"TACTICAL BALANCING" AND PRIORITIZING PRAGMATISM: HIGH COURT DECISION-MAKING ON ECONOMIC POLICY CASES IN BRAZIL

Diana Kapiszewski
Department of Political Science
University of California, Irvine

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DRAFT

"Absolutely, a Supreme Court justice must think of the consequences of his decisions…"[1]
A justice interviewed in connection with this project, discussing high court decision-making (CSM-01)

"... one cannot interpret the constitution according to economic programs. Economic programs must be interpreted according to the constitution. The day that the Supreme Federal Tribunal interprets the constitution according to economic programs and not the opposite, chaos will have been established in the judicial order."[2]
A justice interviewed in connection with this project, discussing high court decision-making (CSM-04)

"They know they must keep the law in mind, but consider it within the socio-economic context, the public context, of Brazil. So, it's difficult – they're walking on the blade of a knife. They can't fall either to one side, or to the other."[3]
Minister of Justice interviewed in connection with this project discussing high court justices' predicament when deciding cases regarding public policy (CSE-25)

1. INTRODUCTION

Brazil, like many Latin American countries that transitioned from authoritarian rule in the 1980s, rejoined the ranks of the world's democracies in a situation of significant economic turmoil. In view of the protracted crisis and encouraged by the international financial community, elected leaders across the region imposed economic stabilization and structural adjustment programs. The general contours of economic reform – entailing policies designed to cut inflation, attain fiscal balance, open markets, and deflate the state – are well known. Equally well known is that in many countries, certain aspects of these economic reform programs and the process employed to impose them were unpopular, and at times unconstitutional. For instance, devaluations could impinge on property rights, while salary cuts or pension reductions could appear to violate constitutional principles of equity or other guarantees.

Less appreciated is that at the same time that they were undergoing economic transition, many Latin American countries, including Brazil, were also experiencing a halting, non-linear,

[1] Original: *"Um Ministro do Tribunal tem que pensar, sim, nas conseqüências da sua decisão..."*
[2] Original: *"...não se interpreta a constituição no rumo dos programas econômicos. E, sim, os programas econômicos hão de ser interpretados no rumo da constituição... no dia que o Supremo interpretar a constituição no rumo de um programa econômico, e não o contrário, então, está estabelecido o caos na ordem jurídica..."*
[3] Original: *"Eles sabem que é preciso olhar para o direito, mas olhar o direito pra dentro do contexto sócio-econômico, público, do Brasil. Então, é difícil, você anda em cima de um fio de navalha. Você não pode cair nem para um lado nem par o outro, né?*"

multi-faceted process of legal and judicial change that we could label a "legal transition."[4] While legal transition has proceeded in different ways and to varying degrees in different contexts, it is marked by some fundamental, interacting elements. Issues of the rule of law and legal accountability have been placed on the political/electoral agenda in many countries, concern about rights has increased within civil society, countries have undergone constitutional renewal or reform, governments have empowered courts; and citizens, civil society, and the political opposition have begun to turn to courts more frequently in order to address transgressions by elected leaders and solve political conflicts more generally.

Across the region, the advancing legal transition both heightened the sensitivity of citizens, civil society organizations, and the political opposition to elected officials' not infrequent bending of legal and constitutional constraints on the form and content of economic policy – and heightened their awareness of the legal tools they had at their disposal to contest economic policy. The resultant eruption of constitutional controversy over economic policy expanded the battleground on which economic policy was disputed to include the judicial arena. Opposition politicians and civil society actors questioned arguably unconstitutional policies in the courts – but also re-dressed ideological disagreements and popular frustrations with economic reform in legal or constitutional clothing, seeking to accomplish via the judiciary what they had been unable to accomplish in the electoral and legislative arenas. In short, the seriousness and simultaneity of economic and legal transformation led to the judicialization of economic governance in Latin America.[5]

[4] To be clear, I do not dispute that many developing democracies have undergone the dual transition to which most theorists refer (the regime/economic transition). The point is that after regime change, those countries experienced an additional pair of transitions (the continuation of economic transition, and a new, legal transition) *in the context* of democracy. Indeed, democratic transition was likely a pre-requisite for certain aspects of the legal transition.
[5] Economic governance refers to efforts to manage the economy, control economic crisis, and encourage economic growth and development.

In Brazil in particular, several aspects of the new constitution promulgated in 1988 generated constitutional conflict over economic reform as reform got underway tentatively in the early 1990s, and more forcefully at mid-decade. First, due to the charter's detailed nature and its statist and nationalist bent, new policies – and in particular those that sought to extricate the state from the many roles it played – tended to collide with constitutional provisions. Moreover, the constitution embodied a fundamental conflict that served to exacerbate Brazil's "intrinsic fiscal imbalance" (EC-34, EC-41):[6] it included an extensive list of rights and guarantees for all Brazilians while simultaneously placing limitations on the government's ability to collect the money necessary to run the country, let alone to fulfill the social agenda implicit in the charter. No matter what strategy elected leaders adopted to collect more, spend less, and advance their economic initiatives, judicial challenges sprung from all sides.

As in other Latin American countries, many of those cases either initially or ultimately landed on the doorstep of the high court, drawing those courts to the center of the political stage as never before. Ruling as the court of last resort on contentious cases regarding crucial economic policies often placed the region's high courts in the difficult position of adjudicating between legality and constitutionalism on one hand, and economic imperatives on the other. Their decisions would have far-reaching implications for the nature of the state, economic governance, the role of courts, and the rule of law.

Consider, for example, the quandary faced by Brazil's highest court, the *Supremo Tribunal Federal* (STF), in April 1990 when it was called upon to determine the constitutionality

[6] Citations of this form are references to interviews carried out in association with this project. Respondents' names are not mentioned to protect confidentiality. Citations with the prefix "I" were early informational interviews; citations with the prefix "EG" were general expert interviews; citations with the prefix "CSE" were case selection interviews; citations with the prefix "CSM" or "JG" were interviews with justices; citations with the prefix "EC" were expert interviews regarding the economic policy cases in the focused sample; interviews with the prefix "ASS" were interviews with Supreme Court clerks.

of a presidential decree that froze bank accounts. The decree was part of a broader stabilization program intended to address hyperinflation, which had reached a devastating annualized rate of 6,821% by early 1990.[7] The decree had been issued just weeks after the inauguration of President Fernando Collor de Mello, the first directly elected president after a 20-year long period of authoritarian rule. Brought to power with a mandate to defeat inflation, Collor's public approval rating topped 70% (despite the bank freeze) when the STF received the case.

The Court confronted a critical choice. Considering just the legal merits of the case, declaring the policy unconstitutional was the obvious choice given its blatant violation of property rights. Yet doing so would place the Court in the unenviable position of defying a very popular transitional president, and would leave it vulnerable to accusations of being exceptionally legalistic and counter-majoritarian, and of imposing an obstacle to economic governability, recovery – and perhaps democracy. Also, it was certainly possible that President Collor would draw on his broad political support simply to ignore the ruling. If the Court declared the policy constitutional, however, it could insist it had ruled in that direction to offer the government's crisis-driven economic policy every chance to succeed, and to fortify the broader institutional system given the potentially destructive effects that continued economic crisis could have on the stability of Brazil's new democracy. Endorsing the policy would also remove the nagging doubt regarding whether the government would comply with a challenging decision. Yet sanctioning the unconstitutional exercise of government power would open the court up to allegations that it had simply acceded to the desires of the executive, lacked independence, and was undermining the rule of law. In short, the Court's ultimate decision – to dismiss the case on a technicality after a protracted delay – resulted from its consideration, weighing, and balancing of a complex series of factors and dynamics.

[7] Reinhart and Savastano 2003: 21

This example is hardly anomalous: like many high courts across the region, the Brazilian STF was repeatedly called upon to resolve crucial and multi-faceted conflicts over economic policy during the first 20 post-transition years. How did the STF rule on these cases: what were the contours of its involvement in economic governance? The paper's next section examines the direction and intensity of the Brazilian high court's rulings on the most important cases regarding economic policy that it considered between 1985 and 2004 (N=26). While we might have anticipated that the STF would consistently endorse the exercise of government power when ruling on such complex and controversial cases, close qualitative analysis demonstrates that the high court was *selectively assertive* in the economic policy realm, challenging the exercise of government power on almost 40% of the cases under analysis. This finding immediately raises another question: what logic lies behind these high court's decision-making on cases concerning the exercise of government power in this crucial policy realm?

The question of what factors and forces motivate judicial decision-making is a fundamental one in studies of courts and politics. Despite the vibrant and prolonged nature of the debate, scholars have reached no consensus on the foundations of judicial decision-making. I submit that the reigning dissensus results from analysts assuming too essentialist a stance, searching for a determinism that does not and cannot exist. As Shapiro (1964, 1981, 2002) has insisted for almost a half-century, judges are political actors. At least in democratic contexts where rules and institutions are still in formation, they consider a range of political and institutional dynamics when resolving politically crucial conflicts of the type this analysis examines. Despite the fact that they often do – and perhaps more importantly, must appear to – take legal factors into consideration, judges' policy preferences and their calculations regarding public opinion and other actors' power inevitably feed into their rulings.

This paper's third section advances an account of judicial decision-making that embraces its political and legal complexity: the thesis of tactical balancing. Building on existing models, the thesis posits that it is rarely one specific factor that explains how a high court decides politically important cases. Instead, six considerations impinge on high court decision-making on such cases, in different combinations and different ways from case to case over time: (1) justices' ideology; (2) judicial corporate or institutional interests; (3) elected branch preferences; (4) the possible economic or political consequences of the decision; (5) popular opinion regarding the case; and (6) legal considerations. No consistent significance ordering can be established among the considerations: as justices contemplate the content of each politically important case, the context in which they are deciding it, and the interaction between the two, they engage in the "tactical balancing" of the six considerations. Variation in the salience of the considerations over cases results in a shifting blend of approaches to decision-making and that shifting blend drives high courts' alternation over time between challenging and endorsing the exercise of government power – what observers view as their "selective assertiveness" when ruling on politically crucial cases.

The fourth section illustrates how the thesis of tactical balancing accounts for the STF's selective assertiveness in the economic policy arena. First it shows how the different considerations (and combinations of considerations) implicit in the thesis impinged on the high court's rulings on each of the crucial cases regarding economic policy under study, leading to the STF's "selective assertiveness" in the realm of economic governance. It then offers a detailed account of two STF cases regarding economic policy, showing how the justices balanced the discrete set of considerations implied in the thesis of tactical balancing. The final section summaries the papers' findings and their implications, and discusses avenues for future inquiry.

2. THE STF'S SELECTIVE ASSERTIVENESS IN THE ECONOMIC REALM

The 26 most important cases regarding economic policy (grouped into 20 topics)[8] to come before the Brazilian *Supremo Tribunal Federal* (STF) during the country's first 20 post-authoritarian years are presented in Table 1.[9] The cases are arranged by the direction of the STF's ruling (endorse or challenge the exercise of government power), and within that, by the *intensity* with which the Court endorsed or challenged the exercise of government power – that is, by the Court's degree of assertiveness vis-à-vis the elected branches.[10] The range thus runs from strong endorsements to strong challenges.

The data reveal that the STF handed down challenging decisions in 11 out of the 26 cases regarding economic governance considered here (that is, 42% of the time). Nonetheless, the Court issued *strong* challenges in only five of the 26 rulings under consideration (less than 20% of the time). Similarly, the high court was more likely to weakly endorse the exercise of government power (which it did 35% of the time) than it was to strongly endorse (which it did

[8] Respondents often mentioned more than one key ruling associated with a particular topic or policy, and those are grouped together.

[9] Appendix A and B discuss case selection. Given that the STF often decides hundreds or thousands of cases questioning the same policy, none of the cases analyzed here is the *only* case the STF decided regarding the policy in question, but all are case experts highlighted as the major or leading case regarding each policy.

[10] The scoring scheme took into consideration how the Court ruled with respect to the particular policies in question as well as what each ruling said or implied about the broader exercise of government power; the timing of the decision; the relationship to the next lowest court ruling if applicable; the form/type of decision to which elected leaders reacted; the procedure employed in taking on or deciding the case; and the form of the justices' vote. For challenging decisions, how important the policy was to elected leaders, and whether the leaders in power when the STF ruled on the case had implemented the questioned policy were also taken into consideration. With regard to the first two factors, it is important to note that the STF's rulings sometimes differed in terms of the intensity with which they challenged or endorsed the particular policy under question, versus their intensity in terms of challenging or endorsing the broader exercise of government power. For example, in the two decisions regarding the IPMF tax (ADIn 926 and ADIn 939), while the Court only weakly challenged the particular policy in question, it more strongly challenged the overall exercise of government power by strongly asserting its ability to consider the constitutionality of – and indeed declare unconstitutional – constitutional amendments. Moreover, in some cases, the Court's ruling on the particular policy under question went in one direction, while the ruling's implications for the broader exercise of government went in a different direction. For example, in its ruling on a case in which certain aspects of Collor Plan I were questioned (ADIn 223), the high court tacitly endorsed the policy (refusing to issue an injunction to suspend it), but practically encouraged those who felt the policy infringed their rights to take cases to lower courts. It was in fact due to the strong "sub-text" of some of the early rulings under study (rather than due to their strong endorsement or challenge of particular policies) that they were scored as strong challenges or endorsements. Such examples highlight the need to carefully study both the text and the less obvious "sub-text" of high court rulings.

Table 1. 26 Brazilian High Court Cases Relating to Economic Policy (1985-2004)

Topic and Case		**Date Distributed ~ Date of Injunction ~ Date of Final Decision (Time since distribution)**	**Issue area**	**Policy or act questioned (all policies national level)**	**Content and/or form of policy questioned**
STRONG ENDORSE (Range for endorse scores: 7.5-14.5)					
Constitutional capping of interest rate at 12% (Score = 11.5)	ADIn 04	12 Oct. 1988 ~ 19 Oct. 1988 ~ 07 Mar. 1991 (28 months, 26 days) (*Not published until 25 Jun. 1993*)	Monetary	*Parecer* of the *Consultor Geral* (SR n. 70, published 07 Oct. 1988) and Central Bank *Circular* 1365 based on that *parecer*, which considered paragraph 3 of Article 192 of the constitution (establishing the interest rate at 12%) to be non-self-executing.	**CONTENT** – Plaintiff questioned the constitutionality of the *parecer* and the Central Bank circular, arguing that they violated Article 192 of the constitution.
Contribution for Financing Social Security (Contribuição para Financiamento da Seguridade Social, COFINS) (Score =9.5)	ADC 01	03 Aug. 1993 ~ No injunction ~ 27 Oct. 1993 (*Interlocutory decision regarding constitutionality of ADC mechanism*) ~ 01 Dec. 1993 (3 months, 29 days)	Fiscal/Tax	Complementary Law 70 (30 December 1991) which instituted the Contribution for Financing Social Security (COFINS) (among other stipulations). (Court also considered the change made to Constitutional Article 102 [part I, letter "a"] per Constitutional Amendment #3 [17 March 1993], as well as § 2º added to that same article.)	Plaintiff (the executive) petitioned the STF to declare Complementary Law 70 *constitutional* in its entirety.
Privatization of the Bank of the State of São Paulo (Banco do Estado de São Paulo, BANESPA) (Score = 9)	PET 2066	11 Jul. 2000 ~ No injunction ~ 13 Jul. 2000 (*Decision appealed and overturned.)* ~ 29 Aug. 2000	Privatization	The headnote (edital) of the opening of the process of the sale of BANESPA, the government's encouragement of foreign entities to bid on the bank, and the timeline for the sale.	**CONTENT** – Plaintiffs wished to overturn the decision of the Regional Federal Tribunal (*Tribunal Regional Federal*, TRF) of the 3rd Region, which issued an injunction suspending the sale of BANESPA, arguing that the suspension of the sale would result in a risk to public order and national economic stability.

		(1 month, 18 days) (*Decision appealed twice, unsuccessfully*)			
Privatization of the Vale do Rio Doce Company (CVRD) (Score = 8.5)	ADIn 1582	15 Apr. 1997 ~ 28 Apr. 1997 ~ 07 Aug. 2002 (63 months, 23 days)	Privatization	Law 9074 (Article 27 and paragraphs I and II) (07 July 1995) which established the procedure for privatizing public services (including the CVRD).	**CONTENT** – With specific reference to the privatization of CVRD, the plaintiff alleged that the procedures for privatization outlined in the law violated Constitutional Article 175, regarding the government's responsibility to provide public utility services
"The black-out" (*O "apagão"*) (Score = 8)	ADC 09	11 Jun. 2001 ~ 28 Jun. 2001 ~ 13 Dec. 2001 (6 months, 2 days)	Public services	Articles 14 through 18 of MP 2.152-2 (originally of 01 June 2001 and re-edited as MP 2.198-5 on 24 August 2001) which revoked MP 2148-1 (22 May 2001) and established policies to address an energy crisis including consumption goals and a tariff regime	Plaintiff (the President) petitioned the STF to declare Articles 14 through 18 of MP 2.152 constitutional, in view of significant judicial controversy over the policy.
Formula for calculating retirement benefits ("fator previdenciário") (Score = 7.5)	ADIn 2111	01 Dec. 1999 ~ 16 Mar. 2000 ~ No final decision	Pensions/ Benefits	Law 9876 (26 November 1999), in particular, Article 2 (which revised Article 29 of Law 8213 of 24 July 1991), and Article 3; Law 9876 established the formula for calculating pension contributions and benefits	**FORM and CONTENT** – Plaintiff alleged that congress had violated procedures established in Article 65 of the constitution when passing the law, and that Articles 2 and 3 of the law violated Constitutional Article 5 (Paragraph XXXVI) and Article 201 (§1º E 7º), as well as Constitutional Amendment #20 (Article 3)
WEAK ENDORSE (Range for endorse scores: 0-7)					
Public sector pensioners' payment of retirement contributions (II) (Score = 7)	ADIn 3105	31 Dec. 2003 ~ No injunction ~ 18 Aug. 2004 (7 months, 19 days) (*Decision appealed, twice, unsuccessfully*)	Pensions/ Benefits	Article 4 of Constitutional Amendment #41 (19 December 2003) which established a tax on retired state and local public sector workers' retirement benefits equal to the retirement contributions paid by active workers (11%); retired state and local workers were only to pay the tax on the portion of their benefits in excess of 50% of the maximum benefit for private sector workers; federal retirees would only pay the tax on the portion of their benefit in excess of 60% of the maximum benefit for private sector workers.	**CONTENT** – Plaintiffs alleged that the retirement benefits of those who were already in retirement when the amendment was passed should continue to be regulated by the norms of the retirement system in place when they retired, and as such, that Article 4 of Constitutional Amendment #41 violated their individual vested rights per Constitutional Article #5 (which is among the fundamental constitutional clauses that cannot be amended or violated).
	ADIn 3128	05 Feb. 2004 ~ No injunction ~ 18 Aug. 2004 (6 months, 13 days) (*Decision appealed; appeal withdrawn*)			

Provisional Contribution on Financial Transactions (Contribuição provisória sobre movimentação ou transmissão de valores e de créditos e direitos, CPMF) (Average score = 7)	ADIn 1497	02 Sept. 1996 ~ 09 Oct. 1996 ~ 30 Oct. 2003 (85 months, 28 days)	Fiscal/ Tax	Constitutional Amendment # 12 (15 Aug. 1996), which established Transitory Article 74, which stipulated the Union's ability to impose the CPMF tax	**CONTENT** – Plaintiff alleged that Constitutional Amendment #12 violated Article 60 (§ 4º, paragraph IV) and Article 154 (paragraph I) of the constitution (i.e. the new contribution violated individual rights, and had the same base as another tax established in the constitution and was thus unconstitutionally cumulative).
	ADIn 2031	02 Aug. 1999 ~ 29 Sept. 1999 ~ 03 Oct. 2002 (38 months, 1 day)		Constitutional Amendment No. 21 (18 Mar. 1999), which established Transitory Article 75, which extended the CPMF for 36 months, changed its rate, and extended the implementing legislation	**FORM and CONTENT** – Plaintiff alleged that when amendment text was considered in the Chamber of Deputies, wording changes were made that were not subsequently approved by the Senate; the procedure through which the amendment was approved thus did not follow the procedure outlined in the constitution (Article 60, § 2) and was thus void; further, the laws that the amendment extended were, at the time of extension, no longer in force; further, the tax was confiscatory, thus violating Constitutional Articles 150 and 7; the tax also violated Constitutional Articles 154 and 5.
Collor Plan I – no injunctions in cases related to the Plan (Average Score = 7)	ADIn 223	28 Mar. 1990 ~ 05 Apr. 1990 ~ 26 Feb. 1996 (70 months, 29 days)	Monetary	MP 173 (18 Mar. 1990) and its re-issuances which prohibited courts from issuing injunctions in cases resulting from MPs and other legislation associated with Collor Plan I	**CONTENT** – Plaintiff alleged that MP 173 violated constitutional Article 5, item 35 (which prohibits excluding norms from review by the judiciary) and item 49 (which provides for the specific judicial mechanism that MP 173 prohibited), and item 65 (which provides that no one may be prevented access to his goods)
	ADIn 295	04 Jun. 1990 ~ 22 Jun. 1990 ~ 09 Nov. 2001 (137 months, 5 days)			**CONTENT** – Plaintiff argued that MP 173 violated constitutional Article 2 (which establishes the independence of the different branches of government) and Article 5, item 35 (which prohibits excluding norms from review by the judiciary).
Collor Plan I – freezing of savings accounts (Average Score = 6.75)	ADIn 259	06 Apr. 1990 ~ No injunction ~ 11 Mar. 1991 (11 months, 5 days) (*Not published until 19 Feb. 1993*)	Monetary	18 different MPs composing Collor Plan I including MP 168 (15 March 1990) which instituted a new currency and blocked savings accounts in excess of 50,000 *cruzados novos* (about US$ 1,300) for 18 months	Plaintiff alleged that 18 MPs were unconstitutional but did not delineate the exact basis on which it alleged that each was unconstitutional.
	ADIn 534	20 Jun. 1991 ~ 27 Jun. 1991		Law 8024 (12 April 1990) into which MP 168 (15 March 1990) had been converted,	**CONTENT** – Plaintiff alleged that the policy represented a "compulsory loan" and its

		~ 26 Aug. 1992 (14 months, 6 days)		which instituted a new currency and blocked savings accounts in excess of 50,000 *cruzados novos* (about US$ 1,300) for 18 months (specifically Articles 5-10, 19, and 20 and others connected to them).	establishment via an MP (and other procedural aspects of its emission) violated Article 148 of the constitution (which delineates the rules by which compulsory loans can be imposed).
Law of Fiscal Responsibility (Lei de Responsabilidade Fiscal) (Score = 6.5)	ADIn 2238	04 Jul. 2000 ~ 08 Aug. 2007 ~ No final decision	Fiscal/ Tax	Complementary Law 101 (04 May 2004) – in its entirety and various parts – and two Articles of MP 1980-18 (04 May 2000)	**FORM and CONTENT** – Plaintiffs alleged that the promulgation of Law 101 had not followed the rules stipulated in Article 64 of the constitution, and asserted that more than 20 different aspects of the law's content violated innumerable constitutional principles including, importantly, the separation of powers and federalism.
WEAK CHALLENGE (Range for endorse scores: 1-9.5)					
Fund for Social Investment (Fundo de Investimento Social, FINSOCIAL) (Average Score =1)	RE 150755	01 Jul. 1992 ~ No injunction ~ 18 Nov. 1992 (4 months 17 days) (*Decision appealed unsuccessfully*)	Fiscal/ Tax	Article 28 of Law 7738 (09 March 1989), which established a .5% tax (FINSOCIAL) on public and private service-providers; FINSOCIAL, created by Decree-Law 1940 (25 May 1982), taxed gross earnings of firms selling merchandise or merchandise and services, financial institutions, and insurance companies	**CONTENT** – A company dedicated completely to service-provision petitioned to be exempt from the FINSOCIAL tax.
	RE 150764	04 Aug. 1992 ~ No injunction ~ 16 Dec. 1992 (4 months, 12 days)		Art. 9 of Law 7689 (15 Dec. 1988); Art. 7 of Law 7.787 (30 June 1989), Article 1 of Law 7.894 (24 Nov. 1989), and Article 1 of Law 8.147 (28 Dec. 1990) each of which incrementally increased the FINSOCIAL tax to be paid by companies selling merchandise, and mixed companies (engaged in both selling merchandise and providing services).	**FORM** – A mixed company questioned whether the FINSOCIAL tax was still constitutional in view of law 7.689.
Salary increase of 28.86% (Score = 8)	RMS 22307	01 June 1995 ~ No injunction ~ 19 Feb. 1997 *(Decision appealed successfully)* ~ 11 Mar. 1998 (33 months, 9 days)	Salaries	The inequity generated by the awarding of a larger salary adjustment to military employees of the Executive than to civil employees via Laws 8.622 and 8.627 (of 19 January 1993 and 19 February 1993 respectively)	**CONTENT** – Plaintiffs alleged that their failure to receive a 28.86% salary increase violated Article 37 (paragraph X) of the constitution, which guarantees salary equality between military and civilian public sector workers

		(Decision appealed, twice, unsuccessfully)			
Adjustment of salary-tied accounts in the Length of Service Guarantee Fund (Fundo de Garantia de Tempo de Serviço, FGTS) (Score =8.5)	RE 226855	16 April 1998 ~ No injunction ~ 31 Aug. 2000 *(Decision appealed successfully)* ~ 26 Oct. 2000 (30 months, 10 days)	Salaries	Constitutionality of adjusting accounts in the Length of Service Guarantee Fund (*Fundo de Garantía do Tempo do Serviço*, FGTS), managed by the *Caixa Económica Federal* (CEF) according to indices associated with five different economic stabilization plans imposed between 1986 and 1991	**CONTENT** – Plaintiffs (asserting that their relationship with the CEF was contractual) claimed that the alterations to the indices applied to their FGTS accounts via laws associated with the economic plans were illegal (as they violated the contract they had with the FGTS) and unconstitutional (as they violated property rights and guarantees of equity enshrined in the constitution)
Salary retention for certain public sector workers (10.94%) (Score =9)	MS 21969	24 March 1994 ~ 28 March 1994 ~ 05 May 1994 (1 month, 11 days)	Salaries	Minister of the Treasury's removal (via Aviso 336) of 10.94% of the March 1994 salary from the bank account of certain employees of the legislature and *Tribunal de Contas*	**CONTENT** – Plaintiff alleged that the Executive's action violated the independence of the Legislature (guaranteed in Article 2 of the constitution) as well as Article 52 (part XIII) which awards to the legislature the power to set its employees' salaries.
Constitutional Amendment #20 – maternity leave salary (Score =9.5)	ADIn 1946	21 Jan. 1999 ~ 29 Apr. 1999 ~ 03 Apr. 2003 (50 months, 13 days)	Pensions/ Benefits	Article 14 of Constitutional Amendment No. 20 (16 December 1998) which established a maximum limit (R$ 1,200/month) for the value of benefits of the retirement system for private sector workers stipulated in Article 201 of the constitution (as well as Article 6 of *portaria* 4883 [1988] which implemented that constitutional article).	**CONTENT** – Plaintiff alleged that Article 14 of Amendment 20 (i.e. capping maternity leave benefits at R$1,200 monthly) violated Constitutional Article 3 (paragraph IV) and Article 5 (headnote and paragraph I) which prohibit gender discrimination, and Article 7 (paragraph XVIII) which guarantees that women will earn their full salary during maternity leave – and therefore, Article 60 (§4°, paragraph IV) which lays out the charter's fundamental principles which cannot be violated or amended.
STRONG CHALLENGE (Range for challenge scores: 10-18.5)					
Readjustment of retirement benefits of 147.06% (Score = 10.5)	RE 147684	23 Apr. 1992 ~ No injunction ~ 26 Jun. 1992 (2 months, 3 days)	Pensions/ Benefits	A government policy (*Portaria* 3485 of 16 September 1991) that established that certain retirees would not receive a 147.06% adjustment in their benefits	**CONTENT** – Collective plaintiff alleged that their union's retirees had a right to the 147.06% increase in their benefits (since those benefits were linked to the minimum wage, and the minimum wage had been increased by 147,06%), and that the questioned *Portaria* (which set the adjustment at a lower level) violated: transitory articles 58 and 59 of the constitution; Laws 8.212, 8.213, & 8.222 of 1991.

Annual salary review for public sector workers (Score = 11)	ADIn 2061 (ADIn por Omissão)	16 Sept. 1999 ~ No injunction ~ 25 Apr. 2001 (19 months, 9 days)	Salaries	President's failure to send to congress an annual bill including a general review of public sector salaries	Plaintiffs argued that Constitutional Article 37 (as amended by Constitutional Amendment #19) required the president to send a bill to congress each year reviewing the remuneration of federal public sector workers; the president had failed to do so by 05 June 1999, one year after the article had been amended. They requested that the STF stipulate a period within which the president must send the bill to Congress and remind him of his duty to send such proposals at least every twelve months
Public sector workers and retirees retirement contributions (I) (Score = 12)	ADIn 2010	07 Jun. 1999 ~ 30 Sept. 1999 ~ 13 Jun. 2002 (*Partial decision*) ~ 15 Mar. 2004 (56 months, 6 days)	Pensions/ Benefits	Law 9783 (28 Jan. 1999) which regulated the contribution of public sector pensioners to the public sector retirement fund, specifically, Article 1º, Article 2º and its only paragraph, and Article 3º and its only paragraph.	**FORM and CONTENT** – Plaintiff argued that laws that institute or raise pensions should be complementary (rather than ordinary) laws; that Congress had violated congressional procedures outlined in Article 67 of the constitution; that the tax was confiscatory and violated Article 150 (Paragraph IV); that the law violated the principle of actuarial balance outlined in Article 195 (§ 5) and Article 37 (Paragraph XV) and Article 194 (Paragraph IV) regarding the irreducibility of salaries and benefits; that the progressive structure of social security contributions violated Articles 5 (headnote) and Article 150; that taxing pension benefits violated Article 40 (§ 12) and Article 195 (Paragraph II); and that the law violated vested rights (Article 5, Paragraph XXXVI)
Provisionary Tax on Financial Transactions (Imposto Provisório sobre Movimentação Financeira, IPMF) (Average score =14.25)	ADIn 926	25 Aug. 1993 ~ 01 Sept. 1993 ~ 02 Mar. 1994 (6 months, 5 days)	Fiscal/Tax	Constitutional Amendment #3 (17 March 1993) which established the IPMF, specifically Article 2, clause 2 which asserted the inapplicability to the amendment of Article 150, Part III, letter "b"; of Article 150 Part VI; and of Article 153 Clause 5 of the constitution	**CONTENT** – Plaintiff claimed that the amendment violated the constitutional principle of reciprocal immunity in taxation (Constitutional Article 150, part VI, letter "a").
	ADIn 939	08 Sept. 1993 ~ 15 Sept. 1993 ~ 15 Dec. 1993 (3 months, 7 days)		Constitutional Amendment #3 (17 March 1993) which established the IPMF (several aspects) and Complementary Law 77 (13 Jul. 1993)	**CONTENT** – Plaintiff claimed that the amendment and the law violated the constitutional principle of anteriority in taxes (Constitutional Article 150, part III, letter "b"); the principle of reciprocal immunity in taxation (Constitutional Article 150, part VI, letter "a"), as well as guarantees prohibiting taxes from being cumulative, and prohibiting bi-taxation (Constitutional Article 154, part I).

23% of the time). While it is precisely this variation in the direction of the STF's decision-making on these crucial cases regarding economic policy that this paper seeks to explain, it is instructive to observe a number of other features of the sample of cases and rulings before proceeding to the explanatory account.

The distribution of cases over time traces the evolution in economic policy-making in Brazil. The country transitioned to democracy in significant economic crisis, and starting in the late 1980s, elected leaders imposed a series of economic stabilization programs in an effort to control inflation (a pre-requisite for any deeper or lasting reform). Many of these plans involved wage and price freezes and the implementation of new indices to correct for inflation, both of which disrupted the indexing (or "monetary adjustment") of prices and wages that was written into most contracts in Brazil in the late 1980s and early 1990s.[11] These plans thus violated contracts across the economic spectrum. Given the ubiquity of these violations, and the innovativeness of Brazilian lawyers who were able to generate a seemingly endless array of legal strategies to perpetuate the "industry of litigation" against these plans (EC-21), tens of thousands of cases associated with their implementation eventually reached the high court, beginning in the early post-transition period (for example, regarding Collor Plan I and the bank freeze it imposed – ADIn 223, ADIn 295, ADIn 259, and ADIn 534), and lasting into the 2000s (for example, RE 226855 which dealt with adjustments to accounts within the Length of Service Guarantee Fund, *Fundo de Garantía do Tempo do Serviço*, FGTS).

Once inflation was brought under control with the implementation of the *Real* plan in 1994, elected leaders embarked on broader efforts to re-orient Brazil toward market-based economics, and to reform the state. However, the new constitution promulgated in 1988

[11] "Monetary adjustment" (*correção monetaria*) is an indexing scheme to compensate for inflation that is very particular to Brazil.

presented a series of obstacles that would complicate Brazilian post-authoritarian leaders' efforts at effective economic governance. A first challenge was presented by the constitution's very detailed nature, which increased the likelihood that public policies would collide with constitutional principles, and thus increased the potential for judicial challenges to the government's initiatives. Moreover, some of the (in essence) public policies enshrined in the charter embodied objectively counterproductive or unrealistic economic principles, and thus inevitably came into conflict with new policies (as occurred in a case regarding the clause of the constitution that capped the interest rate at 12%, ADIn 04). The charter's statist and nationalist bent also complicated the implementation of neoliberal policies. While a series of constitutional reforms carried out by President Cardoso in the mid-1990s were somewhat successful in diffusing potential constitutional conflicts around neoliberal reform (and privatization in particular), extricating the government from the economy and selling off inefficient state enterprises (a key source of capital for the government) still generated significant conflict. Two cases that demonstrate this conflict concern the privatization of the *Companhia Vale do Rio Doce* (a major mining concern, ADIn 1582) and of *Banespa* (São Paulo's state bank, PET 2066).

Finally, and perhaps most critically, the constitution presented significant obstacles to fiscal rectitude. Brazil has long suffered from intrinsic fiscal imbalance (EC-34, EC-41). While Brazil's inflationary crisis actually helped *resolve* fiscal conflicts through the early 1990s,[12] once inflation had been tamed, Brazil's fiscal problems were laid bare, and the need for effective schemes to augment extraction and decrease state spending became more acute than ever. Yet achieving this goal was hindered by the fact that the constitution prioritized just the opposite, placing limits on the state's ability to tax, and laying the groundwork for a generous welfare state

[12] To explain the idea in simple terms, under highly inflationary conditions, the government could award a salary increase, for example, knowing that inflation would immediately corrode the value of that increase such that the government would not actually have to confront the problem of paying workers more in real terms.

– thus placing the law and fiscal discipline at odds. This fundamental conflict within the constitution haunted elected leaders as they sought to engage in fiscal adjustment through the 1990s. The government's attempts to spend less on public sector salaries or benefits (or to increase pension contributions) were questioned repeatedly (for example, in RMS 22307, MS 21969, and ADIn 2061, all of which dealt with salaries, and ADIn 2111, ADIn 3105 and 3108, ADIn 1946, RE 147684, ADIn 2010 dealing with pensions), and various tax initiatives generated high court cases (for example, ADC 01, ADIn 1497, ADIn 2238, RE 150755, RE 150764, and ADIn 926 and 939). Despite their varying content, all of these cases had at their core the constitutionality of the state's efforts to collect more and spend less.

The majority of the cases regarding economic policy (17 out of 26, or 68%) were ADIns (including one ADIn for omission), all questioning government action or policy.[13] The most frequent filers of the ADIns were opposition political parties (which filed nine), and the Brazilian bar association (which filed three), similar to the proportions in the broader sample of cases. The rest of the cases regarding economic policy were either appeals by the state (of cases originally filed against some government policy or action) or ADCs.[14] Further, the amount of time it took the high court to reach a final decision on the cases varied considerably from case to case.

A final comment concerns the types of policies and actions that were questioned in these cases, and what sort of questioning occurred. While much has been made of Brazilian executives' overuse or misuse of "provisional measures" (*medidas provisórias*, MPs, akin to

[13] In an ADIn (*Ação Direta de Inconstitucionalidade*, Direct Action of Unconstitutionality), plaintiffs question abstractly (i.e. in the absence of a case or controversy) the constitutionality of provisionary measures and decrees issued by the executive, of constitutional amendments and ordinary laws passed by federal or state legislatures, or of administrative decrees issued by federal or state courts *since 1988* (Taylor 2004: 166-69). In an ADIn for omission, plaintiffs allege, abstractly, that congressional or agency failure to legislate or regulate certain constitutional clauses makes the content of those clauses ineffective, and that those failures are thus unconstitutional.

[14] In an ADC (*Ação Declaratória de Constitucionalidade*, Declaratory Action of Constitutionality), plaintiffs request that the STF declare the *constitutionality* of a particular federal norm.

executive decrees) (see, e.g., Figueiredo and Limongi 2000, Negretto 2004), legislative action was more often directly questioned in these high court cases than were MPs. Of the 22 cases in which an action or policy of the elected branches was initially questioned, in only four cases (or 18% of the time) was the object of the case an MP,[15] while the constitutionality of a complementary or ordinary law was questioned in eight of the 26 cases (or 36% of the time), and the constitutionality of a constitutional amendment was challenged in another six cases (or 27% of the time).[16] On a related note, it was much more often the *content* than the *form* of policies that was questioned: policy content was questioned in 17 cases (or 65% of the time), and both form and content were questioned in four cases (or 15% of the time). This again suggests that presidents may not have breached unconstitutionally the legislative realm – at least in the area of economic governance – to the degree that other studies have warned.

In sum, during the first 20 post-transition years, a variety of political actors employed a range of legal mechanisms to question the form and content of a diverse set of the national government's economic policies before the Brazilian high court. When ruling on those cases, the STF was "selectively assertive:" it alternated between challenging and endorsing the exercise of economic power. This variation begs the question: what logic lies behind the high court's decision-making regarding the exercise of government power in this crucial policy realm?

3. THE THESIS OF TACTICAL BALANCING

Identifying the foundations of judicial decision-making (in particular on cases in which the elected branches are a party or have an interest) is a central focus of the political science

[15] This is not to say that executive action was not questioned: in another eight cases (or 31% of the time), some sort of administrative policy or decision issued by the executive was questioned.

[16] Of course, it is important to keep in mind that several of the laws questioned *originated* as MPs (that is, they were converted into law by Congress); further, draft constitutional amendments are often submitted to the legislature by the executive and thus also bear the president's fingerprints. Nonetheless, the fact remains that legislative action was as often questioned in the high court as was executive policy.

literature on courts in developed and developing democracies alike. Four major theoretical models of judicial decision-making dominate the literature: the legal model, the attitudinal model, institutional explanations, and strategic accounts.[17] According to these models, courts either pursue a particular goal (imposing their policy preferences or increasing their power in the second and fourth accounts respectively), or are empowered/constrained by one particular force (legality, or different institutional factors, in the first and third accounts respectively). Yet the persistence of the models in the literature raises the possibility of an alternative account: that no single factor explains high court rulings – at least in salient politically controversial cases. Instead, perhaps high court decision-making on such cases consists of a *set* of behaviors that are motivated by different factors and values that Courts consider and balance in different ways over cases, contexts, and time.

This paper advances and illustrates precisely such a multi-factor account of judicial decision-making: the thesis of tactical balancing. According to the thesis, when ruling on politically controversial cases, high court justices take into account a series of considerations that loosely track the attitudinal, strategic and legal models of judicial decision-making (outlined in the first row of Table 1 below).[18] As justices rule on each politically important case – as they examine its content, the context in which they are deciding it, and how the two interact – they "balance" these six considerations: particular considerations become salient while others prove less important. In other words, no single significance ordering can be established for the six considerations: they impinge on high court rulings in different combinations and different ways

[17] A sub-set of the literature on Latin American courts, studies of the Chilean judiciary in particular, offer cultural explanations for courts' consistent *lack* of assertiveness. Karst and Rosenn (1975), for instance, argue that judicial assertiveness is impeded by the formalistic nature of Latin American legal culture, and Frühling (1984) suggests that Chilean judges' reluctance to challenge the constitutionality of legislation has its routes in their traditional training.
[18] Following Epstein, Knight, and Martin (2001), I understanding the strategic account as suggesting that judges recognize and act according to their interdependency with other actors, deciding cases based on their strategic calculations of the preferences, relative power, and likely actions of many actors (including but not limited to the elected branches of government).

from case to case over time.[19] The relative importance of the considerations strongly influences the direction of a Court's decisions leading it to alternate between challenging and endorsing the exercise of government power. We observe that alternation as "selective assertiveness."

Table 2. Considerations Affecting High Court Decisions on Politically Crucial Cases, and Corresponding Approaches to High Court Decision-Making

	Judicial decision-making model					
	Attitudinal	**Strategic**				**Legal**
Justices' considerations	(1) Justices' ideology	(2) Justices' corporatist/ institutional interests	(3) Public opinion	(4) Elected branches' preferences	(5) Potential political/ economic consequences of decision	(6) Law and merits of the case
Corresponding approach to high court decision-making	Preference-driven	Protective	Support-building	Deferential	Pragmatic	Principled

We can think of each consideration as corresponding to a particular approach to high decision-making (identified in the second row of Table 2). For instance, we can call a decision in which justices' ideology was paramount a "preference-driven" decision, and a ruling in which the elected branches' desires were the most salient consideration for the Court, "deferential." In other words, high court rulings on politically crucial cases vary not only in direction and intensity, but also with regard to the *approach* to decision-making adopted by a Court, a previously unexplored axis of comparison. Another way of understanding the claim of the thesis of tactical balancing, then, is that when ruling on different politically crucial cases over time, high courts in developing democracies employ a shifting blend of approaches to decision-making, leading them at times to challenge, and at times to endorse, the exercise of government

[19] For instance, public opinion might be less important in a case regarding a tax on certain corporations, and much more important in a case regarding a freeze on private bank accounts. To clarify, the thesis neither precludes more than one consideration from being relevant to any particular case nor suggests that *each* of these considerations is important in *every* politically important case. Rather, the idea is that the relative importance of the six considerations depends on case content and decision-making context, and that the blend of considerations that motivate judicial decision-making changes from one case to the next.

power – that is, to be "selectively assertive." Each approach to decision-making deserves a bit more elaboration.

1. Justices' ideology. Justices' preferences and their ideological leanings can prove important to their decision-making, particularly in politically crucial cases. This notion is of course reminiscent of the attitudinal model to judicial decision-making, which argues that judges' have and pay attention to their own ideological attitudes, and would thus predict that courts are more assertive when a majority of judges strongly oppose the policies underlying the laws or government decisions whose legality or constitutionality they are asked to evaluate. While the earliest manifestation of this model may have been H.C. Pritchett's work on the U.S. Supreme Court (1948), it was subsequently developed by Schubert (1965) and Rohde and Spaeth (1976), and is now most forcefully advocated by Segal and Spaeth (1993, 1999). We might call high court rulings in which justices' preferences are paramount *preference-driven*.

2. Corporate/institutional interests. Judges' corporatist or institutional interests (those of the judiciary as an institution, or of public sector workers more generally) may also impinge on their decision-making.[20] For instance, high courts might use their decisions on politically crucial cases to "strike back" at elected leaders who had threatened their institutional interests in some way. Justices' institutional interests are obviously at play in cases concerning public sector salaries or pensions. Alternatively, justices' institutional interests may motivate them to decide

[20] To be clear, the idea here is not that certain formal institutional arrangements affect or dictate judicial decisions – but rather that justices' specific interests in terms of the integrity or reputation of their institution affect high court assertiveness. Of course, a number of scholars do emphasize the importance of judicial institutions to judicial assertiveness. Kagan et al. (1978) for example, analyzing U.S. State Supreme Courts, suggest that courts are more assertive when they are able to control their caseloads and thus can elect to focus on important cases. Ginsburg (2002), analyzing Asian cases, alludes to a control mechanism similar to the one highlighted by Kagan et al. to explain why constitutional courts are more likely to exercise judicial control of the constitution than are supreme courts that are granted constitutional review powers. Further, Cornell Clayton and Howard Gillman have edited two volumes gathering work that analyzes the decision-making of the U.S. Supreme Court from a "new institutionalist" perspective (Clayton and Gillman eds. 1999, Gillman and Clayton eds. 1999). Of course, to the degree that the new institutionalist approaches suggest that rules, legal precedent, and legal tradition influence and constrain judicial decision-making, their arguments overlap to some degree with the legal approach.

(or duck) a particular case in order to demonstrate that cases of its ilk fall within (or, indeed, outside) their purview, or because they assume authorities will (or fear they will fail to) comply with their ruling – augmenting (or compromising) their institution's legitimacy (Scribner 2004, Helmke 2005). Similarly, Couso (2002) argues that Chilean courts tempered their decision-making in the constitutional realm in an effort to preserve their power to freely decide less contentious, quotidian struggles in the legal realm. And Huneeus's (2006) account of judicial assertiveness over human rights cases highlights judges' need for "institutional atonement" in the wake of their (self-perceived) poor showing during the dictatorship.[21] We could label decisions in which the institutional interests or the image of the Court itself are important considerations self-*protective.*

3. <u>*Public opinion*</u>. Public opinion about a particular case on which the high court must issue a ruling may also be very important to its decision-making. When courts are deciding politically crucial cases that have become well-publicized, public opinion and media pressure can be quite strong. Indeed, a variety of scholars have suggested that courts may feel empowered to challenge the elected branches in high-stakes cases if sufficient societal support exists for the court itself or for a challenging decision – that is – if a court can count on "basic social support structures" (López-Ayllón and Fix-Fierro 2003) that may decrease the likelihood of retaliation by the elected branches. Such arguments have been used to account for judicial assertiveness in Mexico (e.g. Staton 2002), Argentina (Smulovitz and Peruzzotti 2003), and Egypt (Moustafa 2003). Epp (1998) offers a related argument: courts' assertiveness increases as

[21] To do credit to Huneeus's account, her explanation also suggests that Chilean judges were more able to actuate the institutional preference for penance when the strict hierarchy that normally constrains decision-making temporarily ceased to bind. Hilbink (2007) also offers an explanation that considers institutional preoccupations, but focuses more on ideology and formal institutional factors: she argues that the Chilean judiciary's institutional ideology of apoliticism combined with the incentives established by its institutional structure led to a recycling of judicial conservatism and judicial reluctance to confront the government with "liberal" decisions. See Scribner 2004 for a different take on judicial assertiveness in Chile.

more societal organizations actively attempt to use litigation as a strategy for social change. To be clear, the idea being advanced here is that popular support for a particular ruling (i.e. *specific* support rather than *diffuse* support) may encourage the Court to proffer that ruling.[22] Decisions in which not offending public opinion is an important consideration in this way could be labeled *support-building*.

4. Elected-branch preferences. The elected branches often have strong preferences regarding high court rulings on politically crucial cases, and may exert considerable pressure on the Court to defer to those preferences. Many explanations within the strategic actor framework point – directly or indirectly – to the importance of elected leaders' preferences to judicial decision-making. Different studies suggest that courts are more assertive (that is, *less* attentive to elected leaders' preferences): when the existence of a multi-party system makes legislative repeal of their rulings more cumbersome and less likely (Cooter and Ginsburg 1996; Ríos-Figueroa 2003); when parties alternate in power more often (Ramseyer 1994); in contexts with greater political competition, and in particular, divided government (Chavez 2004, Scribner 2004); or when courts' issuance of decisions within elected leaders' "tolerance intervals" lead eventually to an expansion of those intervals (Epstein et al. 2001). Helmke (2005) found that in Argentina's uncertain institutional environment, high court justices ruled against the sitting government more often towards the end of its tenure, in hopes of gaining favor with the incoming administration. The idea advanced here is simply that elected leaders' (and particularly the administration's) policy preferences can figure into (and even dominate) high court deliberations on a particular case, leading the Court to issue a *deferential* decision.

5. Potential repercussions. The potential repercussions of a high court ruling for the institutional system, for governability, or for economic or political stability may also play a role

[22] See Caldeira and Gibson 1995 and Gibson, Caldeira, and Spence 2003 for more on this distinction.

in justices' calculations when ruling on politically crucial cases. Few scholars of judicial decision-making, and none that this author is aware of in the realm of comparative judicial politics, make the argument that judicial decision-making is guided by practical political and economic concerns (though few scholars would probably deny that justices consider the consequences of their decisions), and this consideration is thus being introduced into the argument on an inductive basis (rather than being drawn from the existing literature). Nonetheless, a similar notion is implicit in certain versions of the separation-of-powers model: courts rule with the objective of maximizing their power vis-à-vis the elected branches, and since inciting economic crisis is not likely to advance that objective, courts do not issue rulings that could generate economic turmoil. Alternatively, we can imagine that Courts might sometimes shy away from making decisions that would derail economic governance because they do not want to be blamed for the resulting mayhem.[23] Yet the idea here is different: Courts' consider the consequences of their decisions because they feel some responsibility for governing the country. When concerns about the possible ramifications of a ruling predominate in a Court's decision-making, it is adopting a *pragmatic* approach to decision-making.

6. <u>Legal considerations</u>. Finally, law and legal considerations may impinge on high court decisions to different degrees in different ways. For instance, courts may feel more confident challenging government action when the legal case against elected leaders is strong and well-developed; when either the form or content of the questioned policy is in blatant violation of the constitutional text; or when there is settled legal doctrine to which they can point to support a challenge. Relatively few contemporary legal scholars (and even fewer political scientists) argue that law determines legal outcomes, at least in the mechanistic sense in which

[23] Note that such a decision would be a *self-protective* decision.

the legal model has been (mis)represented in the literature.[24] The inclusion of this consideration in the thesis is consonant with the thinking of analysts who argue that law matters in more subtle ways to judicial behavior and decision-making. For example, scholars have suggested that law has an impact as a discursive practice (e.g. Whittington 2000) and a spate of studies since the mid-1990s have understood law as a professional "norm of reasoning" that obligates judges to forsake outcomes that cannot be justified by professionally-constructed references to authoritative legal rules or procedures (e.g., Knight and Epstein 1996, Tamanaha 1996, Gillman 2001). Richards and Kritzer (2002) have explored the effect of "jurisprudential regimes" on the U.S. Supreme Court, and Friedman (2006) has recently issued a call for scholars to take law and legal institutions more seriously.[25] We might call decisions in which legal factors predominate in the Court's reasoning *principled*.

The thesis of tactical balancing is not easily categorized within the typology of analytic approaches generally employed in political science. Like rational choice analysis, the thesis focuses on the "micro-foundations" of decision-making by Courts. It understands Courts to be goal-oriented entities that seek to maximize their interests, and whose decisions represent reactions to the opportunities and constraints in their environment (suggesting that they are rational actors). Moreover, courts' periodic decisions on crucial cases could certainly be understood as repeated rounds in an iterated game. Yet the argument simultaneously defies some of the fundamental assumptions and characteristics of rational choice explanation. It is

[24] A purer legal approach was more popular in the United States up to the mid-20th century; one example of work in this vein might be Wechsler's (1959). Also, legal scholars in particular continue to promote a legal approach to judicial decision-making in a prescriptive sense, for example, the work of Ronald Dworkin. And on the purely legal theory side, HLA Hart may be the paradigmatic positivist.

[25] We might anticipate that the legal model would hold sway in Latin America given that most countries of the region follow the civil law tradition, and that a strictly legal approach to decision-making is taught in most Latin American law schools. Nonetheless, due the overall weakness of the rule of law and legality in the region (with significant exceptions, such as Chile), few scholars have adopted this as an explanation for judicial decision-making. Barros's (2003) work on Chile may weave more law into the analysis than do most studies of courts in the region.

clearly non-parsimonious (i.e., it embraces multi-causality) and eschews methodological individualism: rather than being grounded in individual action, the thesis focuses on a collectivity and suggests that a unit *can be* a purposive, autonomous decision-maker.[26] Cycling considerations, the importance of which is determined through internal deliberations and is variable, motivate high court decisions – rather than exogenously bestowed and stable preferences. Indeed, the point of the argument is that Courts' substantive and institutional goals evolve as the substance of cases and the decision-making context change. Finally, the argument makes no assumption concerning the completeness or accuracy of the information actors have; nonetheless, implicit in the thesis is the idea that Courts are always working with incomplete, imperfect information as much of what they know regarding any legal dispute is provided selectively by actors whose objective is to win it. The tactical balancing account thus suggests that it may be possible to develop and deploy a "rational" argument without tethering it to a series of assumptions about political behavior that can be unrealistic under certain conditions.

4. TACTICAL BALANCING IN BRAZIL

This section applies the thesis of tactical balancing to the Brazilian STF's decision-making on the 26 crucial cases regarding economic policy under study here. It begins by showing how the different considerations (and combinations of considerations) implicit in the thesis impinged on the Court's rulings on those cases,[27] implying that the STF's "selective assertiveness" in the realm of economic governance springs from the tactical balancing of those considerations. It

[26] While there are certainly collective action challenges inherent in the generation of decisions by courts that contain more than one member, the focus here is less on the resolution of those dilemmas and more on the resolution of interactive dilemmas between high courts and elected leaders.

[27] As mentioned above, experts interviewed during the case-selection phase of this project often named two key decisions in which the same policy was questioned. Thus, while there are 26 key decisions under analysis, they relate to a total of 20 policies or government actions (or instances of potentially unconstitutional inaction). Since the study seeks to explain why the Court chose to endorse the exercise of government power when ruling on cases regarding some policies and to challenge it when ruling on cases regarding other policies, in the following analysis, cases regarding the same policy were considered together, reducing the N to 20.

then illustrates tactical balancing "in action" through two case studies of how the STF resolved judicialized conflicts over economic policy.

Applying the Thesis of Tactical Balancing in Brazil

To repeat, the thesis of tactical balancing holds that when deciding critical cases, high court justices prioritize and balance, in an ad hoc and context-specific way, their own policy preferences/ideology, their corporate or institutional interests, public opinion regarding the case, the elected branches' preferences, the economic/political situation or the potential economic or political repercussions of the decision, and the merits of the case/legal factors, assigning them more or less weight in view of the content of the case being decided and the decision-making context (political, economic, and institutional). The relative importance of the considerations to each case leads the high court to adopt a particular "approach to high court decision-making" (preference-driven; protective; legitimacy-building; deferential; pragmatic; and principled) – and to challenge or endorse the exercise of government power when deciding the case. Thus it is precisely the Court's tactical balancing of these different considerations that leads it to alternate between challenging and endorsing the exercise of government power over time – to be "selectively assertive."

Table 3 lists the STF cases regarding economic policy under study, again arranged by the degree of assertiveness the Court exhibited in its decision. The figures reported in each column for each case correspond to the percentage of experts/expert sources consulted regarding the case that imputed each particular consideration to the high court's decision-making on that case.[28] As

[28] These numbers were generated through detailed content analysis (coding of mentions of considerations) in the high court's written decision; in interviews with justices (most recorded and transcribed); in newspaper articles focusing on the case; in expert interviews (most recorded and transcribed); and in scholarly sources by judicial experts. As I interpret the percentages in the table, the higher the percentage associated with a particular consideration (that is, the more often the consideration was mentioned in connection with a particular case), the greater the likelihood that it was "important" to justices when they were deciding that case.

Table 3. Considerations Imputed by Experts to Be Important in STF Decisions on Economic Policy and Corresponding Approaches to High Court Decision-Making

Corresponding theoretical model	**Attitudinal**	**Strategic**				**Legal**	
Considerations imputed to high court decision-making (Approach to high court decision-making)	**Justices' ideology (JI)** **(Preference-driven)**	**Justices' corporatist/ institutional interests (JCI)** **(Protective)**	**Public opinion regarding case (PO)** **(Support-building)**	**Elected branches' preferences (EBP)** **(Deferential)**	**Economic/ political situation or potential repercussions of decision (PR)** **(Pragmatic)**	**Law/Merits of case (L)** **(Principled)**	**Approach to High Court Decision-Making in Each Case**[2]
STRONG ENDORSEMENT							
Constitutional capping of interest rate at 12%	4% (1/24 mentions)	4% (1/24 mentions)	4% (1/24 mentions)	4% (1/24 mentions)	**75%** (18/24 mentions)	8% (2/24 mentions)	**Pragmatic**
Contribution for Financing Social Security (Contribuição para Financiamento da Seguridade Social, COFINS)		7% (1/14 mentions)		14% (2/14 mentions)	**71%** (10/14 mentions)	7% (1/14 mentions)	**Pragmatic**
Privatization of the Bank of the State of São Paulo (Banco do Estado de São Paulo, BANESPA)					25% (2/8 mentions)	**75%** (6/8 mentions)	**Principled**
Privatization of the Vale do Rio Doce Company (CVRD)	11% (2/19 mentions)	21% (4/19 mentions)		16% (3/19 mentions)	11% (2/19 mentions)	**42%** (8/19 mentions)	**Principled**
"The black-out" (*O "apagão"*)		11% (2/18 mentions)	17% (3/18 mentions)	11% (2/18 mentions)	**44%** (8/18 mentions)	17% (3/18 mentions)	**Pragmatic**
Formula for calculating					**33%**	**67%**	**Principled /**

retirement benefits ("fator previdenciário")					(3/9 mentions)	(6/9 mentions)	**Pragmatic**
WEAK ENDORSEMENT							
Public sector pensioners' payment of retirement contributions (II)		10% (4/42 mentions)	10% (4/42 mentions)	**29%** (12/42 mentions)	**26%** (11/42 mentions)	**26%** (11/42 mentions)	**Deferential/ Pragmatic/ Principled**[3]
Provisional Contribution on Financial Transactions (CPMF)		10% (1/10 mentions)		**30%** (3/10 mentions)	20% (2/10 mentions)	**40%** (4/10 mentions)	**Principled / Deferential**
Collor Plan I – no injunctions in cases related to the Plan		**31%** (4/13 mentions)		8% (1/13 mentions)	**46%** (6/13 mentions)	15% (2/13 mentions)	**Pragmatic/ Protective**
Collor Plan I – freezing of savings accounts	2% (1/55 mentions)	16% (9/55 mentions)	4% (2/55 mentions)	11% (6/55 mentions)	**56%** (31/55 mentions)	11% (6/55 mentions)	**Pragmatic**
Law of Fiscal Responsibility		11% (2/18 mentions)	11% (2/18 mentions)	11% (2/18 mentions)	**50%** (9/18 mentions)	17% (3/18 mentions)	**Pragmatic**
WEAK CHALLENGE							
Fund for Social Investment (Fundo de Investimento Social, FINSOCIAL)				14% (1/7 mentions)	14% (1/7 mentions)	**57%** (4/7 mentions)	**Principled**
Salary increase of 28.86%		**45%** (5/11 mentions)			**36%** (4/11 mentions)	18% (2/11 mentions)	**Protective/ Pragmatic**
Adjustment of salary-tied accounts (Fundo de Garantia de Tempo de Serviço, FGTS)	8% (2/26 mentions)	8% (2/26 mentions)	12% (3/26 mentions)	19% (5/26 mentions)	**38%** (10/26 mentions)	15% (4/26 mentions)	**Pragmatic**
Salary retention for certain public sector workers (10.94%)		**50%** (4//8 mentions)			**38%** (3/8 mentions)	13% (1/8 mentions)	**Protective/ Pragmatic**

Constitutional Amendment #20 – maternity leave pay		17% (1/6 mentions)	17% (1/6 mentions)			**50%** (3/6 mentions)	**Principled**
STRONG CHALLENGE							
Readjustment of retirement benefits of 147.06%	8% (1/12 mentions)	8% (1/12 mentions)	**33%** (4/12 mentions)		2% (3/12 mentions)	25% (3/12 mentions)	**Support-building**
Annual salary review for public sector workers		**33%** (2/6 mentions)			**33%** (2/6 mentions)	**33%** (2/6 mentions)	**Protective/ Pragmatic/ Principled**
Public sector pensioners' payment of retirement contributions (I)	3% (1/36 mentions)	**58%** (21/36 mentions)				**39%** (14/36 mentions)	**Protective/ Principled**
Provisionary Tax on Financial Transactions (IPMF)		**43%** (10/23 mentions)	9% (2/23 mentions)		**30%** (7/23 mentions)	17% (4/23 mentions)	**Protective/ Pragmatic**

[1] Number of mentions includes each time the consideration was mentioned; in some circumstances, the same judicial decision, or expert respondent, or newspaper article, or written source mentioned more than one consideration for each case; these were counted as individual mentions of each particular consideration.
[2] Approach to decision-making corresponds to considerations that constituted 30% or more of mentions.
[3] As no consideration constituted 30% or more of mentions, the limit was lowered to 25%.

the table reveals, experts imputed a variety of considerations to the high court's rulings on the economic cases under study, and different considerations proved dominant in different cases. This suggests that Brazilian high court justices were in fact engaging in tactical balancing when ruling on these crucial cases.

The consideration most often mentioned by experts as important to the high court's rulings was the economic or political context – the potential repercussions of the high court's ruling. According to experts, the high court issued "pragmatic" rulings (or rulings partly motivated by pragmatic considerations) in 13 out of the 20 cases (or 65% of the time) – and pragmatic considerations were important in both its challenges and endorsements of the exercise of government power.

The next most important consideration to the STF's decisions in the economic realm were law or legal considerations. According to experts, those considerations impinged on the Court's rulings in nine out of the 20 cases under consideration (or 45% of the time); moreover, in four cases (20% of the time), the law or the merits of the case stood alone in the experts' views as the primary consideration in the Court's ruling. Of course, this is not to say that the STF's decisions in other cases *ignored* law or the constitution. Rather, the implication is that the law was not the Court's primary consideration when issuing its ruling in many of these politically critical cases, a finding that supports the impression that justices often decide cases, and then look for legal, constitutional, or doctrinal justification for that decision. Law and legal considerations were as important to decisions in which the high court endorsed the exercise of government power as they were to decisions in which the STF challenged that exercise.

The high court handed down rulings that could be characterized as "protective" in six out of the 20 cases under study here (or 30% of the time). Further, it was very rare that rulings in

which the STF *endorsed* the exercise of government power had protective motivations; the majority of rulings in which justices' institutional or corporate interests were at play were rulings in which it challenged the exercise of government power. In some protective rulings, the STF sought to defend its income, for instance, in cases in which public sector salaries or pensions were at play (such as the case regarding the salary increase of 28,86% [RMS 22307] or the first case regarding the tax on pension benefits [ADIn 2010]). Other such rulings represented the Court's ducking of a controversial case in order not to be blamed for the failure of a critical policy (as in the cases regarding the issuing of injunctions related to Collor Plan I [ADIn 223 and 295]). In other "protective" rulings the Court sought to demonstrate its independence from the Executive, or to emphasize its willingness and ability to carry out a particular function (such as declaring unconstitutional constitutional amendments); experts suggested both of these as considerations in the Court's rulings on the IPMF tax (ADIn 926, 939).

The STF only very rarely considered elected branch preferences when ruling on important cases in the economic policy realm. According to aggregate expert opinion, not one of the rulings under study here was fully motivated by deference, and in only two of the 20 cases (or 10%) were the elected branches' preferences considered an important consideration in the Court's ruling. Public opinion and justices' ideology were the considerations that scholars mentioned least often in connection with the STF's decision-making. Experts suggested that the Court employed a "support-building" approach in only one of the 20 cases under study (or 5% of the time). The STF maintained a relatively positive public image (at least by Latin American standards) (Kapiszewski 2007, Chapter 7) during much of the time period of interest, and the justices likely felt that it would not be tarnished if it handed down rulings that did not respond to what the justices referred to as "*o clamor da sociedade*" – or public pressures (CSM-04, among

others). Finally, according to experts, justices' attitudes were never the defining consideration in their rulings on crucial cases regarding economic policy.

In most of the cases in which the Brazilian high court *endorsed* the exercise of government power (that is, in seven out of 11 endorsements, or 64%), expert responses converged on a single consideration as the most important to the high court's decision. By contrast, in a majority of the cases in which the Court *challenged* the exercise of government power (that is, in six out of nine challenges or 67%), experts understood at least two considerations to be important to the high court's ruling. In other words, the high court seemed to need multiple motivations to challenge the exercise of government power, while it was able to endorse the exercise of government power on the basis of a single factor.

Case Studies

This section describes in greater detail the STF's rulings on two of the most important cases regarding national economic policy that came before it in the post-authoritarian era. The narratives seek to describe how the content of each high court case and the decision-making context interacted to increase or decrease the salience of the six considerations that this paper argues high courts take into account when ruling on politically important cases, and to show how the resulting relative salience of those factors led the high court to challenge or endorse the exercise of government power in each case.

Pragmatic: the Interest Rate Case[29]

The interest rate case represented one of the first times that the STF was required to confront one of the many obstacles to governability embedded in the 1988 constitution. Article 192, which addressed the national financial system, indicated that the system would be regulated

[29] ADIn 04, *PartidoDemocrático Trabalhista* (PDT) vs. the Presidency of the Republic; preliminary ruling 19 October 1988; final ruling 07 March 1991.

subsequently by "*a* complementary law." The article listed eight specific objectives that the law would address, and three additional paragraphs further defined the constitution's aims for the financial system. The third of these paragraphs stipulated that annual real interest rates would be capped at 12% and that charging a higher rate would be understood as usury, punishable as the law would determine. The clause was controversial. Some on the left, who believed that the financial system and banks in particular "made" money in times of inflation,[30] hoped the clause would prevent the government and banks from charging high interest rates and considered its inclusion in the constitution a symbolic "victory" against the financial sector. Deputies and senators from poorer rural/agricultural states (whose votes weigh particularly heavily in the senate)[31] were especially in favor of the stipulation. Economists balked at the cap however, since control of interest rates is a crucial tool of monetary policy; they suggested that banks would be forced to shut down were the clause to be enforced (particularly in a hyper-inflationary context) (EC-30).

On the eve of the constitution's promulgation, when it was clear that the clause capping the interest rate would be included in the charter,[32] Ministry of the Treasury and Central Bank officials met to discuss the problematic stipulation. They decided that Attorney General (*Consultor Geral da República*) Saulo Ramos would quickly draft a memo (*parecer*) stating the

[30] Brazil employed an indexing scheme until the mid-1990s whereby contracts of all types were "automatically" corrected for inflation. These indexes did not always match the actual inflation rate, and some believed that the financial sector somehow "made money" on the difference (EC-21).

[31] The Senate comprises three senators from each of Brazil's 26 states, plus three from the federal district. Many more Brazilian states are rural than are urban, though the urban areas are disproportionately populated. To give just one example, the small northern agricultural states of Roraima (with barely 400,000 inhabits) and Amapá (with barely 600,000 inhabits) together have twice the representation in the Senate as does the state of São Paulo, with a population of over 40 million people.

[32] The clause had a precarious history: when PSDB deputy José Serra (who headed the constitutional commission regarding public finance and taxes) assembled a team to study the financial ramifications of several constitutional clauses, the negative implications of the clause regarding 12% interest rate were noted, and in at least one version of the constitutional text, the clause was removed. Yet in the final voting on the text, PMDB deputy Fernando Gasparian – on something of a personal crusade – converted the clause into a proposal that is voted individually (*destaque*) and was successful in reinstating it into the constitution (EC-29, EC-31).

government's formal position on the matter: that the interest rate clause was not self-executing, that it would need implementing legislation in order to enter into effect, and that infra-constitutional legislation was necessary to define the "real interest rate." Government officials hoped that the writing of such a document, followed by its approval by the president (which would make it mandatory for the administration including the Central Bank), its publication in the *Diario Oficial*, and its wide dissemination would be persuasive to the STF if it were to be called upon to resolve a case in connection with the clause (EC-30, EC-31; Rocha 2004: 135).

By the next day, Attorney General Ramos had written a hefty document (SR No. 70) that clearly and convincingly stated the government's understanding of the interest rate clause; the president approved it, and it was published in the *Diario Oficial* just two days after the promulgation of the symbolic and long-awaited constitution, on 07 October 1988 (EC-31). In the meantime, on 06 October, the Central Bank had issued *Circular* 1365 which – on the basis of the *Consultor Geral's* memo – stipulated that until the complementary legislation regulating the national financial system was passed, financial institutions and all other entities operating under the authority of the Central Bank would continue to be subject to existing pre-constitutional legislation (EC-30, EC-31; Rocha 2004: 135)

On 12 October 1988, the Democratic Worker Party (*Partido Democrático Trabalhista*, PDT) filed an ADIn with the STF alleging that the Attorney General's memo and the Central Bank's *circular* violated Constitutional Article 192.[33] The PDT requested that the high court issue an injunction suspending immediately the efficacy of the Central Bank document. While the STF dismissed the PDT's request for an injunction a week after receiving the case, it did not immediately hand down a final ruling. Memos from lawyers representing interested parties

[33] The PDT's ADIn represented just the fourth time that the new abstract review mechanism (established in the 1988 constitution) had been used.

within the financial system soon flooded the Court, explaining in detail the financial damage the country would suffer if the STF were to enforce the constitutional clause that capped the interest rate (EC-30).

On 07 March 1991 – two and a half years after the case was filed (following 12 hours of deliberation) – the STF handed down its ruling upholding the constitutionality of the questioned norms. The STF reasoned that it was impossible to admit the immediate efficacy, in isolation, of a single paragraph of constitutional Article 192. First, the headnote to Article 192 (the only article dealing with the financial system) called for "a complementary law" to regulate the entire financial system; until such a law offering that "global treatment" of the system (including all of the objectives listed in the article) had been issued, Article 192 was not in force, and the Attorney General's memo (and the Central Bank *circular*) thus not unconstitutional.[34] Moreover, the Court highlighted that it was unclear what a "real annual interest rate of 12%" meant in financial terms, and that this too would have to be clarified in the complementary law.[35]

The STF's decision on ADIn 04 in effect confirmed practices regarding setting interest rates that had been adopted in the 28 months between the promulgation of the 1988 constitution and the high court's ruling in 1991 (EC-04). Nonetheless, a ruling in the opposite direction could have created significant problems for the Brazilian financial system and possibly led to bank failures (EC-30, EC-03), particularly unappealing prospects in a democracy still in the throes of regime and constitutional transition. Moreover, a ruling that suggested that the judiciary could step in and evaluate interest rate policy against this constitutional limit would

[34] This, of course, was not the Court's only choice. For instance, it was not clear whether Paragraph 3 of Article 192 actually depended on the headnote of the article where the necessity of passing a complementary law was stipulated (EC-50). Further, while other constitutional articles stipulate the necessity of passing "a complementary law," the STF has not consistently understood that phrasing to imply one single law (EC-40).

[35] Here and throughout the paper, unless otherwise noted, all summaries of plaintiffs' petitions and STF decisions and reasoning are drawn from the actual petitions and decisions themselves, available on the STF web site (www.stf.gov.br).

have made it much more difficult for Brazil to maintain its credibility before the IMF (EC-03). In short, enforcing Article 192 of the constitution would have created immense confusion, and likely would have had a negative impact on the economy.

Experts largely agreed that it was precisely these considerations – the potential consequences of the ruling – that were the main motivations behind the STF's decision in ADIn 04. In view of the Court's concern about endorsing the article, it had a choice: duck the case or take on the conflict that the existence of the clause generated.[36] The Court chose the latter, and adopted an interpretation that allowed it to take the problematic clause "out of constitutional play" (EC-42). Experts considered the STF's decision to be an ingeniously pragmatic one through which it sought to inoculate the country against a constitutional clause with the potential to prevent the government from managing monetary policy, and to destroy the financial system (EC-30, EC-31, EC-40, EC-50).[37] In short, the interaction of the case and the decision-making context served to increase the salience of pragmatic considerations, and somewhat decrease the

[36] In fact, the STF likely could have ducked the case on a technicality: it may have been something of a jurisprudential stretch for the STF to consider the constitutionality of a memo in an ADIn. The Court suggested that the memo had assumed the character of a norm when it was approved by the president, per Articles 22 and 23 of Decree No. 92.889 (07 July 1986) (STF web site; CSE-10).

[37] Yet while it resolved one problem, the STF's decision created others. In the ruling, the STF implicitly called upon Congress to write *one* complementary law (such laws require higher congressional quorum than does ordinary legislation) to regulate the very broad and lengthy Article 192 (EC-40) – that is, essentially to reform and regulate the entire financial system. The ruling upheld the Central Bank's position on the matter – that a single piece of legislation to regulate the financial system would increase the likelihood that the policy would be internally coherent, EC-35). However, it arguably made it far more difficult to regulate the financial system – thus indirectly (but perhaps not inadvertently) placing *obstacles* in the way of the activation of the constitutional clause capping the interest rate at 12% coming into effect (EC-40). Yet because the ruling also impeded incremental legal changes to the financial system, it contributed to huge delays in financial sector regulation: from 1988 to 2003 (when a constitutional amendment revoked Article 192), it was difficult to modify any aspect of Brazil's financial system or change any legislation other than a few aspects that were regulated by laws outside of the purview of Article 192 (EC-40)Despite four different attempts to pass the required legislation, a complementary law was never passed, and Article 192 remained in constitutional limbo, and was consistently violated. In the vacuum, some previously existing legislation regarding the financial system was adopted as complementary or ordinary laws as the basis for a new normative framework; in particular, Ordinary Law 4595 (1964) was adopted as a Complementary Law, and continued to regulate the financial system, at least through 2005. The Central Bank continued to pass minor rules in an uncoordinated manner, and banks continued to charge interest rates up to the limit established by the Central Bank (plus adjustments included in indices built into different economic stabilization programs) (EC-21). The situation was finally resolved when constitutional amendment #40 (published 30 May 2003) revoked Article 192 practically in its entirety (EC-40).

salience of legal ones: the STF's decision was motivated by a desire to help stabilize the system and smooth over one of the many "original defects" of the 1988 constitution (while simultaneously doing at least the letter of the charter no violence).[38]

Protective/Pragmatic – the 28.86% Salary Adjustment Case[39]

Brazil experienced astronomical inflation beginning in the 1980s, and the government was also obliged to make large payments on the public sector debt. These imperatives compromised the central government's ability to invest domestically, and it was consequently difficult for the state to award salary increases to public sector workers (though their salaries were periodically adjusted for inflation). By the early 1990s, then, workers were calling for a real salary increase. Further, workers had grown accustomed to having their salaries periodically adjusted for inflation, and these adjustments occurred less frequently in the 1990s as inflation was slowly brought under control (EC-18). Together these dynamics generated generalized salary discontent among workers, a dynamic that was bound to engender multi-faceted conflict.

Laws 8.622 and 8.627 (of 19 January 1993 and 19 February 1993 respectively) had awarded wage increases to military employees of the Executive branch, and "repositioned" the salaries of civil employees of that branch (as of 01 January 1993) in compensation for losses due to previous economic stabilization programs (Mueller 2001: 626). Due to an error in the salary structure of public employees (introduced in a previous law), military employees' wage increase

[38] Economists suggested that the decision served as a point of departure for constitutional monetary law in Brazil, and that it continues to be discussed and cited as related situations arise (EC-30). Indeed, in additional cases that the high court received regarding this constitutional article – in particular, mandates of injunction (*mandados de injunção*, MIs, in which the Court is asked to determine the constitutionality of the government's *failure* to regulate constitutional clauses) – the STF stated even more clearly that the government had engaged in unconstitutional delay, and should work to pass this complementary legislation (EC-42). Yet the STF's ruling was not the end of the judicial story. First instance judges all over the country continued to insist on a limit of 12% interest; their decisions were and are consistently appealed, and thousands have arrived to the STF, obliging it to repeat, thousands of times, that Article 192 of the constitution is not self-executing (CSE-16; EC-41).

[39] RMS 22307, *Janete Balzani Marques and others v. Brazil*, decision 19 February 1997 (appealed), final decision 11 March 1998.

(averaging 28.86%) was much larger than the "salary repositioning" awarded to civil employees (NP 03-542). To make matters worse, while no general rule was established or law passed, given that the constitution guarantees equity in terms of salaries and raises among military and civil public sector employees (Art. 37, Para X and XV), the legislature, judiciary, *Tribunal de Contas* and *Ministerio Público* subsequently extended a wage increase of 28.86% to their employees (again, as of 01 January 1993). In response, civil servants (mainly of the executive branch) filed cases arguing that the wage increase that had been informally generalized should apply to everyone, and requesting the application of the 28.86% index to their wages (EC-04). While plaintiffs generally won their cases in the lower courts, the government always appealed, and many such cases eventually arrived at the STF for final decision.

One such case was a collective *writ of mandamus* (*mandado de segurança*, MS 22307), originally filed in July 1993 by a group of employees of the Labor and Social Security Ministries who argued that they were due the 28.86% salary increase as of January 1993. The employees lost their case in the *Supremo Tribunal de Justiça* (STJ, the court of last resort for non-constitutional disputes), which found that since there was no specific law that granted the increase, the plaintiffs had no right to the salary adjustment they were claiming. The employees then appealed to the STF, filing their case on 31 May 1995.

The government was concerned about the possible fiscal consequences of a ruling in favor of the civil servants, fearing that the decision would encourage lower instance judges to continue to rule in the same direction. Consequently, the elected branches engaged in "media terrorism" of the first degree, emphasizing the negative effects such a decision (and its generalization) would have on Brazil's fiscal stability. Minister of Administration Bresser Pereira noted publicly that a decision against the government would cause a "national disaster,"

and made a "dramatic appeal to the public spirit of the justices" to favor the government in their ruling; his comments severely irritated the justices, and prompted President Cardoso to apologize personally to the president of the STF (NP 03-E-19). Newspaper headlines warned that if the nearly one million active and retired workers who could eventually benefit from judicial rulings on related cases were successful in attaining the desired wage adjustments, the government could spend close to R$ 7 billion annually simply to make up for lost wages, quite aside from the cost of paying the adjusted wage bill in the future (NP-03-283, NP 03-E-17, NP 03-E-18).

The STF delayed for almost two years before finally deciding the case on 19 February 1997.[40] The Court awarded the Executive branch civil servants the increase of 28.86% they were claiming (but indicated that their ruling only held back through July 1993, the date on which they had originally submitted their case, rather than 01 January 1993 as they requested). Accepting the plaintiffs' reasoning – and in fact mirroring the reasoning the STF had employed when it awarded the wage increase in question to judicial sector workers – the Court argued that the constitution guarantees equity in terms of salaries and raises between military and civil public sector employees (Art. 37, Para X and XV).[41] The justices noted that their ruling only awarded the salary increase from the moment of the decision forward; back-payments would be calculated and awarded by the STJ. Further, the ruling only held for the 11 plaintiffs who had brought the case. Nonetheless, the ruling formed informal precedent, inciting hundreds of additional public sector workers to file cases, and encouraging lower court judges to issue injunctions awarding

[40] Upon receiving the case in May 1995, a chamber of the STF began to consider it. However, in December 1995 the chamber decided that the STF should hear the case *en banc*. The full Court began to deliberate the case on 01 February 1996, but a justice asked to study the case further and it was not taken up again for another year.

[41] Note that the high court did not simply rule the inequity unconstitutional – but actually stipulated the exact amount of the adjustment, which some suggested represented unusual activism (Marques de Lima 2001: 176). The decision is particularly curious given that STF doctrine includes a summary decision (*Súmula* 339) from 1963 that specifically states that increasing payments to public sector workers on "equivalency and equality" arguments *falls outside* the purview of the judiciary, given that the judicial branch of government does not possess legislative functions (CSE-10; STF web site).

the salary adjustment. In the days following the decision, public sector workers from all over the country called their union headquarters to see if they had already been included in some sort of collective action to claim the salary increase. One union hung placards in all of the executive ministries inviting workers to file a case (NP 03-E-28).[42]

The government's immediate reaction was rhetorical. The day after the decision, newspapers threatened that if the ruling were to be generalized, the economic effects would be devastating, and reviewed several solutions the government was considering, including the cancellation of other planned salary adjustments, and public sector lay-offs (NP 03-310; NP 03-E-29). Political and judicial elites repeatedly referenced President Cardoso's highly controversial reaction to the justices' ruling: "it's a shame they aren't thinking of Brazil" (Teixeira 1997: 118).[43] Four months later, however, once the STF's decision had been published (and appeal was thus possible), the executive took action:[44] on 17 June 1997, it appealed the ruling.[45]

Despite the fact that the Court's internal procedures prohibit the introduction of new argumentation or evidence in the kind of appeal the government employed, the government argued that the civil servants did not have a right to the salary adjustment the Court had awarded them because no specific law had been passed offering those increases to civil servants of the other branches of government. Moreover, the government insisted that executive branch civil

[42] Important to note is that by the time the STF ruled, the period to file collective *writs of mandamus* (120 days after the inequitable act, the passage of the 1993 laws that established the salary adjustments) had expired; while unions could still file cases, all other parties wishing subsequently to file a case would have to do so individually. This vastly increased the number of cases that could potentially be filed (NP-03-309, NP 03-E-24).

[43] Original quote: *"Pena que eles não pensem no Brasil." Folha de São Paulo*, 20 February 1997, p. 2.

[44] In the interim, an important change occurred in the Court's composition: in April 1997, Justice Rezek left the Court to join an international tribunal in the Hague, and Justice Jobim, to that point President Cardoso's Minister of Justice, joined the Court.

[45] The government often files such appeals in order to delay a final decision in cases the STF has decided against it (EC-08). Here, the executive filed *embargos de declaração*, one of several mechanisms to appeal the decision of the STF sitting *en banc*. This form of appeal is to be used only to clarify issues that were not clear in the original decision; it cannot be used to overturn rulings (NP 04-108).

servants – including those filing the case – *had* in fact received other salary adjustments (including via Laws 8.622 and 8.627 of 19 January 1993 and 19 February 1993 – the very laws which had started the controversy) which, to differing degrees, compensated for their failure to receive the 28.86% salary increase in question.

While the government's appeal gave the Court pause, it did little to stem the tide of cases regarding the salary increase that was rising through the judiciary. Judges all over Brazil were handing down provisionary rulings awarding plaintiffs the right to the funds *immediately* (an award that might – or might not – be confirmed in the high court's decision on the appeal). Beyond the executive's concern regarding the impact that the resultant increase in the wage bill would have on the country's budget deficit, leaders also worried about how they would retrieve the money that judges were awarding hand over fist if the final ruling on the cases did *not* award the workers a 28.86% salary increase. Consequently, on 21 August 1997, President Cardoso issued MP 1.570 (converted into Law 9.494 on 10 September 1997) prohibiting judges from handing down injunctions that anticipated a ruling without the case being fully and finally decided by the STF (NP 03-E-35). Many judges considered the measure unconstitutional and ignored it, and several ADIns questioning its constitutionality were filed with the STF (NP 03-336). Eventually, the government filed an ADC (Direct Action of Constitutionality) with the STF requesting that it *confirm the constitutionality* of the MP.[46] On 11 Feb. 1998, the STF issued a preliminary ruling partially confirming the constitutionality of the law (CSM-03).[47]

One month later (11 March 1998), the high court handed down its badly slit (6-5) decision on the government's appeal of its original ruling on MS 22307. Ignoring several

[46] The government's case represented just the fourth time that the ADC mechanism, newly created by Constitutional Amendment #3 was used; a preliminary ruling had never been issued in such a case.
[47] Also in the meantime, Constitutional Amendment #18 (05 February 1998) readjusted the employment status of military workers, permitting the issuance of differential wage increases for military and civil employees (EC-11).

internal procedures, the STF accepted the executive's new arguments and evidence (admitting that it had failed to take into account the facts the government was belatedly highlighting in its first ruling), and agreed that the salary adjustments to be awarded should take into consideration adjustments previously awarded to civil servants. Practically, this meant that few workers would receive an adjustment of 28.86%, thus significantly decreasing the amount the government would have to pay – some suggested by more than half (EC-05; NP 03-470).[48]

Jurists, politicians, and bureaucrats alike questioned the final ruling (Fonseca de Araújo Faria 1998: 33-34). Experts suggested that protective and pragmatic considerations were again paramount. On the one hand, corporate interests (both those of public sector workers more generally – a category into which justices and their assistants fall – and of the judiciary specifically) weighed heavily on the Court's decision. Public sector salaries had been frozen for more than two years (beginning in 1995, NP 03-E-17), and public sector worker lobbies strongly pressured the high court to rule in favor the executive branch employees (even sending a delegation of 11 small children – sons and daughters of civil servants – to the STF to encourage the justices to rule in their favor, NP 03-283; CSE-120, EC-11). Further, experts suggested, the justices were exasperated by the amount of pressure the government was placing on them and the judiciary as a whole, and sought to demonstrate their independence from the executive (NP 03-417). Moreover, the constitutional clause regarding salary equity was very clear (leaving the Court little choice but to award some sort of adjustment to the workers in question). On the other hand, the country's fiscal health and its immense budget deficit remained at the forefront of justices' minds (CSM-03, NP 03-416, EC-12). In the end, the Court balanced these conflicting

[48] This would not be the last time the decision was appealed. A series of *embargos de declaração* were filed by sub-sets of the parties who had filed the original collective petition, contesting the high court's revised decision. The STF dismissed all of these appeals.

considerations, and issued a weak challenge to the Executive – a ruling that preserved constitutionality while limiting the fiscal impact to the state.

5. CONCLUSIONS AND AVENUES FOR FUTURE RESEARCH

High courts in Latin America were drawn into economic governance – and thus to the center of the political stage – in the post-authoritarian period due to the tensions stemming from the "dual transition" (legal and economic) that those countries experienced *after* regime change. Familiar to scholars of Latin American politics, economic transition involved the abandonment of inward-looking state-led development models and the adoption of neoliberal economic policies – sometimes through policies of questionable legality or constitutionality. Less appreciated is the fact that many of the region's new democracies simultaneously experienced a halting and uneven "legal transition" entailing the greater salience of rule of law issues, constitutional revision, greater recognition of rights by citizens and civil society, the empowerment of courts, and the judicialization of politics.

The importance of this latter set of changes cannot be overstated. First, legal transition alters the dynamics of politics by raising the constitutional and judicial stakes: as issues become constitutionalized (often in anticipation of their judicialization),[49] the text of the charter (and the degree to which policy attends to it) can become increasingly important. The way in which legal transition evolves and the degree to which it regresses have important implications for whether courts can contribute to making institutional constraints on the exercise of state power bind. And as judicial challenges multiply and courts are drawn farther into the policy process, who judges are, and how and why they resolve disputes as they do become progressively more significant –

[49] This study understands the "judicialization of politics" to mean the increasing use of courts by citizens, opposition politicians, and other actors in an attempt to hold elected leaders accountable, influence policymaking, and resolve political dilemmas.

for scholars and policymakers alike. Indeed, while conventional wisdom understands economic reform and economic governance more generally as processes that are developed and managed exclusively by government technocrats and international financial institutions, in many contexts societal actors and opposition politicians have also sought to take part in the management of the economy – and at times have sought to do so by invoking courts, constitutionalism, and the rule of law. These developments suggest an increasingly important stewardship role for courts in economic reform and governance.

In many Latin American countries, the interaction of the two transitions encouraged citizens, civil society organizations, and the political opposition to turn to courts to contest economic reform and crisis-management policies with which they disagreed ideologically and/or considered illegal or unconstitutional. This paper examined how the Brazilian high court (the *Supremo Tribunal Federal*, STF) ruled on a systematically selected set of 26 important cases regarding economic policy that came before the Court between 1985 and 2004 – that is, what role it played in managing the national economy. The analysis revealed that it was *selectively assertive* when ruling on such cases, alternating between challenging and endorsing the exercise of government power.

The paper proposed the multi-factor thesis of *tactical balancing* to account for the Court's selective assertiveness. According to that thesis, as high courts consider the content of politically crucial cases, the decision-making context, and the interaction between the two, they weigh a range of considerations – ideological, strategic, and legal. The relative importance of the considerations changes as high courts decide different cases over time. For instance, in some cases justices' concerns about the economic or political consequences of their ruling might be most important, while in other cases popular opinion may weigh heavily in the justices'

decisions. As different considerations emerge as salient to different cases, Courts shift between challenging and endorsing the exercise of government power, engaging in what we observe as their "selective assertiveness" when deciding politically crucial cases.[50] If we think of each consideration as corresponding to a particular approach to high decision-making (for instance, a "pragmatic" approach, or a "support-building" approach), the claim can also be stated another way: Courts' engagement in a shifting blend of approaches to decision-making leads them to challenge the exercise of government power in some cases and endorse it in others – that is, to be "selectively assertive." Indeed, examining these varying approaches to high court decision-making can help us to distinguish between decisions that can seem quite similar, but that are actually very different when we consider justices' motivations.

To be clear, the thesis is not a predictive one: it does not provide a way to anticipate how high court justices will decide any particular politically important case. It simply offers an insight into *how* justices go about making their decisions on such cases. Further development of the theory of *tactical balancing* could be fruitful: developing some mid-range theory that traces more closely the connections between the content of high court cases, particular facets of the decision-making context, and approaches to high court decision-making could increase the thesis's potential for prediction and increase its observable implications, thus augmenting the thesis's falsifiability. For instance, close study of all 26 Brazilian high court cases regarding economic policy suggests that even relatively small changes in case content and decision-making context can lead high courts engaging in tactical balancing to issue very different decisions on very similar cases, suggesting that it may be possible to identify patterns in terms of how and when certain considerations become salient to high court decision-making.

[50] Indeed, while the economic policy realm is the focus of the book, to some degree this is diagnostic of the broader dynamics of high courts' resolution of politically crucial cases.

Alternatively, it may be useful to seek to explain particular "emphases" in a Court's tactical balancing – that is, to account for the predominant salience of one condition over others in a certain Court's decision-making in a particular policy area. A comparison between the Argentine and Brazilian high courts' decision-making on cases regarding economic policy carried out elsewhere (Kapiszewski 2007) is revealing. While, as outlined above, the Brazilian high court most often issued pragmatic rulings on crucial cases in the economic realm (doing so 65% of the time), in Argentina experts suggested that the high court most often issued deferential rulings (doing so 56% of the time). Further, while law was the second most important consideration for each high court, the law or the merits of the case stood alone as the primary consideration in a full fifth of the STF's ruling, almost twice as often as this occurred in Argentina (11% of the time). One potential explanation for this cross-national variation is that the *character* of a Court my influence how it balances the six considerations entailed in the thesis of tactical balancing. It makes sense that justices on a Court that executives traditionally had *politicized* (by manipulating its size and composition and appointing justices with weaker professional qualifications and, often, ties to their appointers), as is the case in Argentina, would consider the elected branches' preferences in many of their most important decisions, tending toward "deferential" rulings. And it is just as logical that justices on a Court executives traditionally had *professionalized* (rarely manipulating its size and composition and often appointing justices with substantial political and judicial experience), as is the case in Brazil, would emphasize "pragmatic" and "principled" decision-making. In short, high courts' historic trajectories likely shape how they balance the different considerations that impinge on their decision-making on politically important cases.

A final comment concerns the contribution this paper's findings and arguments make to the debate within public law and the law and economics school in particular regarding the potential tensions – and synergies – between the rule of law and legal entrenchment on one hand, and economic reform and policy-making on the other. Most scholars engaged in these debates contend that the rule of law and market-led reform are mutually constitutive.[51] Some renditions of the argument are very general, suggesting an elective affinity between constitutionalism and economic liberalization (Farber 2002). One more specific strand of argumentation suggests that for market-led reform to be successful, adherence to the rule of law is necessary as it increases the appearance of certainty and predictability, reduces transaction costs, eases access to capital, and generally levels the playing field (North and Weingast 1989).[52] A few scholars, however, raise interesting challenges to the proposition that economic liberalization and rule-of-law entrenchment naturally reinforce each other. For instance, some analysts have down-played the importance of an independent judiciary to economic development (Posner 1998) noting that the transition to open-market economies produces potentially justiciable conflicts and an increase in potentially disruptive and distracting litigation (see, e.g., Ballard 1999, among others). And others – for instance Ginsburg (2000) – have highlighted the decidedly mixed evidence supporting the assertion that law matters for economic outcomes in East Asia.

This paper also challenges the notion that the processes of entrenching the rule of law and effecting neoliberal economic reform reinforce one another. It highlights the fundamental tensions and trade-offs that can arise when developing democracies attempt to restructure their

[51] This following synopsis is of necessity brief and schematic. For an in-depth appraisal of how thinking on the law and economic development nexus has evolved, see Trubek and Santos, eds. 2006.

[52] An important theoretical referent is the law and development movement, which proposed that the "modernization" of developing countries required U.S.-style capitalist development, to which a particular sort of law was thought to be fundamental. Adherents pushed countries in the developing world to adopt ideas about the law developed in the U.S. believing that doing so would enhance those countries' economic potential, which would in turn lead to an even stronger rule of law. Yet this proved not to be the case, in Latin America at least, and by the 1970s, this movement had experienced a significant decline.

economies in the context of legal transformation. The way in which the transitions interact and progress (and the academic discord over their relationship) almost certainly hinges on their sequencing.[53] Strengthening the trappings of legal systems – that is, adopting a rule-of-law discourse, reformulating constitutions, and formally empowering courts – may serve as an effective "signal" (Farber 2002) of a regime's commitment to property rights and legal rules in general and may encourage growth-enhancing investment, facilitating the *subsequent* initiation of economic reform. By contrast, attempting to liberalize the economy amidst legal evolution – particularly given that those efforts are often being carried out, at least in the contemporary period, in new, crisis-prone democracies with unstable institutions – can produce significant constitutional controversies, creating the perception that the transitions are fundamentally at odds, and serving to prolong each one. This paper also suggest that whether the tensions engendered by the simultaneity of the two transitions are diffused or exacerbated in the medium term – and how quickly the two processes begin to mutually reinforce one another – may depend on what sorts of controversies are ushered to high courts and how they face the conundrum of adjudicating between the rule of law and economic policy.

[53] I am of course not the first to assert that sequencing matters. For instance, Zakaria (2003: 58) notes that the rule of law preceded capitalism, which preceded liberalism, which preceded democracy in the West.

Appendix A, *Research, Data, and Methods*

This paper's longitudinal analysis of decision-making on the Brazilian *Supremo Tribunal Federal* (STF) is based on research carried out during 11 months of fieldwork in Brazil between 2004 and 2005. I conducted approximately 125 interviews with current and former high court justices, high court clerks, journalists, economists, constitutional scholars and other law professors, political scientists, and government personnel. Further, with the aid of a team of research assistants in each country, I collected more than 7,000 newspaper articles regarding the high courts and their most important decisions, gathered public opinion data on the two high courts, garnered a large number of primary documents related to each Court and the cases under study, and assembled a broad range of secondary materials on each high court and its jurisprudence (mainly books and journal articles).

Case selection entailed two steps: obtaining the *sample* of high court cases, and identifying the *sub-sample* of cases regarding economic policy. The *sample* includes the most politically important cases to come before the Brazilian high court during the first two post-authoritarian decades. "Politically important" cases are understood here to be those in which a high court had the opportunity to set boundaries on the exercise of government power (for instance, by reinforcing the separation of powers, enforcing limits on state interference in society, or reviewing the constitutionality of crucial central government policy) – as well as cases in which judicial decisions prioritized competing rights, defined or redefined the constitutional bargain, or rationalized the institutional system. The methodology employed to obtain the *sample*, outlined in Appendix B, yielded a sample of 55 cases in Brazil.

The thesis of tactical balancing was developed through examining the Brazilian high court's rulings on the *sample* of cases.[54] Specifically, reviewing and analyzing the information that I gathered on each case in the *sample* during the case selection process generated some expectations and ideas about the logic behind the Court's decision-making on politically important cases. Yet in order to see if those expectations were born out – that is, in order to formulate them into a concrete thesis and to rebut competing theories – close analysis of a sub-set of the *sample* of cases was required.[55] Departing from other studies of courts and politics in Latin America, I focused the present analysis on high court decision-making in a single policy domain: cases in which central government economic policy was questioned (the *sub-sample*, N=26).

Studying an intermediate-N number of cases allowed me to capitalize on the strengths of both small-N and large-N analysis. Like scholars who engage in small-N analysis, I was able to subject the cases under study to close scrutiny, carefully examining their content, the legal issues they involved, their policy and political details and stakes; the dynamics in the institutional, political, and legal context in which they were filed, considered, and resolved; and the plethora of issues addressed and types of reasoning provided in each Court's written opinions (including both the "text" and "sub-

[54] Analogous fieldwork and analysis were carried out in Argentina in 2004, and analysis of the Argentine *sample* of cases also contributed to the development of the thesis.

[55] To be clear: this intermediate-N analysis is emphatically *not* a "test" of the thesis of tactical balancing. Rather, the intermediate-N analysis of high court rulings on cases regarding economic policy simply serves to animate the presentation of the thesis of tactical balancing (developed on the basis of the larger sample) and illustrate how it accounts for high court decision-making on politically important cases. The entire analysis falls squarely in the realm of theory generation rather than theory testing.

text" of rulings).[56] I conducted multiple interviews about each economic policy case and the decision rendered on it with actors on all sides of each dispute (policy-makers and plaintiffs); with high court justices; and with legal scholars and other experts.

Examining fewer than 50 cases also allowed me to gain enough data to score each decision more precisely than is the norm in the literature, evaluating not only the direction, but the *intensity* of the ruling on each. Yet my inquiry stands on firmer methodological ground than do some small-N studies as I held to strict scientific standards. For instance, I deployed the same systematic case-selection technique in both countries, and utilized the same qualitative analytic techniques (including process tracing and content analysis) in the same way in each.[57] Indeed, my case selection and analytic methods are replicable and the thesis testable in other contexts. Moreover, the fact that I studied a theoretically relevant number of cases gives me a strong basis from which to make claims about judicial dynamics in the countries under study.

[56] It is this necessarily multifaceted nature of these rulings that complicates categorizing them as "for" or "against" the government, as larger-N studies have sought to do. By "text," I mean a decision's statement regarding the constitutionality of a particular policy. By "sub-text," I mean an implicit – or explicit – endorsement or challenge of the exercise of government power more broadly.

[57] The multi-faceted case selection technique employed here helped to ensure that the sample in each country contained cases that were actually politically important. Other studies of high court decision-making on important cases in Latin America have used far-larger samples (e.g. Helmke 2002, 2005; Scribner 2004), raising questions about whether all of the cases under study were highly significant politically.

Appendix B, *Case Selection Methodology, Sample of Cases in Brazil*

1) **Mentions of cases in articles and books**: upon arriving to Brazil, I assembled a bibliography of books and articles addressing the jurisprudence of the STF since Brazil's transition to democracy. In order to facilitate the selection of relevant books and articles, I conducted introductory interviews with professors of law to solicit their opinions. The "first level" bibliography included 42 books and articles written by Brazilian constitutional scholars and lawyers, five articles by U.S. political science and/or law professors, and one dissertation written by U.S. political science graduate student; in these works, high court cases were discussed in some detail. A "second level" bibliography included two Brazilian constitutional law texts that each mentioned hundreds of STF decisions and rarely discussed their details.

Once the bibliography was complete and the materials assembled, I skimmed all of the books and articles and made a list that included every STF case that they mentioned. That list was divided by topic (cases having to do with politics, cases having to do with economic policy, and cases having to do with individual/civil rights). Then, I made a separate list containing just the cases that had been mentioned three or more times in the "first level" bibliography (noting the number of times the case was mentioned in works from both the "first level" and "second level" bibliographies).

2) **Mentions in *O Estado de São Paulo***: I hired four RAs to read every issue of *O Estado de São Paulo* (an important Brazilian daily newspaper) from March 1985 (Brazil's transition to democracy) through December 2004 searching for articles that **focused on** a case of the Brazilian STF. During a month of training, I taught these RAs the systematic methodology for assessing and choosing articles that my Argentine RAs and I had developed, and we adapted the three types of forms used in Argentina. (These forms, one of which was filled out for each article, required the RAs to chronicle each selected article's bibliographic material and information regarding the case with which the article dealt.) As the RAs read *O Estado de São Paulo*, they selected articles that coincided with our article selection criterion, took a digital picture of each article selected, and filled out the appropriate form. Simultaneously, we created a running list (in chronological order) of all the cases mentioned in *O Estado de São Paulo* and the articles associated with each case.

3) **Mentions in "case selection interviews:"** Following completion of Step 1, I carried out 25 interviews with experts (including Justices, retired Justices, lawyers, constitutional scholars, members of NGOs dealing with judicial themes, and government officials) to solicit their opinions regarding which were the most politically important cases to come before the STF between 1985 and 2004. Prior to initiating the interviews, I designed a structured questionnaire which a) laid out clearly my specific definition of "politically important" and b) requested that respondents indicate *two* politically important cases from the period during which Sarney was president (1985 to 1990), *two* politically important cases from the period during which Collor and Franco were president (1990 to 1994), *four* politically important cases from the time period during which FHC was president (1995-2002), and *one* from the first two years of the Lula presidency (2003-2004).[58] Two days before each interview, I sent the questionnaire to each respondent to reinforce the fact (already mentioned in my initial communication) that my questions required respondents to think of specific STF cases. Upon arriving at the interviews, I reiterated my definition of "politically important," and

[58] In these case selection interviews, I tried to reduce selection effects and maximize variation on the dependent variable of high court assertiveness by asking respondents to identify the most politically important *cases* (rather than decisions) in which the high court *had the opportunity* to affect (rather than did affect) the political system, the conduct or policies of the central government, or national laws during the time period under study.

solicited the case mentions. (This methodology worked well; often respondents had thought through and created a list of politically important cases in advance of the interview.)

After completing the portion of the interview in which respondents were requested to name the cases they considered to be the most politically important, I presented respondents with the "list of politically important cases" that was created through Step 1 above, and asked them to indicate which cases on that list they considered to be politically important. (Because those cases were mainly found in legal articles and texts, I was sure that they all had *juridical* importance, but was less sure of their *political* importance. It was for this reason, and in the interest of having some standard data across all 25 interviews, that I requested interviewees to check cases on the list.)

After the completion of all three parts of the case selection process outlined above, I assembled another list of cases that included (a) the cases from the original list from Step 1 above AND (b) all of the cases that had been mentioned in the spontaneous portion of my "case selection interviews" that did not appear on that original list. I placed those cases in a chart with the headings below, and, for each case, counted and filled in the number of mentions.[59]

Case	**Year**	**(i) # of mentions in literature (first level)**	**(ii) # of mentions in literature (second level)**	**(iii) # of mentions in case selection interviews**	**(iv) # of times checked on list in case select interviews**	**(iv) # of mentions in newspaper**	**SCORE**

I then established strict decision rules to determine which of the cases on this list would constitute my sample of cases. Specifically, I set a number of mentions "bar" for each of the categories above, and included a case in my sample if it met or exceeded that bar in three categories; an additional requirement for a case to enter the sample was that it be mentioned in the spontaneous portion of at least one "case selection interview."

The bars set for categories (i) and (iv) varied slightly among my four time periods because a) the bibliography mentioned in Step 1 above contained many more sources analyzing the first two time periods (1985-1990 and 1990-1994) and the beginning of the third (1995-2002) than the last, and b) the coverage of the STF increased *dramatically* in *O Estado de São Paulo* between 1985 and 2004 (not strictly because cases became more important, but rather because the media began to focus much more heavily on the STF.

[59] A total of 113 cases were candidates to be included in the sample – that is, had been mentioned in the first-level bibliography of scholarly sources and/or in the spontaneous section of a case-selection interview. A note about selection bias is useful here. It was important that my case selection technique did not over-represent any of the ideological, strategic, and legal considerations inherent to the thesis of tactical balancing. Accordingly, each source had a slightly different bias in terms of what sorts of cases would appear in it: newspapers and expert respondents were more likely to remember cases that were politically controversial (for instance, in which the Court strategically challenged or deferred) or in which particular justices' ideologies played an important role, while cases that appeared in legal journals and books were more likely to have been included there due to their legal importance.

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