisions Pro-Petitioner and Percentage of Decisions with Dissent

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**Table 6.6:** Citation Chart

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Table 6.7: Regressions with Additional Controls (with state fixed effects)

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The asterisk (*)/(**)/(***)) indicates statistical significance at ten/five/one percent. Standard deviations in parentheses.
Table 6.8: State Constitution information (First of three)  

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Note that all the information regarding the Constitution of the States researched was gathered at the website of the Brazilian Senate, last accessed August of 2013, and available at: www2.senado.leg.br
Table 6.8 cont.: State Constitution information (Second of Three)

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<th>Pará</th>
<th>Paraíba</th>
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<td>Yes</td>
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<td>Yes</td>
<td>Yes</td>
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<td>Yes</td>
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<td>Yes</td>
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<td>Yes</td>
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Table 6.9: Brazilian states (in alphabetical order), abbreviations and regions

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<td>Rio Grande do Norte</td>
<td>RN</td>
<td>Northeast</td>
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<td>DF</td>
<td>West</td>
<td>Rio Grande do Sul</td>
<td>RS</td>
<td>South</td>
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<td>Rondônia</td>
<td>RO</td>
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<td>SC</td>
<td>South</td>
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CHAPTER SEVEN

ADDRESSING FEDERAL CONFLICTS: AN EMPIRICAL ANALYSIS OF THE BRAZILIAN SUPREME COURT, 1988-2010

I. INTRODUCTION

Federal conflicts are an important area of the law that every Supreme Court has to address. In fact, the general role of supreme courts in the context of federal states has been considered in detail by political scientists and legal economists. They suggest that the appropriate balance of power between the union (federal government) and the states, and between the states themselves, justifies an independent and strong judiciary.\textsuperscript{994} Constitutional provisions concerning the division of competences are inevitably incomplete and, therefore, subject to potentially different interpretations and conflicts. All sides have an interest in empowering an independent court to referee these disputes. The enforcement of federalism requires a neutral third party, thus decreasing the likelihood that justices will be openly and overwhelmingly captured by specific political interests.\textsuperscript{995}

Brazil has been politically organized as a federal state since 1891. Brazilian states have significant powers but the union is largely dominant.\textsuperscript{996} Brazil has been pointed out

\textsuperscript{993} An earlier (and shorter) version of this chapter has been previously published: Carolina Arlota and Nuno Garoupa, “Addressing Federal Conflicts: An Empirical Analysis of the Brazilian Supreme Court, 1988-2010,” \textit{Review of Law & Economics} (2014): 137–168, ISSN (Online) 1555–5879, ISSN (Print) 2194–6000, DOI: 10.1515/rle-2013-0037.


\textsuperscript{996} Contending that Brazilian federalism is one of enabled center, due to the union’s entitlement to initiate legislation coupled with the success in approving such bills: Marta Arretche, “Demos-Constraining or Dems-Enabling Federalism? Political Institutions and Policy Change in Brazil,” \textit{Journal of Politics in Latin America} 5 (2013): 133–150, at 137–141.
as an extreme case of federalism. The Constitution of 1988 has delegated important competences to state governments. Unsurprisingly, the Brazilian Supreme Court (Supremo Tribunal Federal: hereinafter “STF”) is frequently asked to entertain conflicts of jurisdiction. Constitutional principles and doctrines had to be developed by the STF to address these particular issues.

Our approach to federal conflicts is empirical in nature. The U.S. Supreme Court has been the focus of much empirical attention by legal scholars and political scientists. Empirical debate about other constitutional courts is an emerging literature. More importantly, the particular case of the Brazilian Supreme Court has been studied by relatively fewer scholars and empirical work based on regression analysis is not common yet.

Federative conflicts, namely, a conflict between the union and a given state (or states) have not been researched. When adjudicating such conflicts, the STF justices are inevitably confronted with two opposing political interests: those of the union and those

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997 Arguing that Brazilian is an extreme case of federalism due to several factors, including the highly different cultures, economical development and distinguished political histories among the states: Scott W. Desposato, “The Impact of Federalism on National Party Cohesion in Brazil,” Legislative Studies Quarterly 29 (2004): 259–285, at 262.


of the states. We focus on the alignment between revealed judicial preferences when deciding those federative conflicts and presidential appointments in Brazil. Therefore, we test whether or not a justice appointed by a given President is more likely to favor the union when such President is in office than otherwise.

In the U.S., the overwhelming majority of justices nominated were originated from the party of the President. Republican Presidents tend to appoint justices who are more conservative in the political spectrum, while Democratic Presidents nominees are much more liberal. According to this line of analysis, a Republican President tends to support a justice who is against abortion, well fare state measures, general intervention in the economy, and healthcare, for instance.

In the U.S., the appointer President considers candidates as close as possible to his ideologies – this also being the case in Brazil, albeit judges being prohibited of partisan-political activities. Nevertheless, legal doctrines in Brazil cannot be generally used as a proxy to political affiliations. Brazilian legal doctrines are nonpartisan. The demarcation of ideology, thus, is not evident – in a significantly different arrangement than the existing scenario in the U.S. The legal issues debated in Brazil are framed differently than along party lines. Moreover, the fact that Brazil has a multiparty system with high fragmentation contributes to additional difficulties in interpreting regressions – in a sharp contrast with the strong U.S. bi-partisan system.

1000 In their dataset comprising 147 justices’ nominations, the Professors note that 87% came from the presidential party: Jeffrey A. Segal and Harold J. Spaeth, *The Supreme Court and the Attitudinal Model Revisited* (Cambridge: Cambridge University Press, 2005), at 180.

1001 Noting that Reagan, during his campaign in 1986, declared that he would favor judicial nominees who are “harsh on crime, opposed abortion, and favored school prayer,” *Idem*, at 181.

1002 A model considering the ideology of the President, median Senator and Supreme Court is capable of explaining 80% of the variance referring to the ideology in presidential nominees, as argued by Segal and Spaeth, *The Supreme Court and the Attitudinal Model Revisited*, at 185–186.


1004 The constitutional prohibition of judges (and justices) of exercising any partisan activities is located at article 95, sole paragraph, III, of the Constitution of 1988. This prohibition is also contained in article26, II, c, of the Complementary Law 35 of 1979 – the so-called Magistrate Statute. According to the STF, judges and justices are forbidden of the exercise of any partisan-political activity, included any affiliation to political parties due to independence concerns, as held in: Adin 1371, June 3, 1998, and having justice Neri da Silveira as rapporteur.
In the Brazilian political reality, given the highly fragmented political party system (more than ten political parties are regularly represented in the Congress), the President is usually supported by a broad coalition in the Senate. The longevity of political parties (those that started during the dictatorship in the 1970s and continue to be important today) shows to a great extent that there was no abrupt substitution of the political elites during the period we consider, but rather cyclical rearrangements of the same elites.

The Constitution of 19988 opted for maintaining all the constitutional modifications that were previously introduced during the military ruling and that ultimately led to a great extension of the legislative powers of the President. It is worth noting that in Brazil, despite the multiparty system, parties are disciplined, and the President has vast approval of the bills enacted by the legislature, with the legislative

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1005 Remarking that once Presidents are elected, they have to form such broad coalition governments, though offers of jobs and resources to distinct political parties: Scott Mainwaring, “Multipartism, Robust Federalism, and Presidentialism in Brazil,” in Presidentialism and Democracy in Latin America, ed. Scott Mainwaring and Matthew Soberg Shugart (Cambridge: Cambridge University Press, 1997), at 69–74.

1006 In such scenario, the STF would be very careful about the decisions, to the extent that this broad coalition may reduce dissent, thus decreasing the space of courts. For how dominant parties reduce the policy space of courts, see: Ginsburg, Judicial Review in New Democracies: Constitutional Courts in Asian Cases, at 81–82; and also at 248–261. Arguing that strong Presidents in Brazil had produced a democratic society due to the interference of the judiciary as a check: Marcus Andre Melo, “Strong Presidents, Robust Democracies? Separation of Powers and Rule of Law in Latin America,” Brazilian Political Science Review 3 (2009): 30–59.


1009 It is not that presidents conquered support for approval of their agenda by endless negotiations with deputes or senators on a case by case basis – as evidenced by the research of roll call votes, demonstrating that political parties are disciplined and that the approval for the president’s agenda is based on the support from the parties forming the government coalition: Figueiredo and Limongi, Presidential Power, Legislative Organization and Party Behavior in Brazil, at 154. The Professors argued, at 158, that presidents gather support as prime ministers do, namely “by building government coalitions through the distribution of ministries to political parties and thereby securing the votes they needed in congress.” Another recent study arguing that Presidents do not need to bargain on a case by case to approve legislation and discussing evidence that governors cannot undermine the executive influence in Congress: José Antônio Cheibub, Argelina Figueiredo and Fernando Limongi, “Political Parties and Governors as Determinants of Legislative Behavior in Brazil’s Chamber of Deputies, 1988–2006,” Latin America Politics and Society 51 (2009): 1–30, at 23–25.
organization being very centralized.\textsuperscript{1010} President and Congress are, in the vast majority of the cases on the same side, with the President bargaining with the parties – instead of separately negotiating with members of Congress.\textsuperscript{1011} Thus, Congress is aligned with the President, approving her or his agenda.\textsuperscript{1012} In addition, there has been a long history of executive dominance over legislative (and courts) coupled with the civil law tradition that emphasizes judges as mere applicators of the law, instead of actors involving in its interpretation.\textsuperscript{1013}

Political scientists have observed the judicialization of politics in Brazil and provide several explanations: the extension of social and economic rights guaranteed by the 1988 Constitution, the dynamics of different interest groups using the courts to arbitrate their conflicts, the lack of strong political parties and consistent majorities, the empowerment of the judiciary and prosecutors (\textit{Ministério Público}) to develop social and economic rights,\textsuperscript{1014} and the decentralization of federally collected funds to finance state governments.\textsuperscript{1015} Importantly, it has been argued that the Brazilian judiciary has been a relevant player in defining policy choices. As a consequence, unlike other Latin American

\textsuperscript{1010} Figueiredo and Limongi, \textit{Presidential Power, Legislative Organization and Party Behavior in Brazil}, at 164–165.

\textsuperscript{1011} \textit{Idem}, at 162.

\textsuperscript{1012} It has been argued that only 0.026\% of the executive proposals voted on the full Chamber were rejected, after the Constitution of 1988: Matthew M. Taylor, \textit{Judging Policy: Courts and Policy Reform in Democratic Brazil} (Stanford: Stanford University Press, 2008), at 74, based on the empirical study conducted by Argelina Cheibub Figueiredo and Fernando Limongi, \textit{Executivo e Legislativo na Nova Ordem Constitucional}, FGV (1999).

\textsuperscript{1013} Emphasizing the concentration of powers in the executive and the related executive dominance as well as the legal education based on civil law as a legacy of European colonialism, see, for instance: Rebecca Bill Chavez, \textit{The Rule of Law in Nascent Democracies: Judicial Politics in Argentina} (Stanford: Stanford University Press, 2004), at 12–14.


countries facing a transitional period from dictatorship to democracy, there is no general perception of the judiciary as deferent to the executive branch in Brazil.\textsuperscript{1016}

Empirical work to uncover patterns of judicial politics has consistently focused on direct actions of unconstitutionality (a form of abstract constitutional review): the so-called Adins (\textit{Ação direta de inconstitucionalidade}). These Adins are a form of constitutional litigation involving actors which can be more easily associated with political interests (mainly political and institutional bodies), and they relate to abstract challenges of federal legislation which are intrinsically politicized in nature (there are other forms of constitutional litigation which we will explain in detail later). Not surprisingly, they are perceived to be partisan due to the frequency they are used by groups affected by federal legislative action.\textsuperscript{1017}

However, fewer empirical studies search for a straight correlation between judicial ideology and decisions by the STF.\textsuperscript{1018} Current empirical work, restricted to Adins in the period 2002 to 2009, concludes that there is no statistical significance between appointment and the behavior of STF justices.\textsuperscript{1019}

At the same time, it has been argued that the Supremo Tribunal Federal is simply deferent to presidential policies (favoring the President in cases of disputes arising out of separation of powers). As far this argument goes, it would be easier to rule against the

\textsuperscript{1016} Taylor, \textit{Judging Policy: Courts and Policy Reform in Democratic Brazil}, at 3. Emphasizing that Brazilian judiciary as “exceptionally strong by regional standards,” Diana Kapiszewski, \textit{High Courts and Economic Governance in Argentina and Brazil} (Cambridge: Cambridge University Press, 2012), at 113. The Professor argues that interbranch interactions followed a pattern of accommodation on crucial economical cases decided after the authoritarian period, at 8 and 31, with her dataset comprising mainly Adins. Nevertheless, there have been voices stating some level of deference of justices of the STF to the executive branch with regard to separation of powers doctrines. In this direction: Brinks, \textit{Faithful Servants of the Regime}, at 136–137.


\textsuperscript{1019} Jaloretto and Mueller, \textit{O Procedimento de Escolha dos Ministros do Supremo Tribunal Federal – uma Análise Empírica}, at 175–180, in particular.
states than it is to rule against the union.\footnote{Generally, see: Daniel M. Brinks, “Judicial Reform and Independence in Brazil and Argentina: The Beginning of a New Millennium?,” Texas Law Review 40 (2005): 595–622; Daniel M. Brinks, Faithful Servants of the Regime, at 136–137, and at 141.} In this sense, state legislatures and state governments would not be significantly powerful vis-à-vis the union.

Our contribution is distinct in providing an empirical testing of judicial behavior in the STF in the context of conflicts of federal versus state jurisdiction (including, but not limited to, Adins). Furthermore, we observe empirical patterns that seem to point out a certain degree of politicization that is in contradiction to previous empirical literature.\footnote{Jaloretto and Mueller, O Procedimento de Escolha dos Ministros do Supremo Tribunal Federal – uma Análise Empírica, at 178–185.} At the same time, our results stress that judicial behavior in the STF follows patterns that are significantly different from the U.S. Supreme Court.

Our study fills a gap in the literature because it considers lawsuits of different types (not solely Adins). In addition, it also tests for centralization and possible alignment between STF justices and the appointing presidents, in the specific context of federal conflicts. Furthermore, our dataset includes all the decisions by the Court \textit{en banc} or by panels that appeared concerning federalism (as so considered by the website of the STF) between 1988 (when the current Constitution was approved) and 2010 (the end of President Lula’s term in office).

This research also contributes to the debacle of long-established legal views based on the continental tradition and which contend that the judiciary is completely immune from political pressures (neutrality based argument), with judges being disinterested actors in the final award by merely applying the law to a concrete case.\footnote{Locating the continental tradition and the dogma of the negative legislator conceived by Kelsen in the context of the review exercised by constitutional courts: Alec Stone Sweet, Governing with Judges: Constitutional Politics in Europe (New York: Oxford University Press, 2000), at 133–139. See also chapters three and four of this thesis, when we analyze the concept of negative legislator, the principle of separation of powers in light of their influence for the Brazilian abstract review, and the presence of such modality of review in the United States, respectively. Therefore, the continental tradition clearly denies the invalidation of a legislative act by the judiciary – and by constitutional courts, in particular – as having a political dimension, with judges being perceived as neutral in the Austro-Germanic influential doctrine. In this direction: Stone Sweet, Governing with Judges: Constitutional Politics in Europe, at 141–145.}

This chapter goes as follows. An overview of the Brazilian Supreme Court is presented in Part II. The hypothesis is discussed in Part III. The dataset and preliminary
empirical evidence is presented in Part IV. A regression analysis is considered in Part V and discussed in Part VI.

II. THE BRAZILIAN SUPREME COURT

The Brazilian Constitution of 1988 recognizes the autonomy to the federal union, the states, and the municipalities. However, sovereignty belongs to the Brazilian Republic, while most of the powers are centralized in the federal union. The states are entitled to self-organization, being governed by their own state constitution. They also have self-government, since they can set the appropriate rules for division of powers within the government in their own territories. At the same time, states are also entitled to political representation in the Senate. This federalist arrangement is formally protected by the Constitution. In fact, the federal structure cannot be abolished or reduced by a constitutional amendment. The Brazilian Constitution of 1988 determines the STF to be the guardian of the federal system. Moreover, according to constitutional law and established doctrines of the STF, whenever a conflict among members of the union and the state(s) takes place, the STF is the only competent court to decide it.\textsuperscript{1023}

In the STF, judicial review is exercised in two main forms: concrete or abstract review. In abstract review (constitutional litigation refers to a norm in general and not in a particular context or situation), the STF considers the so-called direct actions of unconstitutionality and constitutionality, mainly. At the same time, in abstract review (unlike in concrete review), there is a limited set of actors with possible standing.\textsuperscript{1024} In addition, abstract review is determined solely by considerations concerning the constitutionality or unconstitutionality of the challenged norm, and not the particulars of litigation. In concrete review,\textsuperscript{1025} in contrast, the STF has to consider the specific case or controversy being brought by the parties (therefore, any citizen, group or company can

\textsuperscript{1023} Article 102 of the Brazilian Constitution of 1988: “The Supremo Tribunal Federal is responsible, essentially, for safeguarding the Constitution, and it is within its original jurisdiction: (…) f) disputes and conflicts between the Union and the states, the Union and the Federal District, or between one another, including the respective indirect administrative bodies.”

\textsuperscript{1024} See article 103 of the 1988 Constitution.

\textsuperscript{1025} Concrete review is exercised by the STF mainly in the context of the Court’s original competence as well as under extraordinary appeals – the latter being responsible for the huge caseload faced by the STF: Luis Roberto Barroso, \textit{O Controle de Constitucionalidade no Direito Brasileiro} (Rio de Janeiro: Saraiva, 2012), at 127.
have standing). In concrete review, the question of constitutionality matters, but it is not the fundamental issue litigated by the parties.\footnote{Along those lines, cases of original competence of the STF include, among others: civil actions, writs of mandado de segurança, extraordinary appeals, and actions of reclamation: Gilmar Ferreira Mendes and Paulo Gustavo Gonet Branco, Curso de Direito Constitucional (São Paulo: Saraiva, 2013), at 1063–1101.}

The mechanism of appointment to the STF was transplanted from the U.S. Constitution in 1891. Although the STF has eleven justices who are subject to mandatory retirement at the age of seventy years old, the remaining provisions are similar to the U.S. Constitution. In particular, the justices are appointed by the President and subject to confirmation by the Senate.\footnote{Maria Angela Jardim de Santa Cruz Oliveira and Nuno Garoupa, “Choosing Judges in Brazil: Reassessing Legal Transplants from the United States,” American Journal of Comparative Law 59, N. 2 (2011): 529–561.} The mechanism of appointment of justices to the STF (with its recognition archetypal) is an exception to the general rule used for most court appointments in Brazil for which public examination and some career path prevail. Importantly, there is a general impression in Brazil that the decisive factor to sit on the STF is merely the will of the President in choosing a given candidate,\footnote{Barroso, O Controle de Constitucionalidade no Direito Brasileiro, at 396.} because the Senate is by and large deferent to the presidential choice.\footnote{The Brazilian Constitution, article 101, sole paragraph, requires absolute majority in the Senate, namely more than half of the totality of the senators. Personal information about the justices for the period of 1988 until 2010 is available at Table 7.7.}

Table 7.1 summarizes presidential terms and judicial appointments to the STF during the relevant period for our study (1988-2010). We can see that the most relevant presidents in shaping the STF were Figueiredo (under the military dictatorship), Collor (1990-1992), Sarney (1985-1990), and Lula (2003-2011). The remaining presidents (Castello Branco and Geisel under the military dictatorship, and Itamar and FHC under the Constitution of 1988) made significantly fewer appointments.

The Brazilian Supreme Court has attracted the attention of social scientists and interesting empirical research has been developed. A major research work focuses on the number of Adins decided between 1988 and 1998 (presidential terms of Sarney, Collor de Mello, Itamar, and FHC) and finds that a significant majority (more than 70\%) was
initiated by opposition political parties. When expanding the dataset to 2005, the authors observe an increasing average number of Adins during the first three years of President Lula’s term in office (2002 to 2005) despite the most usual petitioner being in power during this period (PT was the traditional opposition in the previous period and a major petitioner for Adins).

At the same time, they identify important effects of challenging Adins in administrative law, possibly correcting a balance of power between the union and the states, favoring the latter. They also argue that while opposition between the union and the states was an inevitable result of the centralization of government during the military regime, it was smoothed down by the Constitution of 1988. According to the authors, a new trend for centralization started around 2002, which resulted in more conflicts between the union and the states. The research points out that the distribution of Adins across the states is very unequal, illustrating diversity within Brazilian federalism. Furthermore, the findings show that the STF prefers to adjudicate Adins in limine rather than en banc. This preference is also corroborated in a quantitative research focusing on Adins between 1988 and 2006.

Recent empirical work shows that more Adins were initiated under the government of President Fernando Henrique Cardoso (1995-2002) than under the government of President Lula (for the period 2002-2008).


1032 Decisions in limine are similar to injunctions. Such remedies may be granted by the rapporteur (the reporter justice) or by a panel of the STF in particular cases – as occurs, for instance, when the subject matter in question is not novel, i.e., it has been previously discussed and voted by the Court sitting en banc.


Adins between 1988 and 2003, federalism and separation of powers emerge as the main issues addressed by the STF. The role of professional associations and private interest in empirically explaining the outcome of Adins has also been considered.

The STF does not have control of their own dockets, technically lacking general mechanisms similar to the U.S. certiorari. The STF has to rule on all the cases that reach their dockets. The absence of certiorari enables a sense of collegiality in the Court, because many decisions (if a question is not posed to the STF for the first time) are judged by one justice or specific panels. The lack of certiorari does not mean that the STF is not empowered to select some cases. The general absence of mechanisms of


1037 The Constitutional Amendment 45 of 2004 introduced two important mechanisms. The first one is the so-called general repercussion for extraordinary appeals. It already existed, in practice, as a non-written requirement demanded by the case law of the STF. The general repercussion requires that for filing an extraordinary appeal in the STF, parties must demonstrate that the constitutional question has a substantial impact, under the terms of article 102, paragraph 3, of the Constitution. Hence, the Court does not have certiorari, technically speaking, because it cannot freely choose which cases to judge. The second mechanism inaugurated by the Constitutional Amendment 45 is the “súmula vinculante.” This “súmula” works as a binding precedent for all other members of the judiciary as well as the public administration. However, solely the STF – and by a qualified majority of two thirds – can authorize the edition of the “súmulas.” Such “súmulas” are limited to constitutional matters, and have as prerequisite the existence of several reiterative decisions on the specific subject matter, as stated in Article 103-A, of the Constitution. From 2004 to 2012, the Court edited thirty-two “súmulas,” only, according to the official website of the STF. Therefore, Brazil presents a mitigated system of stare decisis, after the Constitutional Amendment 45.


1039 Kapiszewski, High Courts Economic Governance in Argentina and Brazil, at 104–106, for procedural analysis of the distribution and selection of the cases that will be judged by the President of the STF, who decides when it will be the most opportune moment to deliver the decisions.
certiorari removes a significant aspect of the U.S. political science literature with regard to the strategic behavior of justices in the U.S. Supreme Court.\textsuperscript{1040} In Brazil, the public sessions of the Court are transmitted on live television.\textsuperscript{1041} Those two factors are important because, at least in theory, they may eliminate some of the recurrent instances pointed out by the U.S. literature for strategic behavior of justices.\textsuperscript{1042}

At this point, it is appropriate to clarify that the current literature (as previously reviewed in this chapter) has been mainly developed by political scientists with a primordial focus on Adins. This line of research is understandable since it emphasizes the role played by political parties within the STF. In fact, Adins can only be started by political actors, mainly political parties (regardless of whether or not they control the Congress) and governors of the states, among others. Naturally, Adins are perceived to work as a proxy for the amount of general opposition against the executive branch. To some extent, it is a simplified methodology for empirical research (including coding) and it enables the construction of reasonable datasets considering a reasonable number of decisions by the STF.

In addition, Adins are lawsuits that directly start in the STF, and the decision of the STF is fully binding \textit{erga omnes} (since Adins are developed as abstract actions of constitutional review). Adins are conceived to address, by definition, potential violations of the constitutional text, i.e., matters that conceptually define and allocate powers across

\begin{footnotesize}
\begin{enumerate}
\item For a study about the decisions of the United States Supreme Court granting \textit{certiorari} or denying it as an example of strategic behavior, with empirical findings supporting this argument: Gregory Caldeira, John R. Wright, Christopher J.W. Zorn, “Sophisticated Voting and Gate-Keeping in the Supreme Court,” \textit{The Journal of Law, Economics & Organization} 15 (1999): 549–572.
\item It has been remarked that the STF is a reality show, whereas the USSC is a black box, as declared by Professor Celso Roma, from the State University of São Paulo – USP, in an interview to Gabriel Manzano, at the Brazilian daily journal: O Estado de São Paulo, August 19, of 2013, last accessed September of 2013, and available on line at: http://politica.estadao.com.br/ noticias/geral-suprema-corte-americana-e-um-mundo-secreto-e-a-brasileira-e-un-reality-show,1065703.
\item Caldeira, Wright, and Zorn, \textit{Sophisticated Voting and Gate-Keeping in the Supreme Court}, at 551, the authors discuss that the United States Supreme Court offers several opportunities for strategic behavior, such as: opinion assignments, dissents, concurrences, and choice of who will write the majority opinion. In the STF, by contrast, the original rapporteur is determined by an electronic random selection system. For an article emphasizing the similar features of this selection to a “lottery,” see the opinion page of Carta Maior, from September 27, 2012, and available on line at: http://cartamaior.com.br/?/Editoria/Politica/BBB-no-STF-Qual-a-importancia-do-relator-%0D%0A/4/25841.
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the branches of government or protect the most important rights.\textsuperscript{1043} Significantly, previous studies that investigated judicial ideology and the outcome of STF decisions in detail are solely limited to Adins.

It is noteworthy that Adins tend to be more partisans, since they are directly related to alleged violations of the constitutional text. As explained, they can only be petitioned by authorized actors or bodies mentioned in the Constitution (mostly political actors). To the extent that our dataset also includes concrete cases (as, for instance, extraordinary appeals, which do not have particular standing restrictions), one would expect to have less partisan decisions the more diverse the dataset is.

Accordingly, our dataset is a radical departure from previous research, because it accounts for more diverse types of lawsuits (and related different types of judicial review, namely, abstract and concrete), while focusing on federal conflicts and the period it encompasses (since the early days of the Constitution of 1988 until 2010).

\section*{III. The Hypothesis}

This chapter focuses on the cases litigated before the STF where one side is the union (federal government) and the other side is a state. Each party wants to maximize jurisdiction, and at some point enhancing the political competence or attribution of one party necessarily reduces the influence of the other party. The legislation reviewed by the STF reflects a conflict of competence that could not be solved politically. It is usually the case that one side has a political interest in enacting some form of legislation that will be challenged by the other side. Naturally, conflicts emerge between political actors that frequently cannot be reconciled without the intervention of the STF.

The U.S. literature encompasses three main models for judicial decision making for the Supreme Court. We enunciate those models briefly. The first one is the legal model, whose corollary holds that the plain meaning of the statutes and the Constitution, precedents, and/or intent of the Framers are the major factors that influence the decision

\footnotetext{1043}{We emphasize conceptually, because the Brazilian Constitution is significantly long, with several articles that do not necessarily protect constitutional rights as traditionally or conventionally considered. As an example, article 242, paragraph second, states that the Public School Pedro II – located in the city of Rio de Janeiro – shall always be federal.}
of the Court. In contrast, the attitudinal model states that ideological attitudes and values of the justices are considered along with the facts of the case. Stating differently, preferences of justices matter for the decision of cases. According to the strategic model, “justices are strategic actors who realize that their ability to achieve their goals depends on a consideration of the preferences of others, of the choices they expect others to make, and of the institutional context in which they act.” Thus, this third model considers the interaction of the Court with the legislative and executive branches.

The perception of the judiciary as being subject to particular challenges for the enforcement of its decisions has been incorporated to the United States since its inception. In the United States, judicial behavior has been the principal interest in political science and legal empirical studies after World War II. Because judges do not have effective mechanisms to oblige compliance with the decision of the court, they have to consider other political factors as well as the public opinion in order to avoid damaging the legitimacy of the court as an institution.

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1044 Segal and Spaeth, *The Supreme Court and the Attitudinal Model Revisited*, at 48.
1045 Idem, at 87.
1046 Discussing preferences of judges when comparing them to theater goers, judge Posner writes: “Spectators make choices about the meaning of a play or movie by bringing to bear their personal experiences and any specialized cultural competence that they may have by virtue of study of or immersion in the type of drama that they are watching, and often by discussing their reactions with friends who may have a similar competence. The judge brings to bear on his spectatorial function not only a range of personal and political preferences, but also a specialized cultural competence – his knowledge of and experience in ‘the law’.” Richard A. Posner, “What do Judges Maximize? (The Same Thing as Everybody Else Does),” *Chicago John M. Olin Law and Economics Working Paper* N. 15, 2D series (March 1993): 1–29, at 19.
1048 See chapter four of this thesis, for a discussion about the separation of powers principle in the U.S. reality, including the famous Federalist 78.
Therefore, independence of the courts does not derive from the constitutional text,\textsuperscript{1051} it includes elections. In this perspective, political organization affects the cost of legislation,\textsuperscript{1052} with the fragmentation of political parties being associated with the increasing discretionary power of courts.\textsuperscript{1053}

The study of independence of the courts in Brazil was mainly developed by political scientists. This is still a remarkable influence of the general civil law perception of judges as neutral and impartial. This is a tradition based on the mores, instead of specific rules in the codes or any objective norm.\textsuperscript{1054}

Commenting on civil law judges, they have been compared to an operator of a machine that was conceived and built by legislators.\textsuperscript{1055} In this direction, the *iudex* of Roman times, a tradition in which judges did not exercise a creative function, was exacerbated by the anti-judicial ideology of the continental European revolutions\textsuperscript{1056} and their strict separation of powers principle.\textsuperscript{1057} Among the current approaches to interpretation, the German Constitutional Court is fond of the so-called constitutional

\textsuperscript{1051} Although constitutional texts are relevant, as argues: Tom Ginsburg, “Economic Analysis and the Design of Constitutional Courts,” *Theoretical Inquiries at Law* 3 (2002): 49–85, at 55–70, where the Professor discusses design issues such as: centralization or decentralization, access and standing, court size, term length, mechanisms of appointments, and the form that review is exercised.


\textsuperscript{1053} In this direction, for instance: Robert D. Cooter, *The Strategic Constitution* (New Jersey: Princeton University Press, 2002), at 229.


\textsuperscript{1055} Kenneth L. Karst and Keith Rosenn, *Law and Development in Latin America*, (Oakland: University of California Press, 1975), at 91, where the Professors contend: “The great names of the civil law are not those of judges (…) but those of legislators and scholars (…). The civil law judge is not a culture hero or a father figure, as he often is with us. His image is that of a civil servant who performs important but essentially uncreative functions.

\textsuperscript{1056} Karst and Rosenn, *Law and Development in Latin America*, at 90, emphasizing that civil law judges shall only use “the law” when deciding a case. Accordingly, civil law judges are generally prohibited of using judicial case law – not even their own prior decisions.

\textsuperscript{1057} In this sense: Karst and Rosenn, *Law and Development in Latin America*, at 91, where it is noted that the process of selection and tenure for civil law judges is coherent with the different status of the judicial profession in civil law jurisdictions.
This interpretation is based on the civil law tradition of legal positivism and has deeply influenced constitutional adjudication in Brazil, as well.

In the context of adjudicating federal conflicts, we can start by considering different theories of judicial behavior. Legalists expect that judicial preferences (in particular, political and ideological preferences) play no significant role. Attitudinalists suggest that judicial preferences explain adjudication of federal conflicts in much the same way as they explain judicial decisions more generally. Agency theorists consider strategic aspects in federal conflicts (for example, the reaction by the Congress or by the President as well as by the states). At the same time, important political and institutional constraints can incentivize consensus in the court where justices are willing to abdicate their ideologically-preferred outcomes to forge significant majorities that enhance the judicial reputation of the court.

We focus fundamentally on the alignment between revealed judicial preferences when adjudicating cases and presidential appointments in Brazil (as we have explained before, the Brazilian Senate plays a limited role in confirming these appointments).

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Under the legalist model, there should be none. For attitudinalists, given the political nature of the selection and appointment of STF justices, it is almost natural to expect justices to exhibit the same political preferences as the party that appointed them.

For agency theorists, the expectation concerning alignment is more complex. On one hand, it could be weak for two reasons. First, Shapiro conjectures that the union usually wins in cases against the states because courts are excessively dependent on the central government in civil law systems. He argues that constitutional courts tend to serve as an agent of the union, “policing” the states while rarely limiting the union’s competences and powers. In other words, political alignment cannot be systematic because the particular influence of the union vis-à-vis the states dominates adjudication in the federal context (independent of any particular party interest). Second, the rational theory of judicial independence sees judicial review as an instrument to achieve an effective balance between federal and state powers.

In order to maximize influence and perform the refereeing role, justices cannot be systematically aligned with particular political interests given the need to pursue a perception of neutrality in relation to the litigation before the Court. On the other hand, given the existence of limited tenure and the possibility of further political appointments, justices could be tempted to satisfy the presidential appointer. When reviewing conflicts of jurisdiction, the STF justices are inevitably confronted with two opposing political interests: those of the union and those of the states. In this context, the political nature and the political implications of judicial review are understandable.

At this stage we can hypothesize two different explanations. One version is that there is no alignment between revealed judicial preferences and presidential appointments. This hypothesis is supported by legalists as well as Shapiro’s conjecture and the literature on independent courts. An additional reason can be borrowed from

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1065 There are several possible explanations consistent with Shapiro’s conjecture. It could be the case that justices always favor the union because of a pro-federal ideology across the judiciary independently of the President in office. Another possibility is that all Presidents have similar preferences when it comes to favoring the union and all justices, as consequence, have equally identical preferences. Certain aspects of
the comparative judicial politics literature. Due to institutional arrangements, justices in civil law jurisdictions are simply insulated from political interests. For instance, the mechanism of appointment in Brazil has been perceived as consensual and depoliticized by some scholars. Other legal scholars argue that the role of the legal professions and a strong sense of judicial independence have eliminated any causal relationship between presidential interests and judicial behavior. These understandings result in the following hypothesis:

H0: A justice appointed by a given President is not more likely to favor the union when such President is in office than otherwise.

The alternative account suggests alignment is to be expected, as supported by the attitudinal model and some versions of the agency theory. Presidential appointers will select individuals that are ideologically close to their policy preferences (so preferences are expected to be aligned between appointer and appointee; therefore, in a model of sincere voting such as the attitudinal model, we should expect the appointee to reflect the preferences of the appointer).

At the same time, in the context of limited tenure (justices have life tenure with mandatory retirement at seventy years old) and with an eye on future advancements (such as positions in future administrations or other political sinecures), justices will seriously consider the political repercussions of Court decisions for the appointers (the appointee should reflect the preferences of the appointer due to strategic reasons). Therefore, as an alternative, we expect a consistent alignment of the way that justices vote and the interests of the appointers (due to both selection and incentives).

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institutional design (such as mandatory retirement at seventy and concerns for other career goals) could induce justices to support any given President rather than exhibiting any special loyalty for the appointer.


1067 For instance: Llanos and Lemos, Presidential Preferences? The Supreme Federal Tribunal Nominations in Democratic Brazil.

IV. THE DATASET AND PRELIMINARY EMPIRICAL EVIDENCE

Our hypothesis is tested on a panel of data recording 119 decisions of the STF concerning disputes between the union and the states between 1988 and 2010, and collected by the authors. Our research encompasses all the relevant decisions (as explained below) made after the proclamation of the 1988 Constitution up to December 31, 2010. For this research, we considered the date when the decision was made (i.e., when the Court adjudicated it), regardless of when it was published. We chose to close our dataset at December 31, 2010, because it coincides with the last day of President Lula’s term in office.

We have considered different possible search techniques regarding identification of cases addressing federalism on the website of the STF. A mere search for “federalism” as the single criterion would not be relevant for our purposes, since it would encompass only twenty-eight cases decided en banc by the plenary. In light of these limitations, the best criterion for researching “federalism” was to use as keywords a combination of “conflict and powers and union and state and constitution and 1988.”

We decided to focus on federalism conflicts that have developed precedents and relevant decisions of the STF after the adoption of the current Brazilian Constitution. If our sample size might be deemed as restricted in comparison to the overall workload of the STF, the main reason is because we have focused on the leading cases appointed by the website search. We did this by commanding keywords in the search mechanisms of the STF database as well as concentrating our attention on the decisions from panels and the tribunal sitting en banc, rather than individual decisions.

For the purpose of this research, it is not relevant to consider individual votes of the justices when there is a single justice deciding the case – informally, even before the constitutional amendment 45, of 2004, there were, in practice, mechanisms to ensure that

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1069 Plus eighteen decisions of the Presidency of STF, and sixty-four documents in reference to monocratic decisions (from October 5, 1988 to January 1, 2012). Despite the intrinsic importance of the decisions of the Presidency, the statistical analysis of a dataset built on single opinions (also including monocratic or individual decisions) is less compelling.

1070 In Portuguese, we used the following key words: “conflicto e competência e união e estado e constituição e 1988,” in the section of legal doctrine of the STF website, last accessed January 2014, and available at the following link: http://www.stf.jus.br/portal/jurisprudencia/pesquisarJurisprudencia.asp.
the plenary would be responsible for setting the guidelines (i.e., for deciding the leading cases). Consequently, individual decisions take place when the petition did not demand any innovation in terms of STF doctrines (for example, when the plenary has already decided a similar claim in some analogous context). Hence, our research focuses solely on those decisions that were not disposed of by an individual judge. Importantly, the use of keywords as search terms assured that the dataset includes the largest possible number of true conflicts between the federal union and a state, or between the union and more than one state. We emphasize that a mere search by the name of the states or by the union would not produce such results. Therefore, we decided to use the combined search with the aforementioned keywords.

However, not every decision that appeared in our preliminary search was coded. At this stage, we obtained a provisional number of 141 decisions for 1988 to 2010. Importantly, we were very flexible regarding the definition of conflict of powers and it does not merely refer to conflicts of legislative competence. It also encompasses conflicts of possible attributions, such as among federal public prosecutors and state public prosecutors.

It is worth noting that our dataset contains decisions of direct actions of unconstitutionality (the so-called Adins, a form of abstract review, as we explained before) as well as other forms of concrete and diffused control of constitutionality (such as extraordinary appeals). Our dataset also encompasses different types of actions, such

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1071 This procedure is determined at article 101 of the Internal Rules of Procedure in the STF: RiSTF. The Constitution also requires in article 97 that the principle of reserve of plenary (that is, only a decision *en banc* of the full court is appropriate) must be observed when courts declare an act to be unconstitutional, with a minimum quorum of qualified majority regardless of the form of constitutional control involved: Barroso, *O Controle de Constitucionalidade no Direito Brasileiro*, at 143–144. Some legal scholars argue that this specific quorum should also apply to the incidental and concentrate forms of control when the STF is the court in question, as explained by Alexandre de Moraes, *Direito Constitucional* (São Paulo: Atlas, 2012), at 747.


1073 We have excluded six lawsuits decided before the Constitution of 1988: CJ 6718; CJ 6641; CJ 6589; CJ 6658; CJ 6672; CJ 6647. We also excluded eleven lawsuits decided after December 31, 2010: AI 753844 AgR; ACO 1109; ADI 4167; ACO 1136; ACO 1534 TA-Ref; Rcl 11243; Rcl 2936; ADI 4167; ACO 1534 TA-Ref; Rcl 6235 AgR; AI 796310 AgR. All those lawsuits are based on the search updated by March 20, 2012.
as: conflicts of competence ("CC"), civil actions based on the primary competence of the STF ("ACO"), actions based on the disobedience of a fundamental constitutional principle ("ADPF"), federal interventions ("IF"), reclamations ("RCL"), writs of *mandado de segurança* ("MS") and injunction mandamus ("MI"). This is particularly important because most of the literature in political science has been mainly concerned with a single form of abstract control of constitutionality in Brazil (namely, Adins), and has largely ignored other types of actions.

In fact, Adins are only the third most frequent form of action in our dataset (only 15% of the total number of cases considered). The most frequent action in our dataset is the ACO (26% of cases considered), which are lawsuits initiated at the STF rather than appealed. This is the case because, as mentioned previously, the STF is the solely competent court to rule on direct federal conflicts among members of the union (although technically there are different understandings when it concerns to municipalities). The second most frequent action included in our dataset is the IF, also reflecting original jurisdiction of the STF (21% of cases considered). Finally, extraordinary appeals ("RE") represent 9% of our dataset. Other actions (including MS, ADPF, RCL, MI) account for 29% of the dataset in dispersed ways.

We shall emphasize that there were no exclusions by convenience or for similar reasoning in our dataset. The total actions that firstly appeared were 141 decisions. We excluded a total of twenty-two actions after the final readings of the cases involved, as

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1074 The abbreviations in parenthesis refer to specific types of actions named in Portuguese and that appeared in our dataset, in accordance with the symbols used by the Court. For the complete list of the decisions analyzed, see Table 7.5. See also footnotes 1069 and 1070, supra.

1075 Since the seminal work of Werneck Vianna et al., *A Judicialização da Política e das Relações Sociais no Brasil*. On the other hand, note that our dataset has a relatively small number of cases when the full workload is considered given that we focus on decisions by panels or by the Court *en banc* based on federalism only, as we have explained.

1076 Despite the fact that article 18 of the Constitution asserts that the Federal Republic of Brazil encompasses the union, the states, the federal district, and the municipalities, whereas the text of article 102, f, particularly excludes the municipalities: see footnote 1023, supra.

1077 Those abbreviations are used by the STF. In English, they would be translated as: writ of mandamus; action for non-compliance with a mandatory constitutional precept; action of non-compliance with a decision of the STF (different from an action of content of court); injunction mandamus (a misleading name, because it can only apply in the case of disobedience to a constitutional norm that lacks a proper implementation measure by one of the elected branches).
further explained. All the pertinent exclusions were made either because there was no federal conflict or because it was impossible to precisely code the conflict in terms of union versus state or states.

An example of the absence of a true federal conflict refers to the cases where the search engine of the website of the STF classified a national nonpublic body as a union, such as the union of the commercial enterprises (instead of union as synonym of the federal government, which is the actual object of our research). Accordingly, it is worth reiterating that we focused the composition of our dataset in the substance, i.e., the existence of a potential conflict between the union and a state or states.

Importantly, as detailed above, our dataset is not limited to a specific form of action; on the contrary, it includes different actions ranging from the original jurisdiction of the STF to the extraordinary appeals that are exclusive to the Court, although not within its original jurisdiction. We crafted the research to be as simple as possible and, by doing so, we faithfully preserved the number of actions as closer to the original results provided by the website of the STF, while also considering in a coherent and systematic fashion the concept of union and states through all the dataset composition (as well as for coding purposes).

Our next step was to select the cases that referred to a potential conflict of powers between the federal government (i.e., the federal union) and the states. We determined this through a mere reading of the summary of each decision. Thus, we excluded the cases based on claims brought by the union against other members or bodies of the union that would not have a significant impact on the states. After making the pertinent exclusions, we had 119 decisions. Our dataset is composed of decisions en banc as

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1078 In Portuguese, the word union also refers to any group of persons or companies with common interests, similar to associations. Hence, the results produced by the STF search engine do not refer solely to “union” as a federal entity, considering its dual meaning in the Portuguese language.

1079 In Portuguese, “ementa.”

1080 The cases included in our dataset reflect the diversity of the powers of the federal union, with conflicts of the pertinent competences encompassing issues as distinct as: the postal service company (Correios); nuclear energy; sea and shores; education; traffic; gamble activity; social security; civil servant employees; indigenous people and land; and environmental protection. Regarding the type of claim, the vast majority (twenty-five decisions) refers to requests for the intervention of the federal government in a particular state. As for the nature of the claims analyzed, conflicts of legislative competence, scope of federal jurisdiction and taxation are the most represented. It is important to notice that federal jurisdiction peaked from the
well as some decisions by panel.\textsuperscript{1081} As we emphasized earlier, this composition of dataset is very rare in the literature.

A possible objection concerns the final dataset. Due to limitations with the STF website and their taxonomy with keywords, it is possible that our search has excluded some relevant decisions. In order to minimize this possibility, we started with a broad search which inevitably had the cost of including less relevant cases. By checking for robustness, we eliminated possible noise in the selection or classification of decisions to be included. Given our complicated procedure and careful rechecking of all relevant case law, as described above, we demonstrated that there is no systematic bias in our dataset in terms of excluding certain types of cases that involve federal conflicts.\textsuperscript{1082} Notice that there is no other dataset of federal conflicts in the STF against which we could compare ours.

After determining the cases that actually had a potential conflict of powers between the union and the states, we turned our attention to coding those decisions. At that point, we considered the full opinion of each justice available online.\textsuperscript{1083}

We worked with a binary dummy variable, assigning “1” if the justice voted for the union and “0” if the justice voted in favor of the state(s). Importantly, in some cases, our coding is based on the preponderance to determine whether or not a decision was pro-


\textsuperscript{1082} The initial selection was made by the search engine of the STF itself. Our exclusions were limited to cases that did not contain federal conflicts – as, for instance, when the union is the plaintiff and the defendant is a federal public enterprise with a state, for instance. Furthermore, in regression five we control for a stricter concept of union, as explained \textit{infra}.

\textsuperscript{1083} Here, we used the search tool of the website known as “inteiro teor,” last accessed January, 2014, and available on line at: www.stf.jus.br/portal/inteiroTeor/pesquisarInteiroTeor.asp.
Dissenting opinions were only coded as dissent when the controversy addressed the federalism claim.

The research considers the broadest possible interpretation to determine who stands as “union” and who stands as “state.” As a consequence, it is possible that the interests of the “union” might not overlap exactly with the interests of the President and, therefore, it could generate noise in the econometric analysis (because federal agencies might pursue an agenda that is not favorable to the President). The regression specifications will take into account these definitions. In particular, we will narrow the definitions for the sake of robustness testing by making sure that “union” does capture the direct interests of the federal executive branch (i.e., the President). The consequence is that the regression specifications for robustness will use fewer decisions (more precisely, 107 decisions).

We control for a decision *in limine* as well as a decision on the merit. Only lawsuits that were extinguished due to the lack of jurisdiction of the STF were considered as non-merit decisions.

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1084 Because of the nature of the underlying legal issue, as it is originated from conflicts across constitutional competences, there is a tendency for the winner to get a substantial victory, with only minor issues being left to the opponent.

1085 By “union” we consider every federal judiciary body (which is relevant, since in Brazil labor courts, military courts and electoral courts are specialized jurisdictions of federal justice), the President of the Republic as well as the National Congress, the Senate, the Chamber of Deputies, and the federal prosecution agency – whether designated as *Ministério Público Federal* (MPF) or as *Procuradoria-Geral da República* (PGR). The army, federal police, federal public foundations, federal public institutes, *autarquias*, public federal enterprises, federal public companies, federal regulatory and federal executive agencies were also considered as “union.” Exception was made for the so-called public and private jointly-owned stock companies, due to specific constitutional provisions. National associations and labor unions were not deemed as “union” or “states.” However, when they succeeded, their victory was counted as pro-union or pro-state, depending on the scope and nature of representation. With the same reasoning, by “states” we consider every body of state judiciary, state prosecutors, state legislative assemblies, state public companies, and state police. Here, we should point out that in Brazil, there is no equivalent to the U.S. Tenth Amendment immunity. Therefore, states and state governors can be directly sued in Brazil. For this research, municipalities were included within the state where they are located, for purposes of coding, as we did, for instance, in the decision: RE 361829, of 12.13.2005.

1086 This chapter addresses *in limine* decisions as a generic term. For the purpose of our research, we disregard the distinction between *liminar*, *tutela antecipada*, and *cautelar*, despite the specific provision of article 273, paragraph seven, of the Brazilian Code of Civil Procedure. For references on those distinctions, and further procedural specificities referring to claims against the government, see: Leonardo Carneiro da Cunha, *A Fazenda Pública em Juízo* (São Paulo: Dialética, 2011), at 264–280.
Our dataset consists of 1,008 individual observations in reference to 119 decisions by the STF during the period from the proclamation of the Constitution of 1988 to December 31, 2010. The main statistics are: 54% of those individual votes were favorable to the state (548 votes) and 46% were favorable to the union (460 votes).

In figure 7.1, we present the percentage of individual votes favoring the union by justice and by presidential term. We can see that the distribution seems reasonably random with no general trend. With higher percentage of votes for the union, we find the justices appointed during the dictatorship (with the notable exceptions of Justice Moreira Alves and two other justices with too few observations in the dataset to be relevant for empirical analysis) as well as justices picked by Presidents Sarney (1985-1990) and Collor (1990-1992). Justices picked by later Presidents such as Itamar (1992-1995), FHC (1995-2003), and Lula (2003-2011) can be seen as relatively more clustered on the opposite side. Still, in relation to the justices appointed by President Lula, there is no clear trend (from Justice Ricardo Lewandowski with 36% pro-union to Justice Eros Grau with 61% pro-union).

As a preliminary empirical exercise, we analyze contingency tables that cross tabulate individual votes favorable and unfavorable to the union when the appointing president is and is not in power. Table 7.2 uses the entire dataset (119 cases and 1,008 observations). It can be seen that a vote is favorable to the union in 53% of the cases when the appointing president is in power and only 42% of the cases when the appointing president is not in power. Hence, table 7.2 seems to suggest that there is some significant positive correlation between voting for the union and the appointing president being in power.

From table 7.1, we can easily notice that certain justices play a slightly different role within our dataset and period considered. All justices appointed during the dictatorship (eight justices) never served under their appointing president in our study (because we start in 1988).

All justices appointed by President Lula (also eight justices) always serve under their appointer in our study (because we conclude the study in 2010). Table 7.3 replicates table 7.2 but including only justices serving in both periods, i.e., when their appointer is

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1087 The data for Figure 7.1 can be found on Table 7.7.
in power and after their appointing president has left power (that is, justices appointed by Presidents Sarney, Collor, Itamar, and FHC).

As a consequence, the number of observations is significantly reduced (117 cases and 627 observations). However, the numbers go in the exact same direction: a vote is favorable to the union in 83% of the cases when the appointing president is in power and only 40% of the cases when the appointing president is not in power. Therefore table 7.3 confirms an important positive correlation between voting for the union and the appointing president being in power.

General assumptions about the vote of a given justice favoring the President-appointer and potential future work in the federal government are not validated by our dataset. Technically, there was only one example of justice leaving the STF earlier than his retirement in order to hold office immediately in the national government. It refers to Justice Rezek, who was appointed to the STF in 1983, during the military ruling, and left in March of 1990, to become President Sarney’s foreign minister – a position he retained during the controversial ruling of President Collor. Rezek left the chancellor office in April 13, 1992, and was reappointed to the STF in May 4, 1992. This time Rezek was appointed by President Collor, little before his impeachment from the Presidency. Rezek remained as justice of the STF until his retirement in 1997.

Justice Jobim, who coincidentally was the successor of Justice Rezek, may be a borderline case. Justice Jobim was appointed to the STF by President Fernando Henrique Cardoso, for whom he has previously been Minister of Justice, from 1995 until April of 1997 – when he became Justice of STF. Justice Jobim retired from the STF, upon his own request, in March of 2006. More than a year after, and following a political crisis, President Lula da Silva appointed Jobim for the Office of Minister of Defense in July of 2007. Jobim served as Minister of Defense during the remainder of President Lula’s term, and was reappointed by President Dilma Rousseff, serving until 2011.

Because Justice Jobim had more than a sixteen months hiatus between his position in the STF and his nomination as Minister of Defense, his case is not one of a

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1088 The information about the justices was gathered at the official website of the STF: www.stf.jus.br, last accessed April, 2015. Table 7.1 portraits the terms of the Brazilian Presidents from 1964 until 2011. Table 7.7 provides personal information about the Justices, such as their state connection, year of birth, age at appointment, President who appointed and dates the Justices entered and left the Court, respectively.
justice leaving the STF to immediately hold political office. Moreover, President Cardoso appointed Justice Jobim for the STF, while President Lula (who was Cardoso’s successor and fierce antagonist) nominated Jobim for the Office of Defense. Therefore, technically, Jobim was not an immediately calculated exit from the Court to hold a national political office.

Nevertheless, even if we consider so for the sake of the argument, both cases (Justices Rezek and Jobim) are completely atypical and had occurred in distinct historical moments (justice Rezek immediately after the dictatorship; and justice Jobim during Lula’s government, despite being nominated by President Cardoso for the STF). Both cases are not representative and amount to isolated episodes during the period examined. Hence, justices have, in practice, little incentives to advance their careers outside the STF itself.\footnote{Arguing that there are low incentives for the STF justices to behave strategically with regard to future appointments in the government: Brinks, Faithful Servants of the Regime, at 139–140.}

V. Regression Analysis

In order to test our hypothesis and confirm the results indicated by the contingency tables, we need to investigate if there is a potential correlation between the behavior of a STF justice and the interests of the appointing president who nominated him or her. We investigate if a STF justice is more likely to rule in favor of the federal government when his or her appointer is in office.

As explained before, the dependent variable is a binary dummy that captures if a particular ruling is favorable to the union or to the states.

The independent variable we are interested in is another binary dummy that takes value “1” if the justice has been appointed by the President when the case was decided; and “0” otherwise, a variable designated Justice union.\footnote{Notice that Justice state and Justice union are not mutually exclusive.} Similarly, we control for the possibility that a justice is related to the state involved in the controversy by constructing a binary dummy that takes value “1” if the justice is related to the state and “0” otherwise.\footnote{State connection is summarized on Table 7.7. It refers to the state where the justice was born and the state where the justice had her/his previous professional career (including where s/he went to law school). Notice that each justice can be associated with more than one state.} This variable is called Justice state. Finally, we construct another important...
dummy variable by assigning “1” if the justice rapporteur has been appointed by the
President when the case was decided; and “0” otherwise, a variable named Rapporteur
union.

Other independent variables include the role played by the union (defendant and
plaintiff) and by states (defendant and plaintiff)\textsuperscript{1092} with designations of Union defendant,
Union plaintiff, State defendant, and State plaintiff, respectively; year of the decision
(Year decision); age and tenure of the justice (Age and Tenure) as well as gender
(Gender); whether or not the decision is in limine as explained before (Limine); and
whether or not the decision relates to an agency (Agency, meaning if an agency or
government-owned company is involved in the lawsuit). These variables are mere
controls to avoid possible spurious results and, therefore, we do not comment on them
extensively.

Finally, inspired by the contingency tables, we also introduce two other variables
– Dictatorship and Lula – to control for those justices appointed during the dictatorship
(mainly by President Figueiredo, but also Presidents Castello Branco and Geisel) and by
President Lula, respectively. As seen before, in our dataset, justices appointed during the
dictatorship never serve under their appointer while justices chosen by President Lula
always serve under their appointer.

The model was estimated by logistic regression with clustering by case due to the
possible non-independence of observations (we used STATA 11). The first specifications
are presented in table 7.4 in terms of odds ratio (where a coefficient above one is
associated with a positive impact while a coefficient below one is associated with a
negative impact). We start by pooling all observations and running three regressions,
where we vary the controls for Dictatorship and Lula.

Age seems to have a significant negative impact on voting for the union of around
3\% (which would be consistent with the idea that younger judges are more concerned
with future payoffs albeit in a relatively small way).

Tenure, however, presents the opposite result – a positive impact on a voting for
the union of around 2-4\%. In this sense, judges with longer tenure might be less
concerned with future payoffs, because they have also accumulated more prestige in the

\footnote{Notice that these four variables are not mutually exclusive.}
STF and are likely to have a shorter horizon. Still the percentage is not large, with no need to advance potentially speculative accounts.

*Year* indicates a reduction in the likelihood of a justice voting for the union of around 8-11% (the union is more likely to win in earlier as opposed to later times in a reasonable percentage). This is consistent with the idea that the STF has been mitigating an overcentralization of powers in the union.\textsuperscript{1093} In this sense, the fact that states tend to have a better successful rate as time passes provides evidence that, in civil law jurisdictions, constitutional courts do not necessarily usually favor the union.\textsuperscript{1094}

The variable *Union plaintiff* seems to multiply the odds of a justice voting for the union (federal government) by a factor of three to four (it seems that justices are more likely to consider the interests of the union when the union is a plaintiff in significant ways). This is particularly important considering the potential effect regarding strategic litigation benefits, as it may impact in determining who should initiate actions in the STF.

*Dictatorship* is statistically significant and reduces by half the probability that a justice will vote for the union (we know this result is being driven mainly by Justice Moreira Alves, who dominates the number of individual observations for justices appointed during the military regime, and we have observed in figure one that he is less pro-union than average). This seems an important effect. However, the control *Lula* is positive but never statistically significant (we already knew from figure one that the eight justices appointed by President Lula vary widely in their behavior).

The coefficients for *Justice union* and *Rapporteur union* have the correct sign but they are not statistically significant – except *Justice union* in the econometric specification that controls for the justices appointed during the dictatorship, but not for those appointed by President Lula. Overall, the preliminary analysis suggested by the contingency tables does not seem to survive a more refined regression analysis.

In table 7.4, we report two more specifications for the sake of robustness. The fourth regression considers only those justices appointed by Presidents Sarney, Collor, Itamar, and FHC for the reasons explained before. The results are largely robust in this

\textsuperscript{1093} Werneck Vianna et al., *Dezessete Anos de Judicialização da Política*, although their findings were restricted to the administrative context.

\textsuperscript{1094} Shapiro, *Judicial Review in Developed Democracies*. 
limited dataset and the coefficient for Justice union is again positive, but not statistically significant. The percentages concerning the statistically significant variables are overall the same as before.

The fifth regression reports on further robustness testing. We limit the dataset to the cases that have a less controversial definition of “union.” We obtain the same results as before, in terms of sign, percentages and statistical significance. Therefore, our initial results do not seem biased by the inclusion of more controversial definitions of “union.”

Considering the percentages mentioned above, a note is required concerning the Priest and Klein’s model for litigated disputes and for disputes that were settled before or during litigation in the United States. The model argues how cases that settled are different from those that go to court. It applies to trial litigation as well as to appeals, and purports to be effective regardless of the issue litigated, predicting that plaintiffs’ chances of success are generally about fifty percent. The model has sparked a wave of scholarship controversies.

The Priest and Klein model does not seem applicable to this research due to different factors related to the peculiar system of judgment by the STF. First, all the cases

1095 We have mainly disregarded cases that address conflicts between federal and state prosecutorial bodies concerning powers and jurisdiction.


1097 Idem, at 13–20. We do note, however, that the Professors emphasize that in litigations involving antitrust (hence, the government), a higher chance for plaintiffs may be verified: at 52–54. This is relevant for our analysis, because the cases researched present at least one public entity directly involved.

in our dataset involve a potential conflict between two different spheres of the Brazilian federalism: one state and the union; or states and the union. Accordingly, we are within the realm of Brazilian public litigation, whose corollary is marked by the supremacy of the public interest as well as by its non-disposable feature.\footnote{The supremacy of the public interest (used as manifestation closer to the French “puissance publique,” not to the general public interest as defended by justice Brandeis) and the non-availability of such interest by the public administration are foundational principles of the public administration in Brazil. The general conceptualization of public interest encompasses the powers of the public administration being exercised for the public interest – not the interest belonging to the tax collector agency, for instance. The non-disposable (non-availability) feature of the public good refers how the public administration is subordinated to the public interest, having a duty to protect it, while being forbidden to neglect it or settle, because it can only act under the strict compliance with the principle of administrative legality: Celso Antônio Bandeira de Mello, \textit{Curso de Direito Administrativo} (São Paulo: Malheiros, 2008), at 69–75. There have been specific permissions for public lawyers to celebrate settlements, as long as authorized by law: article 4 of the Complementary Law 73 of 1993. This act was regulated by article 1, of federal law 9,469 of 1997. According to this article, the possibility of settlements is only authorized during a judicial procedure, being limited to R$500,000, and so long as the expenses are not public revenues originated from taxes, which significantly reduces the scope of application of the article.}

Settlements are generally precluded due to the public nature of the parties and the conflict involved.\footnote{The mere fact that a federative state and the union are involved would be sufficient to characterize the public nature of the litigation, regardless if it was a contractual dispute, a tax claim, an environmental lawsuit, or other topic. This is a relevant justification for the non-application of the Priest and Klein model, to the extent that such model explains the selection of cases that actually go to trial versus the cases that settled. If settlement is not a real possibility due to the public nature of the involved parties, the theoretical framework of the model is not verified in the cases researched.}

Second, our dataset comprises cases that were decided \textit{en banc}, as previously stated, presenting a new question of law that has not been decided yet. There is no discretion from the Court, and no single judge or jury is authorized to rule – only the Court deciding in its complete configuration has jurisdiction.

Third, our dataset encompasses cases of original jurisdiction as well as appellate jurisdiction of the STF. With regard to the appellate jurisdiction of the Court, several cases arrive due to a mandatory appeal procedure. Under this procedure, the public litigant who lost in the first instance must appeal – unless precluded to do so. Such mandatory appeal has also been translated as \textit{ex officio},\footnote{The Brazilian Code of Civil Procedure generally determines that all the claims in which public entities (union, states or municipalities) are defeated must be submitted to the tribunal that would have jurisdiction to decide a potential appeal. Noting that the mandatory appeal (also called necessary reevaluation) is a condition of efficacy of the award, but not technically an appeal: Cunha, \textit{A Fazenda Pública em Juízo}, at 208. It is noteworthy that the Code is binding at all levels – including the state sphere. We do note that this rule is not applicable to decisions of abstract control (Adin and ADC), nor the Action of violation of} because even when the
defeated litigant does not appeal, the trial judge is generally obliged to appeal on behalf of the public entity defeated, as long as the decision is not a preliminary injunction. If the decision is not final, other issues arise.

The concern is that the STF decides several injunction cases, procrastinating the final decision, because the Court has vast latitude regarding when it will reach the final decision.

Fourth, the model is based on the U.S. common law system, with parties and lawyers who are well informed about the courts’ decision and their binding effect. In Brazil, the decisions of the STF in abstract control carry binding force, but if the case arises out of concrete jurisdiction that is not necessarily applicable. Furthermore, the Brazilian judicial process is famous for delivering particularistic decisions, with judgments that are not broadly applicable. A related consideration is the fact that the union would qualify as a repeated player in comparison with the states, to the extent

mandatory precept (ADPF), because the three are not subject to any appeals, according to article 26 of the law 9,868, of 1999; and article 12 of the law 9,882 of 1999, respectively.

There are several important decisions held as injunctions, with some authors considering such preliminary decisions in Adin as being more important than the final decision on the merits: see, e.g., Taylor, Judging Policy: Courts and Policy Reform in Democratic Brazil, at 80.

Diana Kapiszewski, “How Courts Work,” in Cultures of Legality, ed. Javier Couso, Alexandra Huneues and Rachel Sieder, (Cambridge: Cambridge University Press, 2013), at 66, noting the vast discretion of the STF regarding when to decide cases, and emphasizing that there is no general order for the lawsuits to be decided.

Priest and Klein, The Selection of Disputes for Litigation, at 24. Because the model is based on common law, decisions of the higher courts have general binding force of stare decisis, which should facilitate the prediction of the outcome in future decisions.

See our discussion about the Constitutional Amendment 45 of 2004, supra, in this chapter.

We reiterate that binding súmulas (súmulas vinculantes of article 103-A of the Constitution), which must be approved for two thirds of the Court, have been very enacted sparsely by the STF.

that it has always to either initiate or defend itself in cases of federative conflict, while some states may have rarely litigated a federative conflict case in the current Constitution.\textsuperscript{1109}

In addition to the above-referred factors, questions relating to settlement have been object of study by Professor Shavell, who argues that any litigation rate is possible when the parties involved have asymmetric levels of information.\textsuperscript{1110} This would be the case for the union, in particular, if we consider it as a repeated player.\textsuperscript{1111} As Professor Shavell notes when explaining the assumptions of the Priest and Klein model: “… the assumptions rule out all manner of situations, including those in which one or other party does not usually have very accurate information about trial outcomes and those which one or the other party has substantially superior knowledge to the other.”\textsuperscript{1112}

With regard to our preliminary results, in summary, we find that the variables measuring political alignment frequently have the correct sign, according to the alternative account, but are not statistically significant in many econometric specifications. The most powerful results are obtained in the second regression (when we control for justices appointed during the dictatorship, but not for those appointed by President Lula). These results seem to indicate that there is more evidence to support the attitudinal model, or some version of the agency theory, rather than a pure legalist account or Shapiro’s conjecture.

In any case, our findings are different from previous empirical work about the STF according to which no evidence supporting the attitudinal model was found. In this context, our findings about Brazil show that the highest court is not very different from other supreme courts across the globe, thus dismissing exclusive legalist accounts.

\textsuperscript{1109} This is particular relevant due to the “federal government’s ability to delay almost perpetually and to outlast other legal players,” as observed by Taylor, \textit{Judging Policy: Courts and Policy Reform in Democratic Brazil}, at 77.


\textsuperscript{1111} We do acknowledge that under the model of Priest and Klein, a party who is a repeated player will prevail more frequently in litigation, because it will have different stakes in the litigation: Priest and Klein, \textit{The Selection of Disputes for Litigation}, at 28–29.

\textsuperscript{1112} Shavell, \textit{Any Frequency of Plaintiff Victory at Trial is Possible}, at 499–500.
VI. CONCLUSION

This research tests for alignment between judicial behavior and presidential appointments in the Brazilian Supreme Court after the Constitution of 1988. Our empirical analysis focuses on conflicts concerning federal versus state powers and jurisdiction. We have explored our hypothesis based on the judicial politics literature. The results seem to point out that some alignment exists, but it is not as strong as suggested by some theories. Clearly, Brazilian justices do not behave purely on the basis of their judicial preferences, as suggested by attitudinalists. However, at the same time, our econometric results clearly undermine legalist accounts as well as Shapiro’s conjecture (suggesting that justices should always favor the union).

A possible explanation for these mixed results is the vast list of powers that are assigned to the union by the constitutional text of 1988. To some extent, justices appear to try to strike a balance between the many federal powers and the more limited powers of the states. It is worth noting that, conceptually, states have residual powers (as in the U.S. federal design). Nevertheless, the bulk of important powers is centralized in the union, which is the one competent to legislate on important subject matters varying from traffic regulations to energy, criminal, and civil matters, just to cite a few.

As with the general empirical literature on supreme courts, there is always the possibility that the results are influenced by a potential selection effect. However, unlike with U.S. Supreme Court data, this is likely to be a less serious problem with Brazil for three reasons. First, there is no certiorari mechanism. Second, the vast workload and the legal practice show a tendency for generalized appeals in many cases (where the only goal is to delay the inevitable outcome that has already been established by a lower court). Third, given the vast underlying matters that cause litigation in the Brazilian Supreme Court, there is no ex ante perception to favor one side or the other; hence, it is unlikely that a particular actor systematically gives up litigation.

Notwithstanding the fact that judicial preferences matter in Brazil, the patterns of politicization observed in our dataset are weaker than in other similar courts. In our view, this was the case mainly due to the constitutional provisions regarding appointments for the STF. As discussed earlier in this thesis, the Senate approval is a formal rite only. A related explanation to the low politicization in the court refers to the long professional
tradition present in the Court.\textsuperscript{1113} Importantly, our findings are sufficient to dismiss merely legalist accounts of judicial behavior in the STF.

There are important implications for comparative judicial politics. Unlike previous research on Brazil, we show that there is some degree of politicization in decision-making at the Supreme Court. It is weak in light of the U.S. Supreme Court literature, but nevertheless important for the context of Latin American legal practice. It also shows that, although the union is significantly more powerful than the states, the prevalence of the former over the latter is tempered by direct political alignment (therefore undermining Shapiro’s conjecture). Finally, it identifies important time trends that are likely to reflect the transition from an initial building up of constitutional activism to a more solidified balance of competing legal doctrines.

In terms of theories of judicial behavior, it confirms the premise that, although general accounts based on American courts are exportable, they need to be tempered by local effects to make empirical sense. While the pure legalist model is clearly rejected by our results, the attitudinal and agency models need to be understood in the context of Brazilian redemocratization process and institutions.

\textsuperscript{1113} Discussing the STF as a court composed by justices with strong professional background – regardless if the justices were appointed during the military ruling or not – and emphasizing that highly fragmented political parties in Brazil and their dynamics favored the professional appointments for the STF: Kapiszewski, \textit{High Courts and Economic Governance in Argentina and Brazil}, at 100–109. The author also argues, at 106–108, that justices have weak political tights, albeit acknowledging that there was not much information for justices appointed during the military ruling. In our view, justices did have those ties, but, perhaps, they were more discrete in showing them. As a matter of fact, the censorship to the press did not help transparency or accountability, generally.
Table 7.1: Brazilian Presidents, their term and whether or not affiliated with military ruling.¹¹¹⁴

<table>
<thead>
<tr>
<th>President</th>
<th>Presidential Term</th>
<th>Military Dictatorship</th>
<th>Number of Appointed Justices in the Dataset</th>
<th>President</th>
<th>Presidential Term</th>
<th>Military Dictatorship</th>
<th>Number of Appointed Justices in the Dataset</th>
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<td>José Sarney</td>
<td>1985-1990</td>
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<td>Artur da Costa e Silva</td>
<td>1967-1969</td>
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<td>1990-1992</td>
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<td>4</td>
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<td>Ernesto Geisel</td>
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<td>1</td>
<td>Fernando Henrique Cardoso</td>
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<tr>
<td>Tancredo de Almeida Neves</td>
<td>1985</td>
<td>Not technically</td>
<td>0</td>
<td>Dilma Vana Rousseff</td>
<td>Since 2011</td>
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<td>0</td>
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<td>(4 new Justices were appointed since 2011).</td>
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¹¹¹⁴ Not technically: Directly elected President operating under the constitutional environment set up by the military dictatorship, pre-1988 Constitution (1985-1988).
**Table 7.2:** Cross Tabulation: Entire Dataset

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<th>Appointing President is not in Power</th>
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<td>165 (53%)</td>
<td>295 (42%)</td>
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<td><strong>Pro State</strong></td>
<td>148 (47%)</td>
<td>400 (58%)</td>
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<td>313</td>
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**Table 7.3:** Cross Tabulation: Dataset Excluding Dictatorship & Lula Justices

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</thead>
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<td><strong>Pro Union</strong></td>
<td>45 (83%)</td>
<td>232 (40%)</td>
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<tr>
<td><strong>Pro State</strong></td>
<td>9 (17%)</td>
<td>341 (60%)</td>
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**Table 7.4:** Logistic Regressions; Dependent Variable: Voting for the Union

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<th>Regression III</th>
<th>Regression IV: limited number of Justices</th>
<th>Regression V: limited number of obs</th>
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<td>1.19 (0.70)</td>
<td>0.74 (0.34)</td>
<td>0.88 (0.50)</td>
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<td>State Defendant</td>
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<tr>
<td>State Plaintiff</td>
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<td>3.59** (1.96)</td>
<td>3.59** (1.96)</td>
<td>4.76*** (2.66)</td>
<td>3.33** (1.98)</td>
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<td>Year Decision</td>
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<td>0.67 (0.46)</td>
<td>0.67 (0.46)</td>
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<tr>
<td>Gender</td>
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<td>0.92 (0.14)</td>
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<td>0.37* (0.21)</td>
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<td>0.89** (0.05)</td>
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<td>0.97*** (0.01)</td>
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<td>0.77 (0.21)</td>
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<td>0.76 (0.23)</td>
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<td>Lula</td>
<td>1.48 (0.42)</td>
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<td>0.97*** (0.01)</td>
<td>0.97*** (0.01)</td>
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The asterisk (*)/(**)/(***) indicates statistical significance at ten/five/one percent. Standard deviations in parentheses.
Figure 7.1: Votes Favoring the Union by Justice and by President

Dark blue: Justices appointed during the military dictatorship (eight); Red: Justices appointed by President Sarney (five); Light blue: Justices appointed by President Collor (four); Brown: Justice appointed by President Itamar (one); Orange: Justices appointed by President FHC (three); Black: Justices appointed by President Lula (eight).
Table 7.5: Decisions included in the dataset for this chapter

<table>
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<th>Decisions</th>
<th>Dates</th>
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1115 The abbreviations used remained as close as those adopted by the STF.
Table 7.6: Decisions included in the dataset for this chapter with classification of the nature of the main claim related to the conflict of powers and competences.\(^{1116}\)

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\(^{1116}\) As for the abbreviations of the claims: Fin= Finance Law; Leg. Assbl = Legislative Assembly of the states; Fed. Jurisd. = Federal Jurisdiction; Indig. bord.= Indigenous border.
Table 7.7: Personal Information about the Justices

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Table 7.8: Total votes per justice and total percentage per justice

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### Table 7.9: Member States, abbreviations and regions

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CHAPTER EIGHT

CONCLUSION

This thesis researches the interplay between the current Brazilian system of judicial review and the federalism choices adopted by the Constitution of 1988, by investigating how those federative choices impact judicial review. Aiming at answering this central question, this thesis was structured in three sub-questions addressing specific constitutional options referring to all the different levels of Brazilian federalism, namely, the federal union, states and municipalities. The first sub-question focuses on the inclusion of local governments as autonomous constitutional agents. It compares the decisions of the Brazilian Supreme Court to its U.S. counterpart in annexation cases, thus understanding annexation law as a proxy for local powers. The second sub-question concerns the constitutional option granted to state supreme courts in creating specialized panels – and if differences across Brazilian state supreme courts when deciding cases of abstract review can ultimately be related to the existence of specialized panels. The final inquiry considers the appointment of justices to the Brazilian Supreme Court (which was transplanted from the U.S. Constitution) and its consequences for the adjudication of federative conflicts.

This thesis studies the impact of constitutional federal options defined in the Brazilian Constitution to judicial review, utilizing theoretical and empirical methods. It also resorts to comparative method. Political economy factors were considered in our assessment of the uniqueness of the federal scheme designed by the current Constitution and their practical consequences for judicial review. Historical experiences, culture, political and economical forces, the role of institutions (political parties, the Presidency, the Senate and courts, specifically) were addressed. In this context, we turn to the analysis of our preliminary findings for each of the sub-questions referred above.

Based on our evidence of the decisions by the USSC and STF in annexations cases, as discussed on chapter five, we argue that general-purposes local governments in the United States are more powerful than municipalities in Brazil. After two constitutional amendments and the current legal limbo where the annexation of municipalities (and any boundary changes for that matters) is in Brazil, we are left with a sense that little has changed despite the specific inclusion of local governments as federal
actors in the Constitution. We note that while the population involved was left out, such constitutional inclusion appears to have been instated for the benefit of local politicians who control the local sphere.

With regard to constitutional design, inclusions of municipalities as federal actors and mechanisms granting powers to them have shown to not be a panacea, according to the Brazilian experience. On the contrary, such inclusion has increased the litigation regarding federal unwanted (and often deemed unnecessary) influence in state and local spheres. The Brazilian Constitution offers evidence of how having several provisions granting power to municipalities led to unbalanced powers, to the extent that constitutional amendments had to be enacted to combat the abuses occurring in the annexation of municipalities in Brazil.

According to our initial findings based on annexation, we argue that the lack of provisions of local governments in the U.S. Constitution is consistent with the literature on constitutional design, including the absence of constitutional provisions dealing with controversial matters. Our preliminary data also shows that only recently has the USSC been more involved in litigation of federal rights in the context of annexation – after the enactment of the Voting Rights Act, in particular. Importantly, the results of the comparison with the STF are counter-intuitive, because we would suspect that the Brazilian Supreme Court would be more involved in litigation regarding the protection of fundamental rights.

We turn to the preliminary findings of chapter six. The main purpose of our inquiry was to determine whether or not there are significant variations in the outcome of the cases of abstract review as a function of a specialized panel across Brazilian state supreme courts. Because those variations were found, we moved to the second question, namely, whether such differences could be attributable to the existence of a specialized panel. It is worth noting that the Constitution of 1988 does not determine which states should have specialized panels or not. The Constitution merely grants discretion to each state supreme court to create such panels, provided the state supreme court has more than twenty-five judges.

The dependent variables researched are based on our review of the court specialization doctrine and related advantages. Thus, our dependent variables were the
following: length (extension of the decision measured by number of words); lag (time lag from the beginning of the action until the decision – either final or in limine); rate of dissents among the judges of the state supreme court; whether or not the decision favored the plaintiff; and whether or not the court that issued the final decision cited other courts.

We found some evidence that the existence of specialized panels matters for the likelihood and rates of dissent as well as the duration of procedures, but not for other variables. We also found that the STF was by far the most cited court with regard to state constitutional review, which is interpreted as the Court having achieved centralization. This centralization is linked to uniformity, with the STF being very influential for the interpretation of state law, as well.

In light of the above, our empirical analysis does not completely validate frequent advantages of the existence of specialized courts. Our results do not suggest that specialized panels necessarily produce better constitutional law than decisions en banc. Nevertheless, by finding some statistical variations in court performance (number and likelihood of dissents as well as duration), we contend that a particular institutional design (specialized versus nonspecialized) is relevant for litigation. Further studies need to be developed in order to investigate other factors that may affect the analysis of court specialization.

Our preliminary findings concerning federative conflicts, as discussed in chapter seven, are dismissive of the notion that the STF acts as “policing” the states, while only occasionally controlling the union. Actually, our data shows that the opposite occurs. According to our initial results, the STF attempts to balance an over-centralized system of powers and competences on the union, allowing states to be more successful when it comes to the litigation of federative conflicts. In this direction, our results corroborate the understanding of judicial review as an effective means to reach a balance between state and federal spheres of powers.

In addition, our research provides some evidence that judicial preferences are relevant for the outcome of cases. Specifically, our data shows that justices appointed during the military ruling tend to favor the union.

Notwithstanding the fact that judicial preferences matter in Brazil, the patterns of politicization observed in our dataset are weaker than in other similar courts. We
attributed that difference mainly to the general mechanisms of appointment for the STF (because the Senate confirmation is merely pro forma) and the long professional tradition existent in the Court. Importantly, our findings are sufficient to dismiss merely legalist accounts of judicial behavior in the Supremo, which are grounded on the Roman-Germanic conception of judges being insulated from politics. Hence, this thesis contributes to new views about the politicization of the STF and the Brazilian judiciary, more broadly.

Overall, our preliminary results are different from previous studies. It is worth reiterating that those studies were based on abstract review exercised by the STF. Accordingly, we can speculate, at this point, that the more concrete cases of judicial review are included in the dataset of future empirical research, the more politicized the achieved results might be.

In conclusion, this thesis concentrates on different instances of the influence of judicial review and federalism choices (in all the levels: union, states and local government), as defined in the Constitution of 1988. We expect to have contributed with valid preliminary answers to our central question. We also hope to have advanced the debate about the impact of constitutional federative choices for judicial review. More research needs to be done to investigate the remaining areas of mutual influence between judicial review and federalism choices determined by the Constitution of 1988. Among such areas, further research about comparative constitutional design of municipalities is encouraged. Their taxes and revenues should be targeted from a comparative perspective grounded on different federal experiences. In addition, more empirical research focusing on concrete cases of judicial review decided by the STF after the Constitution of 1988 ought to be developed, including the investigation of lawsuits arising out of claims based on federal intervention on states. We also suggest the study of other high federal courts – in a similar fashion as we did with the state courts in this thesis. From a normative perspective, the focus of the Brazilian legal debate should change from denying politicization of the judiciary to investigations into this politicization, namely: where is it more intense and what are the relevant factors advancing it.
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