Veto and Voice in the Courts:

Policy Implications of Institutional Design in the Brazilian Judiciary

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Abstract

Brazil's federal courts have played an increasingly important public policy role since Brazil's return to democracy nearly two decades ago. This article evaluates the effects of a specific constitutional review mechanism, the Direct Action of Unconstitutionality, on public policy. An important theoretical consideration emerges, which is that institutional location matters: institutional rules and mechanisms produce "veto points" that enable veto players to effectively delay or defeat public policies in areas in which they might otherwise have little or no leverage over a given policy.

Introduction

A common theme in much of the literature on democratic consolidation in Latin America is the weakness of the judiciary in upholding the basic rights fundamental to democracy. In the words of a prominent exponent of this view, this is "a failure which is a consequence of the precarious functioning of the judiciary,"[1] a precariousness frequently attributed to institutional weaknesses, such as under-funding, rickety systems of judicial administration, and problems of access.

The Brazilian federal courts offer an intriguing counterpoint: an independent judiciary operating under unambiguous institutional rules may have effects that are potentially as important in their policy impacts as a weak judiciary, perpetuating the power of certain groups and undercutting initiatives by other branches of government. There are of course moments when the judiciary should act as a check and balance on other branches of government. This article, however, investigates the possibility that courts' structure may offer a venue that is especially advantageous to specific political players who seek to block policies that alter the *status quo*.[2]

Two recent examples suggests the Brazilian courts' potential to influence public policy in civil service reform and agrarian reform.

On September 30, 1999, Brazil's highest court made headlines when, in response to a case filed by the Brazilian bar association (OAB), it suspended a tax on civil service pensions. The government was visibly shaken by the defeat, which was expected to create a budget shortfall topping US$1.25bn. Markets were even more unnerved, fearing that Brazil would be unable to meet its debt obligations. To compensate for the judicial decision, and to reverse deteriorating market sentiment, the Finance Ministry was forced to announce an emergency package of spending cuts and tax increases.

A second example comes from agrarian reform, which became an increasingly contentious political subject during the 1990s, following land seizures by landless peasants' groups and violent police repression. Forced to address the issue, the government in 1999 adopted a new policy that made expropriation procedures more efficient, but also constrained the landless movement in its primary tactic of land seizures. The policy seemed to be a successful attempt at reconciling interests on both sides. Successful, that is, until Brazil's highest court struck down the policy's limits on monetary claims in land expropriation cases, in response to a suit by the OAB.

As these examples illustrate, the policy role of the Brazilian judiciary cannot be underestimated. Brazilian courts have reversed important decisions by powerful presidents, with effects that have reverberated across the entire body politic. On numerous occasions, courts have been called upon to challenge decisions made by Congress or the President, and in some cases, they effectively halted policy implementation and sent policymakers back to the drawing board.

The performance of Brazil's federal court system raises several important questions in comparative perspective. First, how do the rules by which judiciaries operate privilege some actors over others? Second, drawing on the literature on "veto players," which has been applied productively to presidents and assemblies throughout Latin America, but seldom to courts, what lessons can we draw about the policy impact of the institutional design of courts? The answers to these questions are interesting for comparative political scientists because they illustrate how different institutional rules may contribute to different public policy results. A second implication of interest to comparativists is that institutional rules may enable some groups to become veto players in areas of policy in which they might otherwise have little or no power.

The first section of this paper places the judiciary within the context of veto player analysis. The second section describes how the institutional design of the Brazilian courts shapes overall court performance and drives some policy actors to use the high court. The third section investigates a particular constitutional review mechanism, the *Ação Direta de Inconstitucionalidade* (Direct Action of Unconstitutionality, or ADIN), to explore how specific judicial institutional rules may capacitate some political actors to act as veto players in the overall political system. The fourth section concludes.

Veto Points and Veto Players

Much recent literature on the courts in Latin American democracies has focused on decision-making by high courts, within the context of the politics of judicial review, executive-judicial relations, and the "judicialization" of Latin American politics.[3] This article draws on many of the lessons of this literature, especially the notion that courts increasingly play an important role in the political process, and that the manner in which they are structured influences this role.

I tread new ground by placing the judiciary in the broader, comparison-rich, frame of political analysis engendered by Tsebelis' work on veto players, which argues that the degree of policy change in any given political system is directly related to the number of veto players in that system. Brazil offers a particularly interesting comparative case study in this regard because it has more veto players than its peers in the region[4]; because, as in most other countries, the Brazilian judiciary has not been consciously evaluated from the veto player perspective; and because anecdotal evidence suggests that the manner in which the Brazilian courts are structured provides for the emergence of veto players who are not

immediately evident in otherwise masterful studies of the executive and legislative branches.

A veto player is defined here as "a political actor – an individual or collective – whose agreement is required to enact policy change."[5] I define veto points as "institutional loci for political actors to exercise vetos of legislation or policies that threaten those actors' interests or objectives." Examples of such veto points mentioned in the literature include federalism, strong bicameralism, and referenda; while the judiciary is not mentioned, it potentially fits the mold.

The veto player literature is broad and not always consistent across its many authors, as Ganghof has noted. But the literature does offer an interesting comparative perspective on why it is that countries with superficially similar political systems may see substantially different political outcomes. At its most simplistic, the approach suggests that the larger the number of veto players, and the greater the differences in policy preferences among them, the less likelihood there is of policy change. The veto point framework, while less developed and subsidiary to veto player analysis, suggests that institutional arrangements may result in very condition-specific opportunities for veto playing.[6] I build further on this argument here to suggest that specific veto points offer an institutional locus for veto playing, and that these veto points may empower particular groups that would otherwise have little influence.

The veto player framework has seldom been extended to courts, and when it has, the courts are generally portrayed as a single veto player.[7] Tsebelis focuses on the judiciary as a potential veto player, arguing that the judiciary is not a veto player when performing statutory interpretations (because it can be overruled) but is a veto player with respect to constitutional interpretation. He softens this, however, by arguing that most of the time,

courts are "absorbed" by other political veto players;[8] when they are not, the "black box" of decision-making by the judiciary makes it impossible to allocate judicial decisions to veto player policy positions.[9]

In the Brazilian case, Ames suggests in a footnote that courts may act as veto players through judicial review of legislation, but sadly goes no further.[10] Sadek and Arantes argue that the Brazilian political system is one of "multi-vetos" across the branches of power. Within this system, the judiciary is able to exercise veto power, usually *after* a policy has been implemented by other political actors:

> …[the judiciary's] decentralized and *de facto* federalized structure allows it to paralyze policies, offer decisions in a non-uniform fashion and thus suspend, even if only temporarily, measures with national impact.[11]

Intriguingly, the Brazilian case provides an interesting exception to the view of the judiciary as a single veto player with uniform preferences: the Brazilian judiciary offers many potential veto points, and resembles more closely what Tsebelis terms a collective veto player, in the manner of a parliament or a weak political party. The next section suggests the judiciary can act as a series of veto points on policy; even if the full judiciary seldom acts as a cohesive veto player, it offers the institutional loci, or veto points, from which other policy actors may exercise their veto.

This is important from two angles. First, it suggests that the potential role of the judiciary in Latin America may be more important than the relative inattention to its role in the policy process suggests, especially inasmuch as it provides veto points to other policy actors. Second, by providing veto points to select political actors, the Brazilian judiciary gives them greater voice and leverage over policy than might otherwise be the case, in

some cases enabling them to act as veto players even when they are unable to do so elsewhere in the political system.

How Institutional Characteristics Privilege Use of the High Courts

The Brazilian federal judiciary is a strong institution from a number of different perspectives. It is the best funded federal court system in the hemisphere,[12] it is highly independent of other branches of government,[13] its decisions are adhered to by the executive and legislative branches, it operates drawing on historically consensual rules and norms, and its members are a highly-qualified, select group within the already elite legal profession.

Post-authoritarian events have reinforced this institutional strength: The 1988 Constitution, the key document of post-authoritarian politics, kept intact many of the legal structures dating from the nineteenth century. But it expanded rather than contracted judicial power, broadening individual rights, guaranteeing greater judicial independence, and expanding access to the courts at all levels of the federal judiciary. The courts' responsibilities were significantly restructured, and judges were given substantial autonomy, leading to "unprecedented levels of structural and individual independence."[14]

That said, over the past decade and a half, policy players have frequently tried to bypass the lower courts to obtain rulings directly in Brazil's Supreme Federal Tribunal (*Supremo Tribunal Federal*, or STF). In part this is precisely an outcome of the judiciary's strength: the sooner a case can be heard in the STF, the more likely the constitutionality of the policy will be definitively resolved. On the other hand, the institutional rules by which policy can be questioned in the rest of the federal judiciary are such that legal challenges in the high court offer a means of privileged access to federal policy that is unavailable to the average

citizen. This section will detail why it is that the judiciary tends to privilege specific policy actors who have direct access to the STF over individual citizens in debates over policy, focusing on five characteristics of the full federal judiciary.

1. Legal rules

Despite its hierarchical pyramidal structure, the federal judiciary works on the basis of legal rules that shift much of the heavy labor to the high courts. As a result, lower court decisions are seen as temporary at best, with judicial certainty affirmed only after a case has been heard in the high courts.

The STF serves as the court of last instance for both state and federal cases involving federal constitutional law. However, given the breadth of the 1988 Constitution – with its 245 articles and seventy three transitional provisions – this constitutional distinction means little in practice. Many rather banal cases, which on the face of it should have little constitutional merit, are appealed on constitutional grounds all the way up to the STF. Legal procedure further influences the intense use of the STF. The STF does not benefit from the *writ of certiorari*, which might allow it to reject some cases; only some cases have *erga omnes* effects; it has only limited powers of *stare decisis*, or binding precedent; and there is no "political question doctrine," such as the U.S. Supreme Court uses to avoid entangling itself in political disputes that can be resolved in the Congress.[15] In the absence of such rules, STF docket control is a question of drinking from the firehose, with no choice but to address all of the cases thrown before it.

2. Weakness of hierarchical controls

In addition to the flexibility of legal decisions engendered by the absence of strong binding mechanisms, Brazil's lower courts also have a good deal of flexibility in budgeting and administration. This tends to counteract much of the leverage that the high courts might otherwise have over lower court judges. In Chile, upper court control over judicial careers and institutional culture has "served to reproduce conformity and conservatism in the judicial ranks."[16] Brazil lies at the other extreme: lower court judges are largely free agents in the decision-making process; while legal reasoning guides their decisions, there are few incentives to conform to the high court's previous rulings. Relatively weak administrative constraints are further limited by customary respect for each judge's autonomy. Furthermore, lower court judges are selected by examination, rather than nomination, and promotion is largely based on time of service, giving upper courts little influence over the professional development of lower court judges.

3. Formalism juxtaposed with particularism

Most judges are selected via a rigorous entrance examination soon after law school, in their early twenties. Mid-career lateral entry from other professions into federal judgeships is virtually unheard-of, except in the top courts. The judge's focus is thus highly theoretical, and often devoid of real-world experience, with training that emphasizes formal legal theory over its practical implications. As one judge noted critically:

> The best decision is one aimed at resurrecting the past, that is, one that manages to return the situation to the *status quo ante*. This results in the total impossibility of the judge facing the future, of exercising a proactive stance, of evaluating the consequences of his or her decision for the parties [to the dispute], for the community, for the nation.[17]

Furthermore, despite the formalistic intent of civil code systems to have the law interpreted to the letter of the civil code, the absence of binding precedent or a tight hierarchical structure within the federal judiciary means that different judges, acting under different circumstances, are likely to come to different interpretations of the same combination of case and law. This guarantees an element of particularism in any decision: a judge can provide particular redress to any given plaintiff, knowing full well that there is little likelihood that the case will have universal application. Thus, despite an extensive catalogue of individual rights in the 1988 Constitution, except for cases that are taken to the highest court, protection of individual rights is almost always the particular exception, rather than the universal rule.[18] A given individual who goes to court to secure her rights may win her case, but in the absence of *erga omnes* application of that decision, or *stare decisis*, the widespread application of such a decision is not guaranteed.

4. Administrative Conditions

Although Brazilian courts have enormous fiscal autonomy and a generous budget, they suffer from two important administrative conditions: staffing shortages and large case backlogs. The number of unfilled judgeships is a perennial source of concern. In 1999, an unexceptional year, 19.8% of judgeships stood vacant.[19] While the number of judges, 5.5 per 100,000, is mid-range for comparable systems – somewhere between 10.2 in France and 1.02 in Peru or 0.65 in Chile[20] – the number of cases per judge is also high, making unfilled judgeships a continuous worry.

To complicate matters, the number of cases filed in the federal court system (excluding labor, military, and electoral courts) has mushroomed, from 350,000 cases filed in 1989 to 1.84 million in 2001, with no sign of abatement since.[21] This is not an especially large

number in comparison with the more than 12 million cases currently working their way through state courts. However, the case overload has taken on especially shocking scale at the higher reaches of the judiciary. Cases on the STF docket have ballooned, from 20,000 in 1987 to a remarkable 160,000 in 2002. Meanwhile, the glut of upper court cases includes not just appeals from lower courts, but also appeals of decisions already taken in the upper courts, which account for nearly 80% of cases in the STF.[22]

Figure 1 compares the caseload of the Brazilian federal judiciary with that of the U.S. federal courts, to illustrate both differences in initial caseload, and in the progression of cases from lower courts upward.

[INSERT FIGURE 1 ABOUT HERE]

Figure 1 illustrates the impressive disparity in the number of cases in the two countries at all levels of the court system, especially when we consider that the Brazilian population is only three-fifths that of the United States. A second striking fact is that the Brazilian high court (STF) hears a volume of cases that is more than 11% of the volume heard in the courts of first instance, against less than 2.5% in the U.S. case. Although the different legal systems mean that there is no equivalency between the number actually argued in the U.S. Supreme Court (86) and the number "judged" ("*julgado*") in the Brazilian STF (109,692), the sheer difference in magnitude is telling. Even if one considers all cases filed in both Supreme Courts, rather than only those argued, there were 872 cases filed per U.S. Supreme Court justice, against 10,070 per Brazilian STF minister.

5. Public sector litigation

Finally, courts have been over-run by the public sector. The glut of cases attributable to public sector litigation is estimated to account for 60% of cases in the federal judiciary as a

whole, and approximately 75% in the Supreme Federal Tribunal.[23] Much of the blame for this predicament must fall squarely on the federal government, which has historically preferred to appeal all suits against itself for as long as possible. As a result of the endless appeals process, it is not unusual to hear the government described as a "bad faith" litigant, or to hear of government defenses in appeals that are only "for show."

In conjunction, the five characteristics described here make it difficult for the federal judiciary as a whole to be used to challenge federal public policies. Although the breadth of the 1988 Constitution allows many policies to be contested in the courts, the weak legal and administrative hierarchy of the court system, the absence of legal instruments to control repeated appeals, and the ensuing glut of federal government litigation all guarantee that the courts work at a snail's pace. A retired STF minister recently guessed that a typical case that started at the bottom of the judiciary and worked its way through appeal up to the STF would average between eight and ten years from start to finish. Sadder still, in this judge's view, in most cases the high court will uphold the decision made at the outset.[24] Meanwhile, the divide between high and low court judges means that very different policy outcomes may arise in different court venues, even if their effects are only temporary.

Some plaintiffs are able to strategically harness these conditions to achieve their policy objectives. The glut of public sector litigation and the absence of downward precedent-setting is a tool the federal government has used to delay payments that could conceivably create gargantuan fiscal challenges. Budgetary shortfalls that might arise if the government were to cease its appeals in closely related individual cases, most related to past economic stabilization plans, are thought to total more than R$100 billion.[25]

On the other hand, the independence of judges (and their decisions) from each other offers opposition political parties the opportunity to distribute legal challenges to the same policy across many courts in the federal judicial system, increasing the chances of finding a lower court judge who will deal the government a policy setback. This was the opposition strategy against the government's controversial electricity rationing measures of 2001, in which a series of court cases not only placed the legality of the government's policy in question but also contributed to de-legitimizing the Cardoso government, drawing attention to the government's policy failures and contributing to a spectacular 12% drop in its popularity over three months. By trying to atomize their challenges across as many lower courts as possible, opposition parties could increase the likelihood of hitting on a judge who might be sympathetic to their goals, while publicizing their opposition.

The effects of these institutional characteristics are multiple, overlapping, and at times contradictory. In general, however, they have three important effects on policy. Because of the opportunity for highly disparate decisions and almost indefinite delay, the overall effect of the judicial process is to particularize rather than universalize decisions. Second, given the federal government's ability to delay almost perpetually and to outlast other legal entities, the current framework tends to privilege the concerns of the executive branch, no matter what decisions are taken by the lower courts.

Perhaps the most important effect, however, is that judicial structure and performance motivates policy actors to access the high court in such a way as to obtain a binding and definitive decision with *erga omnes* effects – a decision that is largely unavailable in any other court lower in the judicial hierarchy. The best and most efficient way of accomplishing this in Brazil is by filing constitutional review cases, which allow plaintiffs to skip the lower courts and directly challenge federal government policy at the STF. The

breadth of the standing granted for constitutional review in Brazil is without parallel in other countries that have concentrated review: it is without question broader than France, Germany, Austria, Spain, Mexico or Argentina, six countries which figure prominently in the literature on judicial review outside the strictly American model of diffuse constitutional review.[26] As the next section illustrates, this boosts the potential for a wide but nonetheless limited range of policy actors to influence policy in a manner that is both more efficient and more effective than that available to individuals using the full federal court system.

Constitutional Review as a Veto Point and the Emergence of Veto Players

In redesigning the judiciary, the constituent assembly of 1988 created several instruments aimed at facilitating constitutional challenges directly at the STF. I focus here on the most widely used, the Direct Action of Unconstitutionality (ADIN), specifically on the more than 1,000 ADINs filed against laws passed by the three branches of federal government between 1988 and 2002. The ADIN was originally created by the military regime in 1965, which gave standing solely to the Prosecutor-General. The 1988 Constitution substantially broadened the list of those empowered to bring ADINs, a positive development in terms of access to justice, but one that undermined its original efficiency goals. Under these current rules, an ADIN can be proposed by either the President, the Federal Senate leadership, the Chamber of Deputies leadership, state governors, the head of the *Ministério Público*[27] (the Prosecutor-General), the Brazilian Bar Association (OAB), a political party with congressional representation, or by a union or "class association" with national representation.[28]

ADINs therefore allow a select group of political actors to challenge the constitutionality of a given federal or state law directly at the STF.[29] They are a powerful instrument for delaying or reversing policy, with no possibility of further appeal. ADINs are of great interest here because they are heard (relatively) rapidly,[30] meaning that the effects of the ADIN mechanism on policy can be analyzed across the full post-constitution period; because they are brought with the express intent of influencing policy implementation; and because their effects are universally binding.

Ruling on an ADIN involves two distinct decisions. The first decision the STF must make, requested in nearly 90% of all ADINs filed, is whether to grant an injunction temporarily suspending the law or portions of the law in question until its constitutionality has been determined. The second decision is whether to acknowledge the ADIN and rule the law in question unconstitutional, known as a ruling on the merits. An ADIN therefore offers two somewhat independent chances of thwarting a law – either through a temporary injunction, or through a decision on the merits.

The chances of an ADIN being upheld by the STF are low: of cases decided to date, 76% of injunction requests have been denied, and 89% have been denied on the merits. But because most ADINs are brought requesting both decisions, the two decisions add up to a more than one in five chance of derailing a given federal law.[31] These are not long odds for a political actor considering the filing of an ADIN. This is especially true given the low costs, which are limited to legal fees and the potential of having a law's constitutionality upheld. While the latter may seem highly consequential, it may not be, as the ADIN is most often filed after all possible policy remedies in the executive and legislative branches have been exhausted. In light of the possibility that the implementation of the policy may either

have high costs to a political actor's constituency, or that thwarting the law may offer considerable political rewards, these potential costs usually appear minimal.

1. The ADIN injunction model

To recapitulate, I have described how the institutional rules governing the Brazilian judiciary make for a slow and often uneven judicial process. The ability of some privileged actors to leapfrog the clogged lower courts and obtain a binding and universally applicable decision in the STF enables them to contest public policies more effectively than would be the case if they were to go through the "normal" legal process that the remainder of plaintiffs are condemned to pursue in the lower courts. The ADIN is thus the best legal instrument available to these privileged groups for rapidly, and effectively, reversing policies.

The decision to file an ADIN is determined by a number of factors, including the salience of the policy to the plaintiff and the expected political and legal costs. But once a plaintiff group has decided upon the ADIN as a legal-political tactic, the likelihood of policy being affected turns on a number of other factors, including the quality of the suit itself, the legality or constitutionality of the underlying policy, and judges' preferences and attitudes. The judicial politics literature suggests a number of potential approaches to judicial decision-making, including strategic separation-of-powers approaches, which emphasize the constraints on judges imposed by other branches of government;[32] attitudinal approaches, which focus on the attitudes and ideologies of judges, especially in contrast to those of the incumbent policymaker;[33] and resource theory, which suggests that courts may privilege some groups over others.[34] The question of strategic behavior is tested in very general terms using a presidential incumbent variable, described below, but for a number of

methodological reasons,[35] I focus here primarily on resource theory, and whether some plaintiffs are more successful than others in the ADIN process.

Two possible models could be constructed to analyze decisions in ADINs: one focusing on injunction decisions and one focusing on decisions on merits. I have resolved to focus here only on the injunction decisions. The choice to grant an injunction in an ADIN oftentimes causes changes in the underlying legislation before the decision on merits is reached, and is thus often more definitive in its effects than the decision on merits. Second, because of delays in hearing the merits of a case, fewer decisions on merits have been made. Finally, because my focus is on the policy ramifications of judicial structure, rather than on legal effects, the injunction decision is just as important in policy terms given its effectiveness, which can cause the immediate delay or the canceling of policy implementation.

The model is a binary logistic regression, which predicts likelihoods for a dichotomous dependent variable, the yes-no decision on whether or not to grant an injunction. I rely on five independent variables.

The first variable is the plaintiff's identity. As noted earlier, for an ADIN to be accepted by the STF, the plaintiff must be one of a list of policy actors laid out in the 1988 Constitution. I hypothesize that the identity of the plaintiff affects the likelihood of obtaining a favorable decision. For example, state actors – which include state executives, state legislatures, and the Prosecutor-General – may be more likely than other plaintiffs to obtain a victory on an ADIN, given the great legal and administrative resources available to them (such as deep budgets, staff lawyers, and accumulated experience). Political parties may be less likely to win, given the fact that they may use the courts not only for legal

purposes, but also to illustrate their displeasure or disagreement even when legal success seems a long shot.

The second variable is the topic, that is, the subject matter of the law at hand, based on my compilation of laws passed between 1988 and 2002. I proceed inductively, and do not frame any hypotheses about which topics may engender greater success. The descriptive data, however, seem to suggest that certain topics, like social security reform, are more likely to engender constitutional controversy than others, such as budget laws, since they represent clear costs to select groups. In the case of social security reform, for example, the civil service faced the greatest costs and was a major initiator of legal challenges at all levels of the court system. My analysis of the degree of contentiousness – the proportion of ADINs to the proportion of laws in any given policy area – suggests that economic regulations and judicial rules are among the most legally contentious subjects; laws governing revenue transfers and budgeting are among the least contentious.

The third variable is the law type. I hypothesize that the means by which a law is approved affects the likelihood of a successful constitutional challenge. Laws such as constitutional amendments, which require large super-majorities, undergo more significant deliberation (which likely involves closer examination of their constitutionality) than more easily approved laws, such as ministerial decrees. As a result, the likelihood of a successful constitutional challenge is expected to decrease as the requirement for deliberation increases.

The fourth variable is a dichotomous dummy variable that denotes whether the plaintiff is a legal professional organization or association, such as the Brazilian Bar Association (OAB), the Association of Brazilian Magistrates (AMB), and the National Association of Members of the *Ministério Público* (CONAMP). I exclude the *Ministério Publico* itself

from this variable, since the *Ministério Público* is often acting at the behest of outside actors, rather than in an attempt to advance its own corporativist interests (in which case its members would most likely act through the CONAMP). My hypothesis is that plaintiffs associated with the legal profession have the greatest resources with which to challenge the constitutionality of a law: they are more likely to be familiar with lawmaking, and aware of the minutiae of the legal process.

The fifth independent variable is the presidential administration in office at the time the challenged law was passed. My hypothesis is that the identity of the presidential administration that passes the law being challenged may affect the willingness of the STF to uphold the constitutionality of the law, thus affecting the success of a constitutional challenge to that law. In other words, the attitudes of STF judges toward the incumbent may affect their willingness to vote for or against a law passed by that administration. The most obvious example is of the political outsider President Collor, whose relation with the court was extremely contentious, and thus might lead to a greater likelihood of his administration's laws being overturned.

2. Summary of model findings

I list here briefly the key findings, which are shown in Table 1.

First, the plaintiff's identity matters, and some, such as state actors, are far more likely to obtain a favorable injunction decision. Professional unions are 18.6% as likely as state actors to win an injunction. Political parties are only just over 25% as likely to obtain an injunction as state actors, other things equal.

[Insert Table 1 about here]

Second, the topic of the law being challenged affects the likelihood of obtaining a favorable injunction decision. Laws governing judicial benefits and structure are far more likely to be successfully challenged than any others. The results suggest two groups of probabilities. Cases dealing with civil service, fiscal relations, taxation, other economic issues, and the "other" category are between a third and two-fifths as likely to result in a successful injunction request as judicial cases. Cases dealing with social security and electoral and political rules are even less likely to result in an injunction, with chances of obtaining an injunction between one-sixth and one-quarter the likelihood of cases in the judicial group. Topic may matter because highly contentious topics increase the number of cases being filed or because the legal framework surrounding a given topic is stronger in relation to the cases being made than in other topic areas, making contestation less likely or, at any rate, less likely to be successful.

Third, law type, or the means by which a law is implemented, has only a slight effect on the likelihood of a favorable decision. Although this initially seemed like the strongest hypothesis, the model suggests that *ceteris paribus*, law type does not offer a clear-cut explanation of decisions. Indeed, for the one statistically significant category of executive laws, the evidence runs counter to my hypothesis: ordinary laws, which require far more deliberation than executive measures, are roughly twice as likely to face successful injunction challenges as executive decrees. A second key finding here is that non-executive decrees by either Congress or the Judiciary are 1.8 times more likely to face successful injunction requests than executive decrees.

Fourth, membership in a legal professional group makes a big difference. Plaintiffs associated with legal professional groups are 1.6 times as likely to obtain injunctions as other plaintiffs.

Finally, there does not appear to be any systematic bias against a particular presidential administration in terms of the success of injunction challenges to their laws.

It is impossible to draw strict comparisons across legal cases, since different cases may address superficially similar issues from a number of different conjunctural, legal, and constitutional perspectives. But an example may provide readers a better intuitive grasp of the predicted probabilities in the model. If, other things equal, the National Industrial Confederation (CNI) were to challenge a federal tax on industry, it would be less than 60% as likely to succeed as a state institution, and it would have only one third the chance of success in obtaining an injunction as it would if it were instead challenging a decree on judicial benefits. In contrast, a professional union challenging a tax on its professional activities would be only 20% as likely to succeed in obtaining an injunction as the state institution (or a third as likely to succeed as the national industrial confederation). But, if for some reason that professional union was representative of lawyers, or prosecutors, suddenly its chances of winning that injunction against the tax on its professional activities would almost double, all else equal.

I will briefly discuss here a few findings that emerge from the injunction model, before turning to my broader conclusions. The first finding of the model highlights the existence of a potential veto player that has received little attention in other works on Brazilian politics: the legal profession. As noted above, the legal dummy included members of the Brazilian bar association (OAB), the Association of Brazilian Magistrates (AMB), and the National Association of Members of the *Ministério Público* (CONAMP). Such legal profession interest groups are far better at using the courts than other groups, *ceteris paribus*, with nearly twice the likelihood of winning an injunction. Their success may be

further proof of Gibbon's view that the wind and waves are always on the side of the ablest navigators:[36] as professionals in the use of the courts, members of the legal profession are perhaps the best qualified to bring cases in court.

The ADIN mechanism provides legal profession interest groups with a veto point that is unavailable to them in the executive branch, and which is more costly to them in the legislative branch. The legal profession emerges in this context as an influential veto player, capacitated by the existence of the veto point generated by the ADIN injunction mechanism. The OAB particularly has been an active filer of ADINs, and has been especially successful in using injunctions to delay (sometimes permanently) the implementation of policies that hurt lawyers' interests, whether it was in limits on lawyers' fees in agrarian reform legislation, rules that would have delayed the payment of judicial debts, or changes in judicial and legal regulations. Without the existence of the ADIN, the OAB would have had no privileged forum from which to press such interests. And without the threat of the ADIN, it is likely that the OAB's pronouncements elsewhere in the policy process might not have been given so much prominence.

A second finding relates to law type and deliberation. The results are contrary to the initial hypothesis: other things equal, there is little relationship between the amount of deliberation a law receives and the success of ADINs. This conclusion knocks down any assumption that the STF views the use of provisional measures as inherently more arbitrary or less constitutional than the use of other forms of legislation, representing a usurpation of power by the executive branch. More importantly, it suggests that the degree of deliberation received by a law does not necessarily ensure immunity from successful constitutional challenge.

Although it is not substantiated by the model here, a second form of deliberation may also be at work here. In analyzing specific ADINs, I found considerable anecdotal evidence that both political parties and lower court judges use legal mechanisms as an instrument of voice.[37] For instance, political parties in the minority – largely shut out of the political process in Congress or the executive branch – appear to have used the STF as a site for voicing their opposition. Political parties file more than one-third of all ADINs against the federal government, and of these, more than 9 out of 10 were filed by opposition parties. After the Cardoso social security reform passed Congress, a PT leader in the Chamber noted: "The reform left the Chamber plenary, and will now cross the Plaza of the Three Powers [which divides the buildings housing the STF, the presidential offices, and the Congress] to be debated in the Supreme Court."[38] Queried about why the PT had a much worse success rate on ADINs than the OAB, one party staffer responded, "[we] sought to create a political fact, generate an issue and a debate."[39] Legal remedies, in other words, were not the party's sole objective.

Judges, meanwhile, were frequent losers in ADIN cases, filed by the *Ministério Público* to contest lower court judges' self-decreed wage increases. The model shows that court administrative decrees are the most successfully challenged of all laws, with the chances of being suspended by injunction always more than twice as high as the chance of a successful injunction request against an executive or legislative decree. One might speculate beyond the model's results, and question why it is that judges – who are no doubt highly cognizant of the judicial process and the success or failure of past judicial decrees – might continue to push through administrative decisions they know are likely to be overturned? Although the model provides no direct evidence, one possibility is that in the absence of other forms of expression (except the voicing of their concerns to the media) judges use the court

administrative decrees as one step in the policy game, in the hopes of influencing future policy outcomes.

Finally, I find that the STF does not appear to have a significant bias in its constitutionality rulings for or against any particular presidential administration. Despite the relatively even turnover of STF judges by presidential administration,[40] the model tested whether the laws passed by any presidential administration were more likely, other things equal, to be considered unconstitutional. No such relationship was found, suggesting that in ADIN cases, the STF has not exhibited any overarching political preferences regarding the occupant of the executive branch. The lack of a clear bias in favor of a particular incumbent contrasts with experiences elsewhere in Latin America, where elected officials have made various attempts to pack high courts (such as Peru under Fujimori, Argentina under Menem, and Venezuela under Chavez) and judges can be more clearly linked to the interests and ideologies of the president appointing them.

Conclusion

I have made an effort here to emphasize why the ADIN mechanism is a privileged form of access within the overall judicial system, and how its use may capacitate specific policy actors, who might otherwise have little voice in the policy process. The logic that lies behind much of my analysis of the Brazilian courts has consequences that extend far beyond the famously idiosyncratic Brazilian case.

Despite its impressive institutional strength – illustrated by clear rules, impressive autonomy, and decisions that are widely adhered to by other branches of government – the Brazilian federal judiciary operates in an institutional framework that tends to delay clear, universifiably applicable and binding policy decisions. The ADIN mechanism of

constitutional review, however, enables a select group of specific policy actors the ability to contest policies in an expedited and binding manner directly at Brazil's high court, thus avoiding the same delays facing ordinary citizens contesting policy. Once there, they have a roughly one in five chance of derailing policy,[41] although as the model shows, some actors are better at it than others. By virtue of the possibility that these actors will employ the veto point offered by the ADIN, access to this veto point provides them with greater potential veto power over legislation than would otherwise be the case. This leverage may be used either in the courts, or earlier in the policy process, via an implicit threat to exercise such a veto.

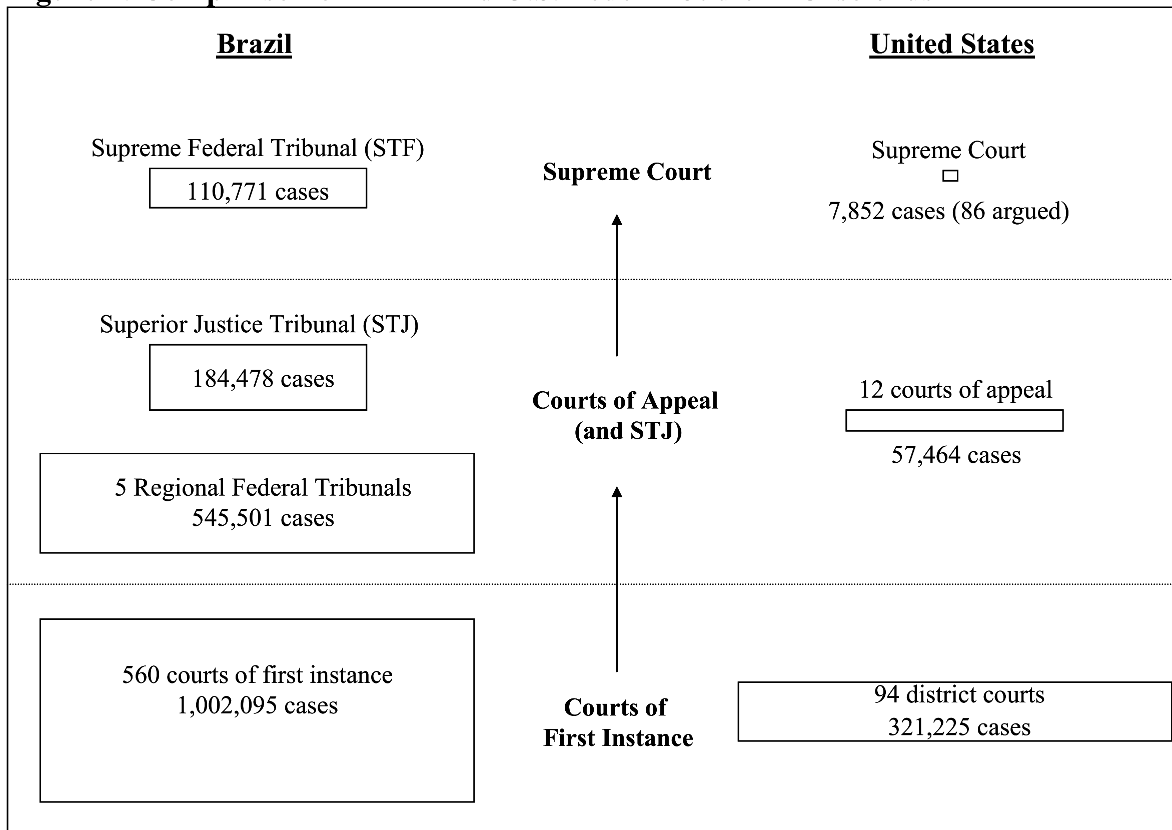
The rules governing who can use the constitutional review mechanism are therefore essential to the course of the public policy debate. For example, if Brazil's constitution allowed constitutional challenges by mayors – as Mexico does – its policy framework today would undoubtedly be very different, having been shaped by more than 5,600 mayors nationwide. Under such rules, there can be little doubt that legislation like the 1993 Emergency Social Fund, which withheld revenue transfers to municipalities, would have been extraordinarily contested. If successful, such challenges would have undermined one of the key components of the Real Stabilization Plan, thus undercutting the Cardoso government's crucial price stabilization policies and altering the course of politics over the past decade.

On the other hand, if Brazil's constitution prohibited constitutional challenges by political parties – as Argentina does – the implications in terms of policy change might not be so different, but the implications for democratic consolidation might be strikingly distinct. After all, while Brazilian opposition parties were not enormously successful in challenging policy by ADIN – political parties succeeded in obtaining injunctions from the

STF only 25% as much as state actors – their use of the ADIN nonetheless showed an adherence to the political process and incorporation into the democratic regime. Without access to the veto point provided by the STF, the political parties who remained in opposition between 1988 and 2002 would have had no power in the executive branch, only a minority role in the Congress, and virtually no lasting effect in the judiciary, save through temporary policy victories in the lower courts.

Significant theoretical implications for comparative political science arise from the notion that institutional rules may enable potential policy actors to exercise a veto in areas in which they might otherwise have little or no leverage over a given policy. This article has sought to advance this concept to the judicial branch, illustrating that the courts offer precisely such veto points on policy. By identifying veto points within the judiciary and other political institutions, researchers in Brazil, Latin America and beyond may be able to identify new veto players which, like the Brazilian legal profession, are not immediately apparent as important veto players in most analyses of legislative and executive politics, but whose absence would leave our understanding of policy choice incomplete.

Figure 1: Comparison of Brazil and U.S. Federal Judicial Caseloads



Note: The size of the boxes is proportional to the number of cases in each level of the judiciary. Brazilian figures are for 2001, drawn from *BNDPJ*. U.S. figures are from Rehnquist, William, *2001 Year-End Report on the Federal Judiciary (*Washington, D.C.: Supreme Court of the United States, 2002).

Table 1: Regression Results for Injunction Decisions

	Odds[†]	***Significance***[∇]
Plaintiff (*Requerente*)	**-**	(.0000)**
State actors	**-**	-
Commercial, Industrial Federations	**.5761**	(.094)*
Political Parties	**.2543**	(.0000)**
Professional Unions[‡]	**.1860**	(.0000)**
Topic	**-**	(.0025)**
Judicial benefits/structure	**-**	-
Civil service	**.3799**	(.0039)**
Fiscal relations	**.3982**	(.0247)**
Taxation	**.3333**	(.0037)**
Social security	**.2227**	(.0067)**
Other economic	**.3395**	(.0026)**
Electoral/political	**.1667**	(.0002)**
Other	**.3131**	(.0006)**
Law type	**-**	(.0103)**
Executive decree	**-**	-
Constitutional amendment	.9232	(.8947)
Complementary law	1.6550	(.4215)
Ordinary law	**2.1387**	(.0371)**
Provisional measure	1.1986	(.6410)
Non-executive	**2.8404**	(.0071)**
Legal dummy	**-**	-
Not legal	**-**	-
Legal	**2.6096**	(.0014)**
Administration	-	(.6805)
Sarney	-	-
Collor	1.3558	(.4939)
Franco	1.3250	(.5459)
Cardoso I	1.2422	(.6201)
Cardoso II	1.7881	(.2104)
Model Chi-Square	171.187	(.0000)
Hosmer Lemeshow Test	11.4057	(.1798)
	Constant:	B: -0.3723
		Sign: .4804
	K-S Z[§]	41.3% (.000)
	N	773

** Significant at the 5% level.
* Significant at the 10% level.
[†]Odds are calculated as Exp (B), or e^B.
[∇] Sign. is the statistical significance for each category. Each variable's significance is listed below.
[‡]Includes OAB
[§]Kolmogorov-Smirnov Z, most extreme differences reported.

Notes

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[1] Paulo S. Pinheiro, "The Rule of Law and the Underprivileged in Latin America: Introduction," in Juan Méndez, Guillermo O'Donnell, and Paulo S. Pinheiro, eds. *The (Un)Rule of Law and the Underprivileged in Latin America* (Notre Dame: University of Notre Dame Press, 1999), p. 3.

[2] This argument is not new: see, for example, Robert A. Dahl, "Decision-Making in a Democracy: The Supreme Court As a National Policy-Maker." *Journal of Public Law* 6 (1957): 279-95; and Marc Galanter, "How the "Haves" Come Out Ahead: Speculations on the Limits of Legal Change." *Law and Society Review* 9 (1974): 95-160.

[3] Among many recent works in this regard, see: Rogério Bastos Arantes, *Judiciário e Política No Brasil* (São Paulo: IDESP, 1997); Rebecca Bill Chavez, *Rule of Law in Nascent Democracies: Judicial Politics in Argentina* (Stanford: Stanford University Press, 2004); Javier A. Couso, "The Politics of Judicial Review in Chile in the Era of Democratic Transition, 1990-2002" in Siri Gloppen, Robert Gargarella, and Elin Skaar, eds. *Democratization and the Judiciary* (London: Frank Cass Publishers, 2003); Pilar Domingo, "The Politics of the Mexican Supreme Court," *Journal of Latin American Studies* 32: 3 (October 2000).

[4] Barry Ames, *The Deadlock of Democracy in Brazil*. (Ann Arbor: University of Michigan Press, 2001), p. 16.

[5] Josephine T. Andrews and Gabriella R. Montinola. "Veto Players and the Rule of Law in Emerging Democracies." *Comparative Political Studies* 37 (February 2004), 55-87.. This follows definitions by other scholars: George Tsebelis, *Veto Players: How Political Institutions Work* (Princeton, NJ: Princeton University Press, 2002), p.2; Steffen Ganghof, "Promises and Pitfalls of Veto Player Analysis," *Swiss Political Science Review* 9 (2003): 1-25; Stephan Haggard and Mathew D. McCubbins, *Presidents, Parliaments, and Policy* (Cambridge: Cambridge University Press, 2001), p.5, fn.10.

[6] Readers acquainted with Tsebelis' work may find some overlap between my use of the term "veto point" and Tsebelis' discussion of collective veto players (actors who are not "monolithic" or composed of homogenous majorities). According to Tsebelis, for collective veto players, such as a committee, political party, or parliament, "the location of the outcome depends on the internal decisionmaking rule and who controls the agenda." I use the term "veto point" to avoid the semantic confusion between the ***process*** of decision-making and the ***players*** involved in that decision-making. Institutionalized decision-making processes – such as constitutional review, committee vote procedures, or electoral laws – are veto points inside collective veto players which influence how these veto players will act in the aggregate political system.

[7] Andrews and Montinola; Nicos C. Alivizatos, "Judges As Veto Players," in Herbert Doring, ed., *Parliaments and Majority Rule in Western Europe* (New York: St. Martin's, 1995), 566-91.

[8] "Absorption" occurs when a new veto player is added within the "unanimity core of any set of previously existing veto players." If Player Y's preferences are within the same area of preferences as Player X's, Player Y is "absorbed" by Player X. Player Y will thus have no influence on policy stability in that particular policy context, since Player Y's preferences are fully incorporated in Player X's extant preference set. Tsebelis, pp. 19-37.

[9] Ibid., pp. 226-234.

[10] Ames, p.15, fn.25.

[11] Maria Tereza Sadek and Rogério B. Arantes. ""A Crise Do Judiciário e a Visão Dos Juízes." *Revista USP* 21 (1994), p.37.

[12] Brazil has the highest per capita federal judicial budget of all Western hemisphere federal systems. Using purchasing power parity-adjusted dollars, in 2000, Brazil spent $3.81 million per 100,000 inhabitants, versus $3.46 million in Argentina and $2.65 million in Mexico. "Worldwide Legal and Judicial Indicators, 2000." Web-based. Washington, D.C.: World Bank, 2000. The federal judiciary's 2003 budget, at US$4.7 billion, is comparable to that of the United States federal court system(US$4.9 billion), even though Brazil's population is three-fifths that of the U.S. Data from National Treasury, "Relatorio Resumido da Execução Orçamentária do Governo Federal e Outros Demonstrativos," at http://www.tesouro.fazenda.gov.br, accessed March 5, 2004; and Administrative Office of the U.S. Courts, "The FY 2003 Budget and the Federal Courts, at: http://www.uscourts.gov/ttb/, accessed March 5, 2004.

[13] Independence has been defined as "the extent to which justices can reflect their preferences in their decisions without facing retaliation measures" from other branches. Matías Iaryczower, Pablo T. Spiller, and Mariano Tommasi. "Judicial Independence in

Unstable Environments, Argentina 1935-1998." *American Journal of Political Science* 46 (October 2002), 699-716.

The independence of the Brazilian judiciary has been guaranteed since 1988 by the budgetary and administrative autonomy of the courts, recruitment of most judges by civil service examination, and vociferous objections to any perceived incursion on the judiciary's prerogatives. The constitution's provisions for the judiciary led to "unprecedented levels of structural and individual independence, but, in the process of reacting to more than two decades of military rule, swept aside the balancing constraints of accountability and transparency." William C. Prillaman, *The Judiciary and Democratic Decay in Latin America: Declining Confidence in the Rule of Law* (Westport: Praeger, 2000), p. 94.

[14] Prillaman, p. 94. On the courts' evolution see Maria Tereza Sadek, ed. *Uma Introdução Ao Estudo Da Justiça* (São Paulo: Editora Sumaré, 1995).

[15] Alfred Stepan, "Brazil's Decentralized Federalism: Bringing Government Closer to the Citizens?," *Daedalus* 129 (Spring 2000), 145-69.

[16] Lisa Hilbink, "An Exception to Chilean Exceptionalism?" in Susan Eva Eckstein and Timothy P. Wickham-Crowley, eds., *What Justice? Whose Justice?: Fighting for Fairness in Latin America* (Berkeley: University of California Press, 2003), p. 66.

[17] José Renato Nalini, "O Juiz e a Privatização," in Armando C. Pinheiro and Fabio Giambiagi, eds. *A Privatização No Brasil: O Caso Dos Serviços De Utilidade Pública* (Rio de Janeiro: BNDES, 2000), p.342.

[18] Anthony Pereira, "An Ugly Democracy? State Violence and the Rule of Law in Postauthoritarian Brazil," in Peter Kingstone and Timothy Power, eds. *Democratic Brazil: Actors, Institutions and Processes* (Pittsburgh: University of Pittsburgh Press, 2000), p.222.

[19] Data is from the *Banco Nacional de Dados do Poder Judiciário* (*BNDPJ*), accessed at http://www.stf.gov.br/bndpj , March 23, 2003.

[20] Non-Brazil data are for 1995-96, from Maria Dakolias, "Court Performance Around the World: A Comparative Perspective." *World Bank Technical Papers* 430 (1999), p. 19. Brazilian data calculated from the *BNDPJ*.

[21] *BNDPJ.*

[22] Velloso, Carlos Mario, "Judicial Management Information Systems," in *Judicial Challenges in the New Millenium* (Washington, D.C.: The World Bank, 1999), p.35.

[23] The 60% figure is from Armando C. Pinheiro, *Judiciario e Economia No Brasil* (São Paulo: Editora Sumare, 2000), 192. The 75% figure is an estimate in *O Estado de São Paulo*, May 18, 2003.

[24] Presentation by Minister Sydney Sanches at seminar on "Como melhorar a justiça brasileira?" Fernand Braudel Institute of World Economics, October 14, 2003.

[25] Silveira, Wilson. "AGU vai defender governo de ações petistas," *Folha de São Paulo*, January 7, 2003.

[26] Patricio Navia and Julio Ríos-Figueroa, "The Constitutional Adjudication Mosaic of Latin America," *Comparative Political Studies* (forthcoming, 2005); Donald W. Jackson and C. Neal Tate, eds. *Comparative Judicial Review and Public Policy* (Westport, CT: Greenwood Press, 1992).

[27] For the sake of clarity and to highlight the uniqueness of the Brazilian *Ministério Público*, I use the term "Ministério Público" throughout, rather than the rather awkward translation "Public Ministry."

[28] *Constituição Da República Federativa Do Brasil*, Article 103.

[29] My analysis builds on two pioneering studies of the ADIN: Luiz Werneck Vianna et al., *A Judicialização Da Política e Das Relações Sociais No Brasil* (Rio de Janeiro: Editora Revan, 1999); and Marcus Faro de Castro, "Política e Economia No Judiciário: As Ações Diretas De Inconstitucionalidade Dos Partidos Políticos," *Cadernos De Ciência Política* 7 (1993).

[30] A random sample of 100 ADIN cases found that an average of 12 months, and a median of 6 months, elapsed between a law being *promulgated* and a decision on the injunction. This compares favorably to the 8 to 10 year process for ordinary court cases, supra footnote 24.

[31] This total, 20.8%, is the proportion of all cases in which a challenge on either the injunction or the merits, or both, is granted or partially granted.

[32] For example, Gretchen Helmke, "The Logic of Strategic Defection: Court-Executive Relations in Argentina Under Dictatorship and Democracy." *American Political Science Review* 96, no. 2 (June 2002): 291-303.

[33] For example, Jeffrey A. Segal and Harold J. Spaeth. *The Supreme Court and the Attitudinal Model*. New York: Cambridge University Press, 1993.

[34] For example, Stacia L. Haynie, "Resource Inequalities and Litigation Outcomes in the Philippine Supreme Court." *The Journal of Politics* 56, no. 3 (August 1994): 752-72, as well as Galanter's work.

[35] Although I include a presidential administration variable in my model to test the possible effects of incumbency on decisions, a more rigorous test of strategic and attitudinal measures is a complicated task in the Brazilian case. The decade-long policy predominance of Cardoso, as finance minister and president, means there is little variation on the independent variable of incumbency. Using party identification as a measure of attitudes is fraught with methodological problems in Brazil, a country whose party system and party allegiances are extraordinarily fluid. All four presidents during this period were members of parties close to the center of the political spectrum. But even within centrist parties, the multiplicity of opinions is legendary: STF minister Jobim, for example, was a member of the same party as Presidents Franco and Sarney, but he is cut of a different cloth when it comes to his liberal views on the role of the state in the economy. Furthermore, turnover in court membership is insufficient to lead to significant variation in the attitudes and ideologies of the STF ministers. Over the period covered here, appointments to the 11-member STF were fairly evenly spread between the presidents in question (Sarney 5, Collor 4, Itamar 1, and Cardoso 3). The judges they appointed came largely from non-partisan origins in the legal profession and lower courts, suggesting judicial policy preferences may have no parallel with the policy preferences of the appointing executive. A final difficulty is that, even if we can agree on which dimension of attitudes to measure (economic policy over social policy, for example), the differences between the courts' composition under the four presidencies analyzed here are not very large. On economic policy, if we score Cardoso and Collor appointees to the STF as "neoliberals" on one end of the spectrum and Franco and Sarney appointees at the other as "statists," the median of STF members appointed by non-military presidents in each administration is exactly equal for all

presidents, except for Sarney, who was President with an STF in which a majority of members were military appointees.

[36] Edward Gibbon, *The History of the Decline and Fall of the Roman Empire*. Abridged ed. London: Penguin Books, 2000, 713.

[37] A description of political parties' use of the courts as a means for divulging policy opposition and discrediting policy (in addition to their use in delaying and disabling policy) is found in Matthew M. Taylor, "El Partido De Los Trabajadores y El Uso Político Del Poder Judicial." *América Latina Hoy* 37 (August 2004), 121-142.

[38] Madueño, Denise, "Promulgação depende da votação de MP," *Folha de São Paulo*, November 6, 1998.

[39] Author interview, December 1, 2003.

[40] Supra footnote 35.

[41] Supra footnote 31.