

“Faithful servants of the regime”

The Brazilian Constitutional Court’s Role under the 1988 Constitution

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Latin America has witnessed an undeniable increase in the importance of courts in policy debates, in debates about the rights of citizens and the duties of states, and in controversies across branches of government. This raises the question, whose rights and interests are these courts protecting? Are they perhaps newly empowered by the need to police a more democratic separation of powers? Who benefits from the increasing intervention of courts in politics? Are courts acting autonomously, or as agents of the executive, the legislature, or someone else? In this paper I propose a theoretical and conceptual scheme for explaining the capacity and inclination of courts to effectively police the separation of powers and enforce the rights of citizens. The framework takes into account both the institutional design of courts and their political context and seeks to explain which issues and whose interests the courts will protect with special solicitude. I apply the scheme to the STF, the highest constitutional court in Brazil.

The question posed in this conference is, are courts effectively protecting people’s rights and are they effectively policing separation of powers disputes. For courts to be able

to do this at all, they must have both autonomy and power. Courts will need autonomy whether they are protecting rights against governmental incursion or policing the separation of powers. First, if courts act as pure agents of either the executive or the legislature in disputes over rights then we would not expect them to vigorously defend those rights from encroachment, and when they do we would attribute their behavior to the interests of someone other than the courts themselves. The more interesting question would then be, why does the executive or the legislature act through the courts in this respect? Courts also need autonomy from other political actors in order to be impartial arbiters in disputes between and among these political actors. As Shapiro (1981) notes, if courts are to be credible dispute resolvers, they must at least appear to be neutral (see also, Brinks 2005 for a discussion of neutrality and independence). Moreover, they must have something we might call power, because if they do not, they may not have the ability to intervene in disputes at all, and when they do intervene they are likely to be ignored. Without autonomy and power it is unlikely that courts will be interesting actors in their own right in resolving crucial issues relating to the separation of powers or in defining the limits and extent of the rights accorded to citizens.

I will mostly avoid the term “independence” since its meaning is both contested and confused (see, e.g., Rios-Figueroa and Staton 2008). I have elsewhere argued that, when most people speak of independence, they are (a) reaching for some notion of impartiality, not unbridled discretion, and (b) speaking of a behavioral attribute, not the formal/institutional attributes that may or may not actually produce independent behavior (2005). Most empirical measures of independence, however, either include both power and autonomy (Larkins 1996), assess indicators of power to measure independence, or simply

use *de jure* factors to infer independence (Rios-Figueroa and Staton 2008). Since I want to examine the relationship between institutional factors and actual behavior, separate questions of power from questions of autonomy, and avoid terminological confusion and debates, I will simply avoid the term independence and speak of power and autonomy.

Under what conditions, then, do courts obtain judicial power and autonomy? We know quite a bit already about the conditions under which courts can secure something which has often been called independence, but I will call autonomy: the freedom to rule sincerely, according to judges' own legal and policy preferences. By most accounts, autonomy is a product of mostly contextual political conditions, which might broadly be characterized as the fragmentation of the political arena (see, e.g., Bill Chavez 2004), typically measured either by the number of parties (Ginsburg 2003), or by the degree of executive control over the legislature (Bill Chavez 2004; Iaryczower et al. 2002).

Political fragmentation can have two distinct consequences that lead to more room for judicial autonomy. The first is uncertainty about future political outcomes, and thus a need to impose some constraints on future electoral winners (Ginsburg 2003; Finkel 2004, 2005; Hirschl 2004). This mechanism operates more at the design/reform stage than later, but it can also affect judicial nominations and respect for the court once in operation. The second is the separation of powers argument in which a less monolithic political environment simply makes it more difficult to punish judges who rule adversely to power holders (Epstein et al. 2001; Iaryczower et al. 2002). The Chavez, Ferejohn and Weingast paper in this conference is an example of this sort of analysis. Institutional design factors have received less attention recently, but certain features, such as secure tenure, are

typically considered essential preconditions for judges to feel unconstrained by important political actors (Helmke 2002; Herron and Randazzo 2003).

Most of this literature takes seriously the notion of judges as strategic actors, and so the focus tends to be on the possibility of acting, post-appointment, to punish or reward judges for their decisions. The focus, then, is on what I will call *ex post* mechanisms of control.

There is another way for politicians to ensure favorable judicial outcomes, of course, and that is through the appointment process – what I will call *ex ante* control. Rather than appointing neutral players and counting on *ex post* incentives, politicians can appoint judges who share their policy preferences and leave them essentially free to act sincerely (Brinks 2005; Dahl 1957). *Ex ante* control is less precise, since one can never fully predict how a particular judge will act, or what issues will come before the court. It can, however, be more effective and less costly, since it generates voluntary rather than grudging cooperation, it does not depend on costly confrontations between branches, it is exercised at a time when public attention may not be trained on the particular issue at stake, and it is usually not as visibly inconsistent with popular notions of judicial independence and the rule of law. In many instances, we might expect political actors to trade off one kind of control for another (Brinks 2005).

Appointment mechanisms vary according to the degree of political control over judicial preferences and the number and cohesion of veto players involved in the process. Some mechanisms give legislatures and executives a great deal of freedom, while others require them to pick from lists submitted by unelected vetting agents, such as Supreme Courts, bar associations, or judicial councils, for example. Some processes require the

cooperation of two or more actors, such as the president and a majority of the Senate in the US case, while others allow a diversity of actors to seat some portion of the judges, as in Colombia, where justices of the constitutional court are appointed by either the President, the Supreme Court or the Council of State. Some appointment systems seek to purge political influences from the process, as in the professionalized, meritocratic, open exam process used to select lower court judges in Brazil; others, in turn, seek to take power away from elites, using popular elections to choose judges, as in many state systems in the US.

Whether *ex ante* or *ex post*, the ability to exercise institutionally determined levers of control is a function of the veto points defined by formal and informal rules, the thresholds required for their action, and the fragmentation of the political arena. Thus, for example, a system in which the president may appoint judges without intervention by any other actor gives the executive maximum freedom in selecting judges. A system that allows the president to select justices with consent from only a simple majority of the Senate gives the executive slightly less freedom when the same party controls the executive and the senate, constituting the president's own party as a veto player. This freedom diminishes even more if the president has only coalitional majorities in the senate, and dissipates further if an opposition party or coalition actually controls the legislature. Finally, a system that uses presidential nominations with the approval of a supermajority of the Senate allows less-than-majoritarian parliamentary actors to block approval, but would give the Executive continued control if he or she could count on a large majority in the Senate.

The same is true of rules – formal or informal – that permit the executive to replace justices, pack the court or otherwise punish non-compliant judges. The point is, the institutional context defines the relevant veto points and the thresholds required to

exercise a veto, while the political context determines whether a single interest or party controls all the mechanisms of control or whether any action must satisfy multiple veto players with opposed policy goals (see Tsebelis 2002 for an analogous discussion of partisan and institutional veto players).

One other factor that is likely to induce strategic considerations in judges is the likelihood of compliance. Calculating the effect of the need for compliance is more complicated, and bleeds over into considerations of power, as we will see. The literature is, in consequence, less clear regarding what the relevant factors might be. Theoretically, we can reduce the problem of compliance to a simple inequality: other branches (or actors more generally) will comply when the cost of compliance is less than the cost of defying a court order. But we know less about what affects the cost of compliance and the cost of defiance. Vanberg (2001) and Staton (2004) show that public attention to judicial decisions, coupled presumably with a willingness and ability by the public to impose costs on defying politicians, can generate compliance with adverse decisions. Epstein et al (2001) argue that politicians' tolerance of adverse decisions depends on such factors as the salience of the issue, the clarity of jurisprudence on the issue, public support for the outcome in question and public support for the court as an institution. While many details remain to be worked out, the crucial factor seems to be the presence of a third actor who can impose sufficient costs on a non-complying political official, either out of support for the court's particular solution or out of support for the court *tout court*. In short, one additional precondition for judicial autonomy is the presence of an effective ally, which could be, depending on the issue, the executive, the legislature, or the public (Gauri and Brinks 2008: 25-28). To the extent judges are strategic actors, then, there is a tight

connection between actual power (defined in the Weberian sense as the ability to carry out one's will despite resistance) and autonomy, since a lack of power should caution prudence in emitting judicial orders.

Judicial power, in turn, is a consequence of the interaction between the scope of authority given the court in its institutional design and the capacity of the authorized users to impose costs on the targets of adverse decisions. The scope of authority of a particular court is given by (a) the categories of conflicts the court is legally empowered to resolve, (b) the nature and range of actors empowered to bring conflicts to the court, (c) the effect of the court's decisions, and (d) the degree of control over its own docket.

Each of these parameters has a separate effect on the potential power the court can exercise. Thus courts that can resolve constitutional conflicts are more powerful than courts that are limited to statutory interpretation, courts that can resolve both abstract and concrete claims are more powerful than those that do one or the other, and courts that can only resolve abstract claims within 60 days of passage of the law in question are less powerful than courts that can entertain abstract challenges at any time.

Similarly, the French Conseil Constitutionnel became more powerful in 1974 when the range of actors who could bring abstract challenges was expanded – from a list that included only the President, the Prime Minister and the leaders of the two legislative chambers – to include any 60 members of either the National Assembly or the Senate. This move not only expanded the court's role from arbiter among equally majoritarian actors (who rarely used the court) to refereeing majority-minority conflicts; it also established another potential ally – the left, when the right was in power, and vice versa.

Moreover, courts whose decisions have *erga omnes* effects and who can establish binding precedent – *de jure* or *de facto* – are more powerful than courts limited to deciding one case at a time. Their decisions, potentially at least, bind more people and have greater policy consequences with less effort. And, finally, courts that can choose their own agenda through discretionary docket control are better able to focus and target their decisions, to choose their allies and their enemies. The combination of these various factors determines the influence courts can potentially exercise over substantive policy outcomes.

Power and autonomy work together in the following way: given that a court has power in a particular area, how will it exercise that power? Whose interests will it favor? Put most simply, a greater number of effective veto players in the *ex ante* mechanisms of control will narrow the range of preferences judges may hold and still win nomination. This will produce more centrist, more mainstream judges, who are likely to hold well-established, non-controversial legal and policy positions. In short, it will, *ceteris paribus*, produce respected but cautious, even conservative judges, who are likely to be neutral arbiters but unlikely to be judicial crusaders. Conversely, more veto players in the *ex post* mechanisms of control will give judges more freedom of action, enabling them to follow their sincere preferences, thus potentially expanding the range of possible outcomes.

The actual output of an unconstrained court is, however, conditional on the results of the initial appointment process. When one faction controls appointments, outcomes will reflect the interests of that faction, as in Menem's Argentina. When appointments must satisfy a range of actors, either from the president's own coalition or from an opposition-controlled Senate, judges will be non-controversial: qualified, centrist, cautious. Under



these circumstances the court will sincerely make well-founded, even principled, centrist, cautious decisions, even or especially when left free to decide according to its own lights.

While there is a wild diversity of institutional arrangements, we should be able to use the parameters described above to locate any court within the two-dimensional space defined by the extent of autonomy and power we can expect its institutional design to produce, holding the context constant. We can then identify the relevant veto players and examine their partisan identity to determine which ones might be activated under what circumstances. For example, a mechanism requiring a 60% supermajority for approval of judicial nominees will produce a higher degree of autonomy in a multiparty, highly fragmented political system than in a two-party system with a dominant party. A system that gives organized civil society groups the right to file abstract challenges to legislation will produce a more powerful court in a high-functioning democracy with strong civil society. The interaction between the institutional and contextual variables should account for much of the variation in the inclination and ability of courts to act either as arbiters of inter-branch conflict or as activist rights-protectors, producing different judicial constituencies and consequently different areas of judicial engagement.

The Brazilian constitutional court, the Supremo Tribunal Federal (STF), can be analyzed using this approach. I will address first the question of judicial power, then the problem of autonomy.

### **Scope of authority of the STF**

Among apex courts in Latin America, the Brazilian STF has one of the broadest mandates. It is both a mechanism for centralized constitutional control and the highest court of appeals in a decentralized system of constitutional adjudication. Given the broad

range of rights and expansive language of the 1988 Constitution, it can intervene in almost any conflict of any importance. Moreover, a broad range of actors can bring claims, from individuals acting under a *mandado de segurança*, to various political and collective actors filing abstract challenges to the constitutionality of laws under the ADIn system. Potential claimants include minority political parties, state actors and social actors such as unions and professional associations. Taylor (2008) describes the various actors who are legally enfranchised in Brazil, and how they have used the courts to influence policy outcomes in Brazil over the last couple of decades. The STF has many potential allies, and many of them have sufficient influence to protect the court from a flagrant attack.

The STF is weakened by its traditional inability to set binding precedent and by its lack of docket control. While in practice precedent is never “binding” in a strong sense, even in systems more used to the common law approach to precedent and *stare decisis*, it is arguably weaker in systems like Brazil’s. In Brazil trial court judges have a ready normative justification for disregarding precedent with which they disagree – an appeal to civil law traditions and state positivism (Merryman 1985). The hierarchical nature of the Brazilian judicial career track means there are powerful career incentives to conform on the part of judges, so that ultimately judicial outcomes will be normalized, if not at the trial court level, then at the appellate level. But the lack of formally binding precedent means that, at minimum, litigants have leave to continue re-arguing positions that have been repeatedly rejected by the STF. The result is that the STF has to expend a lot more energy to establish a new rule than, say, the US Supreme Court.

Constitutional reforms in 2004 have changed this aspect of the court in some respects, giving it the ability to set binding precedent through a special procedure and

consequently increasing its power (see, Nunes, forthcoming 2010; Brinks 2005). It is still a little early to measure the effects of the reform, but the intent appears to be precisely to increase the ability of the STF to make broadly binding decisions. In summary, the court has a broad scope of authority that allows it to weigh in on many issues central to the politics of Brazil, but must exercise it repeatedly in order to produce broad and effective legal change. This will change somewhat under the new rules for binding precedent, although they are unlikely to make a dramatic difference, at least in the short run.

Beyond the institutional context, however, the court has sufficient support, partly in consequence of its broad mandate, to assert its authority with some confidence. I have no actual data on the nature and strength of the court's support groups, but there are some indications that the STF itself draws substantial support from the executive. Nunes (forthcoming, 2010), for example, shows that first Cardoso and then da Silva pushed reforms that strengthened the STF at the expense of lower courts. On the other hand, minority parties, such as the PT under Cardoso, zealously protected the courts from reforms that might subject them to greater political control. Their primary goal was to protect the lower courts, since that is where they found more support (Nunes forthcoming, 2010). The Bar Association was a prominent actor in judicial reform debates as well, protecting its own interests as well as those of the courts. Moreover, the STF has substantial public support, even though Brazilians have a low opinion of their court system more generally.

Clearly, then, the court has the scope of authority and the backing to intervene on behalf of rights, and to authoritatively adjudicate inter-branch disputes should it choose to do so, although it has to expend a great deal of energy to produce a significant change in the

law. In other words, it is a powerful court, somewhat limited in its ability to promote change, but with considerable capacity to protect well established and popular rules. This brings us to the second step in the inquiry – what might we expect the court to do with this power? For this we must examine its degree of autonomy and its likely preferences.

### **Judicial Autonomy**

As noted earlier, autonomy is a function of the degree of *ex ante* and *ex post* control exercised by other actors. *Ex post* control determines the degree to which justices must be strategic, while *ex ante* control influences the preferences we are most likely to find on the court. I begin by examining the institutional and political factors that affect the degree of *ex post* control to which the STF is subject, and then discuss the likely preferences of STF justices. The following discussion, which follows the guidelines laid out above, is summarized in Table 1.

**Table 1: Institutional bases for autonomy of the Brazilian constitutional court (Supremo Tribunal Federal)**

<b>Parameter</b>	<b>Predicted consequences for process</b>	<b>Expected impact on judicial behavior</b>
<b>(a) <i>Ex post</i> control:</b>		
Life tenure, forced retirement at 70	Peak of career appointments plus long tenure with late retirement age suggests few post-tenure career ambitions that could be manipulated to reward/punish. 0 veto points.	Very low incentives to act strategically in order to advance career
Irremovability: Senate must impeach, in a political trial. No instances of impeachment in Brazil's history.	1 collective veto player; no precedent for impeachment; difficult to activate, because of internal fragmentation.	Low incentives to act strategically for job security
Irreducible pay interpreted broadly to require keeping pace with inflation	Effectively protects judicial income	No incentive to act strategically to protect income

Compliance: relatively high levels of public support for court and victory in previous clashes suggests that the court can impose outcomes in high visibility areas, at least.	Fragmentation of legislature suggests difficulty both in securing affirmative action in response to court orders <u>and</u> in overriding judicial vetoes of legislation.	1 collective veto player; while compliance with affirmative orders is an issue, low likelihood of concerted action to punish or reverse decisions that create a new status quo or are self-enforcing (e.g., judicial vetoes of legislation; due process rulings).
<b>(b) Ex ante control</b> Presidential nomination; no vetting body	Unconstrained presidential selection means President sets agenda	Gives president the initiative to identify nominees who hold views congruent with major policy goals, and who are unlikely to hold strongly parliamentarist views.
Senate approval by simple majority	Simple majority, highly fragmented legislature marked by routine organization of presidentialist coalitions. President must affirmatively organize a supporting coalition for judicial nominees but simple majority makes an opposition coalition veto of presidential choices difficult.	The combination rules out only extreme or controversial candidates, virtually assures approval of candidates from legal and policy mainstream, forces occasional concessions on secondary issues.

Ex post control is likely to be weak. Justices are insulated from pressures while on the bench, are not highly susceptible to the possibility of rewards/punishments after retiring from the court, and enjoy moderately high popular support. The principal constraint on judicial activism should be compliance. Any court order requiring affirmative action in the face of resistance on the part of the legislature or the bureaucracy can easily be vetoed in the fragmented Brazilian political context. By the same token, any judicial veto that requires concerted effort to overcome is likely to stand, for the same reason. Compliance concerns thus strongly favor acting as a veto player rather than as an affirmative policy maker in the face of opposition. Given this political and institutional context, and focusing purely on ex post control, we would expect a court that acts sincerely,

especially when issuing rulings that are largely self-enforcing, such as rulings on the constitutionality of norms or rulings governing behavior within the courts (e.g., due process rights of criminal defendants). We might also expect any decrees that require affirmative action to focus on bureaucrats or lower levels of government, and to have at least the tacit support of influential national policymakers.

But what should we expect to be the content of these sincere rulings? It is not the case, surely, that all judges when left free to decide according to their sincere preferences will issue rulings that run directly contrary to the preferences of dominant political actors. Hilbink (2007) makes a persuasive case that Chilean judges sincerely pursued a deferential course with respect to the executive. Dahl (1957) assumed a largely unconstrained judiciary, and yet argued that the courts would rarely if ever challenge the dominant national lawmaking coalition. What can we say about the likely preferences of justices on the STF? In Table 1 I also summarize the expected effects of *ex ante* mechanisms of preferential control.

The institutional arrangements governing appointments give Brazilian presidents the initiative to select judicial nominees who are sympathetic to their primary policy initiatives and who will not unduly restrict executive authority. The only constraint on Presidential choice is the required Senate approval. Brazilian politics are notoriously fragmented (cites), but also marked by the relatively straightforward construction of presidentialist coalitions that allow the government to advance its principal policy objectives (cites). A simple majority requirement means it is not difficult, for a president who is already building a coalition to advance policy initiatives, to secure approval for judicial nominees who will be sympathetic to these same goals. That is, neither Cardoso nor

Lula were forced to compromise on major policy positions in order to secure approval for their justices. As a result, we should expect their nominees to be generally sympathetic to their largely market-based attempt to promote greater development and integrate Brazil into world markets. Nor could they be forced to appoint judges who would be hostile to the increasingly expansive understanding of presidential powers.

At the same time, the fact that they had to affirmatively build coalitions of support for nominees, rather than counting on quasi-automatic party-line approval (as Menem, for example, could in Argentina during his first term) means presidents had to be measured in their choices. Nominees were virtually guaranteed approval so long as they were congruent with the overall policy agenda of the legislature, exhibited traditional markers of competence and impartiality, and were not overtly cronies of the president or advocates of a hyper-presidentialist style of politics. Coalition members had to be appeased from time to time with concessions relating to the diversity and regional origin of the nominees. Smaller coalition members could be expected to push for judges who could be perceived as truly neutral adjudicators in most conflicts, and who might therefore effectively protect them from oppression. In short, we should expect justices coming out of this system to hold well-established legal views, to have unimpeachable professional qualifications, to be tolerant of presidential authority and to be politically aware and generally sympathetic to the policy preferences of the “national lawmaking coalition” (Dahl 1957) – in this case, market reforms and moderate state withdrawal.

In summary, STF justices should support majoritarian initiatives but with due regard for legalities and formalities, and with due concern for the appearance of impartiality of the court. They should be free to rule sincerely in accord with these

preferences and free to follow their own preferences whenever they disagree with the legislature or the executive. The one constraint on their ability to rule sincerely is compliance. As a result, they should be more reluctant to issue counter-majoritarian rulings that require affirmative steps on the part of the government, but not reluctant to veto legislation with which they disagree. They should be more free to rule against state legislatures (with national policymaker support) than to rule against national policymakers.

Is this what we observe? How has the Brazilian constitutional court acted, since the return to democracy and the crafting of a new constitution? Whose interests has it protected? Here I draw on analyses of the court's intervention in rights cases, and on accounts of its reaction to presidential decree power.

### **The STF's record in protecting rights and enforcing the separation of powers:**

Second generation rights receive a cautious embrace from the Brazilian constitutional court. The lower courts enthusiastically grant all manner of demands grounded in the right to life, the right to health (care), the right to education, but the conventional wisdom is that this enthusiasm wanes as one moves up the judicial hierarchy, especially at the STF (Hoffmann and Bentes 2008: 118-19).

Where the STF has ruled in favor of the expansion of rights, it can be described as protecting middle class, mainstream demands, often by empowering the government to take action, rather than requiring additional government action. The STF has ruled, for example, that the government may impose price controls on private schools in the name of the right to education,<sup>1</sup> and that private health facilities are subject to constitutional

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<sup>1</sup> CONFENEN v Presidente da República e Congresso Nacional, ADIn No.319-4 (1992).



obligations stemming from the right to health (Hoffmann and Bentes 2008: 122-26), but it has not led the way in expanding access to health care or education by imposing additional obligations on the national government (additional cites). In terms of protecting the welfare state more generally, as Nunes (forthcoming, 2010) summarizes, the “STF has refrained from vetoing economic and structural changes even though the 1988 Constitution protected elements of the state-led development model.”

Kapiszweski’s paper for this conference further describes a court that is mostly cautious in either support for or opposition to policy initiatives, but that also found or created the requisite constitutional space for the pro-market and fiscally restrained policies of the 90s. In short, the STF’s interpretation of the otherwise quite statist 1988 Constitution has remained well within the preferences of both the Cardoso and da Silva administrations on this central policy concern, as the court’s institutional contours would predict.

At the same time, it is clear that the STF is able, when motivated, to intervene decisively in Brazilian politics. The STF has acted strongly to protect some core first generation rights, where courts can easily accomplish such action with no outside cooperation. Thus it has repeatedly ruled in favor of criminal defendants, ordering their release pending trial, for example (cites). But it has failed to curb egregious police misconduct and similar abuses, an action that would require far greater cooperation at minimum by state governments, and possibly also by police authorities and the rank and file. Mark Osiel (1995: Brazil’s courts resisted the authoritarian regime) and Anthony Pereira (2005: the courts were instruments of political repression) have slightly different takes on the history of the courts in Brazil under dictatorship. But over the last decade at

least, the highest courts in Brazil have taken core, first generation, civil rights seriously, while experiencing some difficulty in imposing their preferences across and down the judicial hierarchy. In this area, the STF justices are, as predicted, clearly from the mainstream of legal and political thought in Brazil's democracy, serious but not particularly innovative and somewhat hampered by the looseness of the Brazilian judicial hierarchy.

Taylor's (2008: 79-87) analysis of the STF's record on ADIns is highly instructive, showing a court that acts to protect presidential initiatives and presidential power, but not to the extent of losing its credibility as an impartial arbiter. The court has consistently held a significant percentage of laws unconstitutional (20% of all challenged laws are invalidated). But whose claims does it recognize? The most striking finding, for purposes of this paper, is that the court has a clear but generic presidentialist bias: ordinary laws are twice as likely to be struck down as presidential decrees, and no one president is more or less successful than any other. The court simply favors the executive as an institution. In addition, state actors in general are the most likely to succeed. Nunes further notes that the court is more active in striking down state legislation on the request of the attorney general than in striking federal laws, that the court assists the government in controlling spending and in controlling state governors (forthcoming 2010: 19).

At the same time, and again as predicted, there is strong evidence of autonomous behavior when the court's own interests are at stake: legislation affecting judges is most likely to be struck down, and the judges' professional peers, lawyers acting through the Bar Association, are 1.6 times more likely to succeed than other plaintiffs. Finally, there is evidence that, in conflicts involving the very actors who make up the coalition that approves judicial nomination, the court effectively behaves as a "neutral arbiter," in the

sense in which Alex Stone Sweet or Martin Shapiro might use this term: the court is most frequently chosen to resolve disputes between majority and minority interests (Taylor 2008: 84). Predictably, given its presidentialist bias, it is much less likely to arbitrate interbranch disputes (p.85), and when it does, it favors the use of executive power, as evidenced by its reluctance to strike down presidential decrees.

Summarizing this record, we might note that STF justices are by and large supportive of mainstream government policies, they defy them only when their own interests are at stake or in defense of clearly established and widely accepted principles. As a result, when disputes do not affect government policy, they act credibly and effectively to protect well-established rights. They are less likely to move forward in the relatively new area of second and third generation rights, although they are perhaps moving in a more progressive direction, extending cautious support to positive rights. They are, moreover, weak instruments to police the separation of powers, since they are more likely than not to support the exercise of presidential power.

**Conclusion:**

Already in 1981 Shapiro noted that courts' inevitable involvement in lawmaking creates a dilemma for any regime. Courts must be seen as neutral – what we occasionally call “independent” – or they lose all claim to the social logic that gives them both utility and legitimacy. But if courts are making law, they cannot be left free to follow their own whims. In response, he argues, regimes “can create systems of judicial recruitment, training, organization, and promotion that ensure that the judge will be relatively neutral as between two purely private parties but will be the absolutely faithful servant of the regime on all legal matters touching its interests” (Shapiro 1981: 32). This is, I would argue, a fair

description of the Brazilian STF over the last two decades. The mechanisms of recruitment and training in a fragmented and pluralistic political context have produced judges that are “faithful servants of the regime,” but that have the autonomy and credibility to rule fairly on disputes that do not touch upon core state interests. This accounts for their fair – if absolutely mainstream in its caution and conservatism – approach to rights claims. It also accounts for their caution in embracing positive rights claims that might come in conflict with the dominant market reform policies of the last 15 years.

In terms of separation of powers, they are also moderately fair but with a presidential bias. Presidential control over judicial selection ensures judges that are sympathetic to the president, but the need to secure coalitional support for the nominees in the Senate means they cannot be overtly biased and they must be at least moderately sensitive to the interests of minority parties. The STF’s primary bias, then, is a deference to presidential prerogatives and to prioritarian presidential policies, which makes the court favor the president in inter-branch conflicts.

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