
When backlashes and overrides do not scare: the power to review constitutional amendments and the case of Brazil's Supreme Court

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Abstract: This study deals with two of the most significant trends in global constitutionalism: the rising power of courts to review the 'constitutionality' of formal constitutional amendments, and political backlashes – as part of democratic erosion – aiming to curtail the court's authority. Focusing on Brazil's Supreme Court as our case study, we raise the hypothesis that the power to review constitutional amendments allows the justices to primarily decide cases according to their own policy preferences, rather than by searching for second-best solutions considering possible political overrides and backlashes. We argue, in sum, that the behaviour of justices might be altered by the power to review constitutional amendments, insofar as they have less to fear from political backlashes and overrides.

Keywords: judicial review of constitutional amendments; judicial behaviour; judicial strategy; Brazil; eternity clauses; democratic erosion.

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1 Introduction

It is usually said that judicial independence is a central part of a healthy and stable separation of powers. A system of ‘checks and balances’ depends upon the ability of judges to decide without undue interference from other political actors. However, it is no easy task to allocate powers among these different political agents in such a way as to allow for an adequate measure of autonomy and, at the same time, establish institutional safeguards that will effectively bar excesses. In new democracies, this problem presents itself with even more challenges because designers must draw up new systems with little support from its own previous experiences.

In this context, one of the challenges is to correctly predict and understand the impact of specific institutional features on the ‘checks and balances’ mechanism, especially when these features have not been extensively tested in other constitutional systems. One example is the power of courts to review the ‘constitutionality’ of constitutional amendments enacted by the legislature. Even though there are perhaps some good normative reasons to sustain the existence of such a power (Roznai, 2017), it is unclear how this allocation affects the balance of the separation of powers or, more specifically, if it will add a layer of judicial independence that will fundamentally alter the behaviour of political actors.

To better understand the impact of the power to review amendments on the separation of powers, we observe in this article the case of Brazil’s Supreme Court. Reeling from a military dictatorship that lasted over 20 years, the founders of the Brazilian Constitution of 1988 thought it best to create a very strong judicial power that could defend and protect the newly established constitution. In order to effectively ‘guard the constitution’¹, the Supreme Court (*Supremo Tribunal Federal* – STF) was awarded the prominent role of having the last word on all important constitutional questions due to mechanisms that allow it to review virtually every statute enacted by congress. In 1993, this power was significantly expanded when the court proclaimed it could also review the constitutionality of constitutional amendments (Tommasini and Riccetto, 2020; Scotti 2018; Benvindo, 2018).² Although there are many factors that influence judicial behaviour, Brazil’s STF presents an interesting case-study on how amendment review may create imbalance within a system of ‘checks and balances’.

The power to review amendments has converted Brazil into a ‘ultra-strong’ system of judicial review, under which the Supreme Court has the last word on all constitutional issues [da Silva, (2012), p.217]. With reference to rational choice theory, we argue that, in such a system, we should expect justices to be more ‘sincere’ in their approach to constitutional adjudication. As adopted here, a ‘sincere’ justice will primarily decide according to her own policy preferences, while an ‘insincere’ justice will search for second-best solutions considering possible overrides and backlashes³. Because the court has the power to strike down overrides and backlashes, it is significantly more independent and its justices will be less inclined to reach middle-ground positions.

The article is structured as follows. Initially, we quickly canvass the different models of judicial behaviour, focusing on a broader rational choice theory approach to judicial independence (Section 2). We then consider the implications of adopting this theoretical position and conclude that judges should be expected to behave more sincerely regarding their policy preferences when they integrate a more independent power (Section 3). With this framework, we evaluate the specific case of the Brazilian Supreme Court and how the power to review constitutional amendments greatly increases its independence, thus increasing its tendency to render sincere decisions (Section 4). We then conclude that the Brazilian Supreme Court’s behaviour can in part be explained by its institutional independence and power to review amendments. Further, we indicate that judicial independence must not necessarily be seen as an untouchable institutional feature; quite to the contrary, the level of judicial independence must be set according to a normative theory of how we want judges to behave: if we desire a more sincere court, then the power to review amendments is probably desirable; if we prefer an insincere court, backlashes and overrides should be allowed within the system. This may be important in order to achieve a balanced separation of powers.

2 A rational choice approach to judicial behaviour

In the search for better understanding how judges decide, different theoretical models that attempt an overarching explanation have been tested. The literature on this subject usually emphasises three models: legal, attitudinal, and strategic. The legal model states that justices only consider the law when deciding cases. Non-legal factors do not play a role in judicial decision-making as legal constraints are sufficiently substantial. Although some subjectivity may be inherent when identifying and applying the law, judges will do their best to fill in these semantic ambiguities and gaps as objectively as possible and by following the criteria furnished by the legal system. As far as normative models of judicial behaviour go, the legal model checks several boxes: judges are impartial, neutral and are strictly bound to law. However, as a descriptive model, it is insufficient insofar as it depicts an idyllic and unrealistic judge that ignores everything (including her own preferences) but the law.

Conversely, a rational choice approach to judicial behaviour considers judges utility maximisers (Olson, 1965). Their actions are labelled as rational when they pursue personal preferences by means that are efficient and effective. This theoretical framework encompasses the attitudinal and strategic models as it attempts to explain how judges go about deciding constitutional disputes⁴. It stems from the teachings of legal realism, that ultimately concludes that legal provisions can almost always be interpreted to fit the preferences of the interpreter, and thus cannot objectively bound him (Maveety, 2006).

For the legal realist, the constitution is what the Supreme Court says it is, and the constitution's text has little bearing over the outcome of constitutional disputes.

The attitudinal model argues that judges' decisions are motivated by their own policy preferences⁵, and legal factors are only employed as a *posteriori* rationalisation of their personal ideology (Segal and Spaeth, 1993, 2002). Drawing from this idea, the attitudinal model believes that a judge's ideology will define the outcome of judicial decisions, without any textual or other substantial constraint to their personal preferences⁶.

Finally, the strategic model also believes that a judge's goal in decision-making is to maximise her policy preferences. However, it adds another layer to the analysis of judicial behaviour. Because other political players also act in order to further their own preferences, judges sometimes modulate their preferences and opt for second-best choices (Epstein and Knight, 1998), in an attempt to avoid overrides and backlashes that may restore the *status quo ante* or disturb the court's independence. Unlike attitudinalists, this model encompasses insincere action. For example, a liberal judge still has liberal decision outcomes as preferred goals (sincerity) but would decide for a moderate outcome if she faces a conservative congress willing to override her decisions (insincerity). Of course, judges differ in their inclinations towards strategic and sincere choices, and the personality of a judge may be decisive in this regard (Baum, 2009).

The main dispute in recent Brazilian scholarship on judicial behaviour relates to whether the justices of the Supreme Court act in an attitudinal or strategic manner (Martins, 2018). The analysis we carry through here intends to contribute to this broader problem as we add a variable that has not yet been observed in the court's decision-making studies: the power to review constitutional amendments. As we argue, this power may have a profound impact on the justices' behaviour and consequently on the validity of the strategic and attitudinal models⁷. Our analysis here is strictly theoretical and we hope to later test it by collecting the relevant data.

We pay special attention to judicial independence given it is a known to influence judicial behaviour within rational choice theory⁸. If the court's independence is strong to the point where it need not consider second-best decisions, then it might be expected that its decisions will be less considerate of the policy preferences of the other political branches. If not, they rely on strategic pathways in order to maximize their preferences.

It is important to note, however, that recent literature has questioned the explanatory power of the rational choice model (Baum, 2009; Braman, 2016). Judges may not be that rational after all, as their decision-making may be marred with cognitive biases. However, although rationality is not the only component in behaviour prediction and may not account for hidden irrationality, it would be a mistake to consider that judges do not factor in the possibility of backlashes and overrides. Consequently, the rational choice is still a valuable theoretical premise.

Also, while the study focuses on Brazil, it has much broader implications as the question of judicial review of constitutional amendments is becoming one of the most burning questions in global constitutionalism (Albert, 2019; Roznai, 2017; Yap, 2015; Halmai, 2012).⁹

Before continuing, however, it is important to note the limitations of our observations. First, besides the power to review amendments, there are several other independence defining features that may also be relevant in influencing judicial behaviour. For example, political fragmentation in political branches may impact the capacity for coordinated responses and thus strongly influence the court's fear of suffering backlashes (Ferejohn et al., 2007). Second, decision-making that does not

search for second-best decisions may encourage the government to slowly appoint partisan judges to the court in order to form a consistent majority in its favour, switching the court's preferences. Third, sociological legitimacy also plays an important role. Courts must manage their political capital as a way to survive and prosper in the institutional context, and they may improve it by becoming more independent or more popular.¹⁰ Congress may attempt to delegitimise the court by other means in order to sustain overrides and backlashes to judicial decisions. Fourth, the court has many deliberation problems and it is sometimes difficult to say that 'the court' has a given preference. Further, negotiations among justices may cause the court to find second-best decisions as a matter of its own internal tensions. All this makes it hard (which is why we refer only to the preferences of individual justices) to isolate the proper variables and test our hypothesis empirically.

In sum, our argument is limited in scope, as it only tackles one of numerous variables. The relation we strike between the power to review amendments and judicial 'sincerity' is theoretical and must be tested further. And it may be examined in other countries, where courts hold the power to review amendments. Nonetheless, in the case of Brazil and within the rational choice model, there is good reason to believe the power to review amendments *substantially* impacts the justices' behaviour.

3 Judicial independence, models of judicial behaviour and the power to review constitutional amendments

We take judicial independence to be the degree of freedom of courts from interference of other political actors. As Ferejohn et al. (2007) put it, "to the extent that a court is able to make decisions free of influence from other political actors, and to pursue its goals without having to worry about the consequences from other institutions, it is independent." As the influence of other political branches on the judiciary increases, judicial independence decreases and vice-versa. Independence can thus be curtailed by increasing influence on the "court's personnel, its case selection, decision rules, jurisdiction, and enforcement of laws" (Ferejohn et al., 2007).

How does judicial independence influence judicial behaviour? The strategic model posits that institutional constraints bear upon the ability of the court to implement its preferred policy and that judges will usually anticipate the political branches' reactions in order to search for the best possible alternative. So, the extent to which a court will pursue its own preferred policy is determined, at least in part, by its independence: as the risk of backlashes and overrides increases, courts will increasingly opt for milder and more insincere decisions. In other words, as independence decreases, judges will correspondingly dial back on decisions that carry through their own policy preferences, at least in situations where their preference clashes with that of the legislatures.¹¹

In consequence, when the institutional framework guarantees high levels of judicial independence and courts act unconstrained by the possibility of overrides and backlashes, judges will not be especially considerate of the preferences of other political branches¹². Courts will impose their preferences with less concern for how the decision may be received by other political agents. So, when there are little to no constraints and all decisions are equally available to judges, the strategic model collapses into the attitudinal model. After all, it also supports the rational choice theoretical proposition that judges will implement their preferred policy.

This allows a fundamental claim about the relation between judicial independence and judicial behaviour that derives from the rational choice approach: as courts become more independent, they will increasingly impose their own policy preferences and consequently become more sincere when advancing their policy preferences.¹³ On the other hand, as independence is cut short by the fear of overrides and backlashes, courts will be more mindful of legislative decisions and become increasingly strategic.¹⁴

If this extrapolation of the rational theory is true, it might be one of the key factors to explaining why the Brazilian Supreme Court is constantly making bold decisions that fly in the face of legislative or executive preferences. Its significant independence, secured by its power to review constitutional amendments, has guaranteed that there is little reason to be especially considerate towards the policy preferences of the elected branches of government.

4 The Brazilian Supreme Court as an independent and sincere court

It has now become common place to describe the Brazilian Supreme Court as a very strong court. Some diagnoses go as far as to suggest that Brazil has become a ‘supremocracy’ (Vieira, 2008; with new analysis in Vieira, 2018), which means the court now occupies the centre of political power as a ‘rule-maker’. In other words, the Supreme Court is not afraid, in most cases, of imposing its own policy preference by striking down a legislative act or even by establishing general norms when legislation is lacking. We argue in the following subsections that this strength may in part be attributed to the institutional framework that grants the court the last word in constitutional disputes and does not allow for several common types of legislative backlashes. The courts’ high judicial independence allows the justices to advance their own policy preferences without having to consider second-best choices – or, at the very least, be less mindful of possible retaliations from the legislative branch.

Judicial independence, from the perspective of rational choice theory, is usually measured with reference to two broad categories: overrides and backlashes. Overrides refer to future legislative acts that review judicial decisions. They may reverse decisions completely, try to establish some intermediary solution that takes the court’s view into account, or may in fact take steps to deepen the policy differences between the branches by extending or amplifying the policy features that the court disagreed with. Backlashes, on the other hand, describe actions that intend to disturb the workings and composition of the court, either by punishing its members individually or targeting the institution as a whole.

Under these two broad categories, there are a few variables usually taken into account by scholars interested in measuring judicial independence¹⁵. Rosenberg (1992) compiles an extensive list of different ways by which congress and the president may enact backlashes attack the court:

- 1 [using] the senate’s confirmation power to select certain types of judges
- 2 enacting constitutional amendments to reverse decisions or change court structure and procedure
- 3 impeachment
- 4 withdrawing court jurisdiction over certain subjects

- 5 altering the selection and removal process
- 6 requiring extraordinary majorities for declarations of unconstitutionality
- 7 allowing appeal from the Supreme Court to a more ‘representative’ tribunal
- 8 removing the power of judicial review
- 9 slashing the budget
- 10 altering the size of the court.

In the following subsections, we demonstrate why many of these variables are, at least in theory, altered by the power to review amendments¹⁶.

5 Brazil as a case study

5.1 *Unconstitutional constitutional amendments in Brazil*

As we have summarily explained above, judicial independence is limited by the possibility of legislative overrides. From a practical point of view, in most constitutional systems, political actors can override court decisions by enacting constitutional amendments that place the dispute beyond judicial scrutiny (Dixon, 2011). Courts must therefore be aware that their decisions may ultimately not stand – or even worse, that congress and president act as to deepen the policy disagreements. In Brazil, given flexible amendment rules and a high amendment rate^{17,18}, one should expect courts to be even more wary of overrides, especially when the president controls a strong legislative coalition. As a matter of fact, all federal governments in Brazil have had a ‘constitutional reform agenda’ (Couto and Arantes, 2006), which roughly means that the implementation of their political program is contingent upon the approval of constitutional amendments.

However, in 1993 the Brazilian Supreme Court decided the constitution granted it powers to strike down constitutional amendments when amendment procedure is not properly followed or, more importantly, when it is materially incompatible with the constitution’s unamendable provisions (*cláusulas pétreas*)¹⁹. According to article 60, IV, of the Brazilian Constitution, congress may not enact amendments that ‘tend to abolish’ the federation; direct, secret, universal and periodic voting; the separation of power; and individual rights and guarantees.

The constitution itself is not completely clear as to the role of courts in the formal amendment dynamic. On the one hand, the constitution does expressly prohibit amendments under the circumstances described in article 60. On the other hand, the Supreme Court’s powers are limited to the constitutional review of ‘statutes and normative acts’²⁰, which does not necessarily include amendments (Mendes, 2005). It is not evident, therefore, if this power was a design option or a power that the Brazilian Supreme Court created for itself.

Regardless, it is our claim here that the ‘unconstitutional constitutional amendments’ doctrine has bolstered judicial independence by not allowing congress to have the last word in constitutional disputes and by having the power to strike down most backlash attempts that may come from congress. This, in turn, may have altered the behaviour of the Supreme Court’s justices.

5.2 Overrides and unconstitutional amendments

The situation just described impacts judicial independence. The Supreme Court's power to strike down constitutional amendments effectively strips the political branches of their ultimate override tool. Although congress, with the president's push²¹, may in many cases be able to enact overriding constitutional amendments with relative ease, the Supreme Court can strike down the amendment and re-implement its preferred policy without having to appeal to second-best solutions.²²

The court may of course decide to maintain the overriding amendment, especially if it attempts to meet some sort of middle-ground or if it believes extra-legal reactions are not out of the question. As we have already stated, the power to review the constitutionality of amendments is not the only variable that counts towards defining judicial independence. Nonetheless, the Supreme Court does get to decide whether amendments are compatible with the constitution's unamendable core. After all, the court can use the power to review amendments "as a strategic trump card, by applying it selectively" (Roznai, 2017 and also Mohallem, 2011). Theoretically, this impacts judicial behaviour insofar as the Supreme Court worries less about effective legislative overrides. Instead of tempering its decisions and reaching a middle-ground, the court may act more freely and render more sincere decisions.

The Supreme Court may sometimes accept intermediary solutions from congress and embrace an institutional dialogue of sorts. This has happened in a few occasions, most notably, in relation to legislative regulation of access to electoral funds and television time by political parties' campaign purposes.²³ The practical effects of the court's decision were disastrous²⁴ and so, many years later, the court accepted new regulation, albeit in a less restrictive form. Interestingly, the 'unconstitutional constitutional amendments' doctrine reverses the traditional picture: ordinarily, constitutional amendments threaten the court's independence, which would lead them to search for second-best solutions; however, in Brazilian case, the legislature is prompted to reach compromises and second-best solutions, for the court holds the power to strike it down.

5.3 The (in)feasibility of effective backlashes

Congress' ability to successfully override the Supreme Court's decisions is much more limited when amendments themselves can be invalidated. Moreover, congress also has very limited institutional tools to promote backlashes against the court. Again, this is essentially because any alteration must pass the court's scrutiny, so only in special circumstances will the court allow its own independence to be undercut by congressional action. In the following paragraphs, we describe some of the failed attempts by congress to diminish the court's independence.

Withdrawing court jurisdiction over certain subjects and removing the power of judicial review – the first type of backlash to consider is a reduction of the court's jurisdiction as a response to one or several decisions that interfere with legislative preferences. Congress may, for example, strip courts of important parts of their jurisdiction, such as their judicial review powers. In Brazil, given the Supreme Court's ample jurisdiction over matters that range from constitutional adjudication to criminal cases and extradition, political agents might attempt to diminish the court's range, thus mitigating its interference in the political process.

In Brazil, however, the Supreme Court's jurisdiction is very well detailed in the constitution. Any attempt to influence the court by shrinking its reach must be accomplished by formal amendment. But, as we have seen, even if congress manages to stir up the necessary votes, the power to hold amendments unconstitutional allows the court to review the new amendment and effectively pick and choose which alterations it wishes to keep. Legislative reaction here also seems to generate little to no judicial dependence, because the court will most certainly have the last word on the matter.

As a matter of fact, the court's jurisdictional reach has been amplified since 1988. It must now rule on suits against the National Council of Justice (CNJ) and National Council of the Public Prosecution (CNMP) and on requests that it declare statutes to be constitutional with binding and *erga omnes* effects, so as to prohibit other courts and judges from holding the statute unconstitutional (*Ação Direta de Constitucionalidade*). It has only lost the less significant attribution of enforcing foreign judicial decisions and conceding 'exequatur' to rogatory letters.²⁵ In summary, the court's constitutional jurisdiction has grown. As pointed by Sadek (2004), it may be the case that the minor reductions that can be observed have come at the behest of the own court's desire to control its (massive) caseload.

Allowing appeal from the Supreme Court to a more 'representative' tribunal – also, legislators might consider adding a mechanism of review or appeal from Supreme Court decisions. The constitution already incorporates an important provision to this effect that could theoretically prove very effective in controlling the court's judicial review powers. Article 52, X, establishes that it is the senate's attribution "suspend the execution, in part of entirely, of laws declared to be unconstitutional by definitive decision of the Supreme Court." The most intuitive reading of this provision would indicate that for the court's decisions of unconstitutionality to extend beyond the litigants of the specific case, the senate must suspend the statute.

If such a rule were interpreted in that way, perhaps the court would render decisions that the senate would vigorously not oppose, so as to encourage the statute's suspension. In other words, it would act strategically in order to see its second-best option implemented to as many people as possible. However, the Supreme Court has taken this power away from the senate via interpretation. First, it declared that the suspension would be unnecessary in cases of abstract review, because of the very 'nature' of this type of review. Second, Gilmar Ferreira Mendes, one of the court's most influential justices, has long been arguing that the provision has suffered a 'constitutional mutation' and can no longer be invoked in order to limit the effects of the Supreme Court's decisions also in concrete judicial review cases. It is still somewhat unclear whether a majority of the court has backed Mendes' argument, but it seems close to definitely doing so.

Some members of congress have proposed to submit the Supreme Court's decision to legislative review. Amendment Proposal N. 33/2011, for example, sought, among other things, to subordinate the Supreme Court's abstract decisions on constitutionality to congress, by delaying its binding and *erga omnes* effects. The proposal established that if congress, by three-fifths quorum, disagreed with the Supreme Court's decision, then the decision should be submitted to popular review. However, constitutional commentators were quick to pounce on the proposal and denounce it as absurdly and flagrantly unconstitutional, as they did not believe the court's independence should be messed with. It was eventually scrapped.²⁶ Even if it had been approved, however, the Supreme Court

could have – and almost certainly would have – held the amendment unconstitutional for violating the *cláusulas pétreas*.

Requiring extraordinary majorities for declarations of unconstitutionality – congress may also enact statutes or amendments requiring extraordinary majorities for declarations of unconstitutionality. Article 97 of the Brazilian Constitution establishes that a court need only absolute majority to hold a statute unconstitutional. This same majority requirement has been extended to declaration of unconstitutionality of constitutional amendments.

The aforementioned Amendment Proposal N. 33/2011 also proposed to modify article 97 and change the requirement to four-fifth for declarations of unconstitutionality. But again, because the Supreme Court can review the constitutionality of amendments, it could strike down this requirement under the ‘separation of powers’ eternal clause. Unless other important variables are at play (such as the court’s legitimacy, its popularity, etc.) changes in the court’s institutional structure can hardly be imposed upon it. Apart from the behavioural component, this lack of control presents potential problems in relation to democracy.

Limiting access to the Supreme Court – congress could also theoretically limit access to the Supreme Court by establishing new requisites for cases to be heard or by stripping the legitimacy to challenge statutes from some actors altogether. This way, only specific constitutional disputes would reach the court and its influence would be greatly reduced. In some systems, depending on the rules of access, courts may be even more prone to second-best solutions when it is uncertain the dispute will ever reach them again. Access to the Brazilian Supreme Court, however, is extremely easy, be it through individual claims or in abstract review of legislation.²⁷ This can be easily demonstrated by the court’s vast caseload.²⁸ The court thus knows that any relevant (and many not so relevant) constitutional disputes will in no time at all be submitted to its analysis.

Limiting access, therefore, could be an effective response to judicial sincerity. However, as is the case with jurisdiction, rules of access are for the most part explicit in the constitution. Significant changes would have to be introduced via amendment and, even then, the court could easily strike them down by arguing that the measures ‘tend to abolish’ the ‘separation of powers’ (article 60, §4, III). Indeed, although amendment proposals that aim to reduce direct access to the court are not rare, very few manage to reach the final stages of the legislative process.²⁹

Access to the Supreme Court has changed significantly since the constitution was first promulgated in 1988. Most of these changes, however, have come via constitutional and statutory interpretation as a response to the court’s growing caseload. In concrete review, several requisites and limitations were placed upon litigants, in a specific type of judicial policy that came to be known under the derogatory term ‘defensive jurisprudence’ (Kapiszewski, 2010). Moreover, in abstract constitutional review, the court established that certain actors can only provoke the court when they successfully show they are relevantly related to the challenged statute (*pertinência temática*). These important changes cannot be described as backlashes, however, given that they do not originate from other coordinate branches, but rather stem from the court’s own management problems (Sadek, 2004; Ribeiro and Arguelhes, 2015).

One of the most significant access-limiting mechanisms was introduced by congress via Constitutional Amendment N. 45. Similar to the *writ of certiorari* of the US Supreme Court, the *repercussão geral* establishes that only claims that are legally, socially, economically or politically relevant can be analysed in appeals to the

Supreme Court. This change, however, came at the behest of the Supreme Court, which asked for such a mechanism so it could control its own caseload (Ribeiro and Arguelhes, 2015). Further, this mechanism does in fact give the Supreme Court even more power to pick and choose that which it wishes to analyse.

In short, although in some systems the relevant actors may agree among themselves not to present the constitutionality of legislation to the courts, in Brazil there are numerous avenues through which legislation can be challenged. Many actors are constitutionally authorised to bring abstract challenges straight to the court, including any party that has at least one representative in National Congress. Given there are, at present time, more than twenty parties in that condition, it is almost certain that at least one of them will not agree with the outcome of legislative deliberation and challenge it in the Supreme Court. Even if none do, however, new amendments can still be challenged in any concrete dispute, even if the parties do not request the law be reviewed (Tommasini and da Silva, 2018), and the matter can then be appealed and make its way to the Supreme Court. The Supreme Court, therefore, will always be instigated to review the constitutionality of new amendments and political actors will only be able to set up access filters when the court deems it appropriate³⁰.

Altering court size and composition – finally, congress may alter the court's size, thus allowing new appointments and consequently new majorities to be formed. Recently elected President Jair Bolsonaro, at the beginning of his campaign run, floated the proposal that the number of justices of the Supreme Court should increase from 11 to 21, but the idea was not well received so he gave up on it. Interestingly, in Brazil, congress passed an amendment to the exact opposite effect: it increased the compulsory retirement age and perpetuated the court's composition. The amendment had the very specific purpose of not allowing President Dilma Rousseff to appoint new justices and supposedly 'politicise' the court.

Altering court composition, especially by forcing some members into retirement, is not unprecedented in Brazil. During the military dictatorship, three justices were retired in order to form the necessary court majority (Recondo, 2018). In today's context, although such changes would be challenged in the Supreme Court and it is likely that they would be struck down, it is important to consider that if a measure as drastic as this managed to garner three-fifths support from both houses of congress, perhaps the court's legitimacy is so tarnished that it may not have sufficient political capital to stand in the way of congress. Still, the mere possibility of review means that the political branches must be wary of the possibility of a declaration of unconstitutionality and, at the same time, guarantees that the court may stand its ground if it so wishes.

Lastly, congress may impeach members of the Supreme Court if certain conditions are met. In theory, the court only reviews the procedural correctness of impeachment proceedings and does not actually analyse if the merit conditions were met. Thus, this seems to be perhaps the best way congress can control justices. Yet, no justices has ever been impeached under the 1988 Constitution, nor has any impeachment proceeding ever advanced through preliminary stages. Although it is hard to pinpoint exactly why this is, perhaps it has something to do with the justice's ancillary power to judge senators, congressmen and the president for criminal charges committed during his term and related to his public functions. If impeachment proceedings begin, the court can retaliate against individual members of congress in an attempt to preserve its members.

6 Conclusions

If all we have said so far turns out to be true, judicial independence is key in order to understand judicial behaviour. In search for their preferred policies, judges will consider how other political branches react to their decisions. As other actors are more empowered to respond, justices modulate their preferred policies and advance them cautiously. This provides a practical tool for implementing normative models of judicial behaviour: judicial independence can be set to enable more or less constrained judicial decisions. We should concede more independence to judges if we wish they adopt an attitudinal behaviour. On the other hand, if we desire higher levels of dialogue between courts and legislatures, we must reduce their independence to an intermediary position.³¹

In Brazil, if one considers the Supreme Court's 'supremocratic' behaviour a problem to be solved, it may be an option to engage in the unpopular and counter-intuitive proposal of decreasing their independence, perhaps by reducing or banning their power to review amendments.³² That way, they will search for second-best choices and be more respectful of legislative deliberations. However, if 'supremocracy' is meant as a compliment, as a court of the 'global south' that is finally coming into its own, we should preserve its independence, so that it can more easily strike down unwanted legislative enactments. What seems to be clear is that a court with the final word over the validity of constitutional amendments has less to fear from backlashes and overrides and little reason to entertain dialogue.

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Notes

- 1 Article 102, Brazilian Federal Constitution of 1988 (stating that the primary function of the Supreme Court is to ‘guard the constitution’).
- 2 The Supreme Court first proclaimed its power to review amendments in the Direct Action of Unconstitutionality N. 829, 830 and 833. However, as early as 1991, Justice Celso de Mello had already stated that the Supreme Court could review amendments under the constitution’s ‘eternal clauses’. For a criticism of the Supreme Court’s decision, see Tommasini and Riccetto (2020).
- 3 The ‘sincere’ and ‘insincere’ behaviour have its correspondents in the attitudinal and strategic models of judicial behaviour, as we shall substantiate in Section 2. Important to notice that the terms ‘sincerity’ and ‘insincerity’ here are not equivalent to the *animus* or psychological state

of the judges, but to their attitudinal or strategic behaviour as externally captured by the model we adopt.

- 4 At first, the attitudinal model was strongly influenced by the behavioural revolution in political science in the 1930s (Epstein et al., 2003). The model adopted a *stimuli-response* (*S-R*) logic from the social psychology to analyse judicial behaviour, stating that the stimulus of an individual preference would immediately be translated as the decision outcome (Segal, 1984). However, later scholarship revisited the attitudinal to a position closer to the rational choice theory, understanding the judicial actors as conscious preference maximisers, and not simply as decision-makers who immediately react to impulses (Segal and Spaeth, 2002; Epstein et al., 2013). Finally, there is rational choice theory scholarship empirically testing the influence of legal constraints in decision-making, but they do not claim that these are the only factors to play a role in judicial behaviour (Bailey and Maltzman, 2011), distancing from the legal model.
- 5 The words ‘policy preferences’, ‘personal preferences’ and ‘ideology’ are used interchangeably here.
- 6 The attitudinal model scholarship tends to embrace large-N analysis to demonstrate the high level of correspondence between the judge’s ideology and decision outcomes – in some cases reaching close to 80% (Segal and Spaeth, 1993). So, if a judge is categorised as liberal, she will in most cases decide for a liberal outcome; if conservative, for a conservative outcome, no matter what the law says.
- 7 There are two basic applications of the rational choice model of judicial behaviour when applied to courts. The first is the internal perspective, ‘which focuses on intra-court strategies’ [Segal and Spaeth, (2002), p.326]. The second is the external perspective, which focuses on the constraints posed by other political actors and emphasises that judicial behaviour is in some way influenced by the broader institutional context, i.e., they will avoid legislative backlashes or overrides. As Vanberg (2001) notes, “the political environment in which a court must act is crucially important to the manner in which it will use its power.” For this paper, we focus on the external perspective.
- 8 Epstein (2015–2016) notes that judicial independence is now conceptualised as “the ability of judges to behave sincerely, whatever their sincere preferences may be and regardless of the preferences of other relevant actors, without fear of reprisal and with some confidence that political actors will enforce their decisions.”
- 9 Apart from Brazil, another important jurisdiction in which courts review constitutional amendments is India. Supporting our claim, Roux (2018) recently argued that thanks to the power of the judiciary the review constitutional amendments and examine their compatibility with the “basic structure of the constitution”, “the court was free to intervene in any public policy issue that could plausibly be said to implicate the constitution’s vision for a just society.”
- 10 Comparing, again, to India, Roux (2018) claims that the Indian Supreme Court’s “legitimacy is tied to popular satisfaction with the substantive outcomes of the cases it decides.”
- 11 Of course, other factors (such as political fragmentation) may lead to sincere action. Ginsburg (2003), for example, demonstrates how political diffusion in Asia was an important condition for the emergence of strong constitutional courts, and Chavez (2004) claimed that fluctuations in the concentration of political power contributed to judicial independence in Argentina. In developed democracies, it indeed appears that political competition is positively correlated to judicial independence (Adin, 2013).
- 12 This is of course an oversimplification within the rational theory framework.
- 13 Recent examples from Slovakia, Colombia, India and Bangladesh indicate that courts may employ the power to review constitutional amendments in order to invalidate amendments that curtail their competences or change the manner by which judges are appointed (Roznai, 2020). As Abeyratne (2017) remarked regarding courts in India and Bangladesh, these courts have arguably “invoked the basic structure doctrine selectively to suit their own substantive and institutional ends.”

- 14 One might argue that courts use their acquired independence to behave in ways that are not directly connected to advancing their members' policy preferences, but are rather connected to the justices' desire to protect their power. This argument was raised by Baum (2009) when he affirms policy preferences are not the justices' only goal when deciding cases, supposedly a limitation to the strategic model. However, Epstein argues that the strategic model – and other rational theory approaches – usually adopt policy preferences as the judges' exclusive goal but is not limited to them [see Epstein Lee, Christopher Parker, and Jeffrey Segal, do justices defend the speech they hate? An analysis of in-group bias on the US Supreme Court (2018), in which the authors adopt a rational choice approach to test the US Supreme Court justices' biases, that is, the deviation from its preferred policies]. In this paper, we consider any goal that may be advanced with little fear of overrides or backlashes as possible preference that may be tested within the rational choice model.
- 15 For example, see the variables adopted by Melton and Ginsburg (2014).
- 16 Our argument here is not that the Supreme Court of Brazil is completely independent and always acts in a 'sincere' way. There is always the fear of extra-legal measures that inherently constrain the court, as well as specific backlashes (such as impeachment proceedings and control over the budget) that would not be easily controlled by the court. Moreover, even the power to review constitutional amendments may itself be removed through constitutional amendments. Yet, it is nonetheless significant to argue that most dependence generating backlashes, as well as overrides, are significantly less powerful if courts can revise constitutional amendments. Indeed, independent and powerful courts, as in India and Belize, were able to block and invalidate constitutional amendments that removed the court's competence to review constitutional amendments. See Roznai (2017).
- 17 Ginsburg and Melton (2015) describe the amendment culture to be 'ultra flexible', noting that from 1988 to 2015, the constitutional amendment process has been used 84 times.
- 18 According to article 60 of the Brazilian Constitution, amendments can be proposed by one third of the House of Representatives or the senate (I), the president (II), or more than half of the state legislatures, represented by the majority of its members (III). For approval, it requires three fifths of each house in congress, in two turns.
- 19 See ADI 829, 830 and 833, decided on 14th April 1993.
- 20 See article 102, I, Federal Constitution of Brazil.
- 21 The president's backing is important for amendment approval: 25 of Brazil's 95 first amendments were proposed by the president.
- 22 Since 1988, they were more than 80 challenges against constitutional amendments. Nine were struck down; 11 were upheld; 21 challenges were extinct by procedural objections and 39 challenges are pending of final judgment. See Lima (2020).
- 23 In 1995, congress established rules that limited access of political parties to funds and television time ('clausula de barreira') when they did not meet a voting threshold. In 2006, the Supreme Court held those rules to be unconstitutional, basing their decision primarily on the multi-party system. In the end of 2017, congress enacted more flexible new rules that have yet to be analysed by the court. Considering the negative impact of the older rules, it seems unlikely that the court will strike down the new ones.
- 24 In 2017, Justice Gilmar Ferreira Mendes said that the court has made a big mistake declaring the unconstitutionality of this amendment in 2006, mentioning that his colleagues also recognise their *mea culpa* for the undue interference in congress and multiplication of parties (see <https://www2.camara.leg.br/camaranoticias/noticias/POLITICA/526598-GILMAR-MENDES-DIZ-QUE-STF-ERROU-EM-DECISAO-SOBRE-CLAUSULA-DE-BARREIRA.html>).
- 25 The court has, however, changed the scope of its jurisdiction by way of constitutional interpretation. As we are only analysing backlashes from other branches of government, these have been omitted.
- 26 We must consider that, in this case, there was also strong popular pressure against the Amendment Proposal N. 33, including specific manifestations in several Brazilian cities

- (i.e., see <https://www.terra.com.br/noticias/brasil/cidades/manifestantes-fecham-avenida-paulista-contra-a-pec-33,11a1414baaaaf310VgnCLD2000000dc6eb0aRCRD.html>).
- 27 Brazil adopts a ‘mixed’ or ‘hybrid’ system of review, which allows for challenges to statutes via individual cases or abstract challenges.
 - 28 See Anuário da Justiça, 2018, providing detailed figures of the court’s caseload.
 - 29 The only proposal of constitutional amendment devoted to changing the rule of access to the court that is ready for voting in a full plenary session is the Proposal N. 350/2013, authorising the head of public defenders to question the ‘constitutionality’ of laws in abstract review.
 - 30 The exceptions, here, are the amendments which do not stir up controversies as to their constitutionality. Because the Brazilian Constitution is very long, amendments sometimes do not alter fundamental questions that are subject to intense political dispute. They will thus not be challenged.
 - 31 However, reducing the independence of courts drastically may also be an incentive to attitudinal behaviour, as the courts know their preferences will be substituted by the ones from the other branches as they wish.
 - 32 Of course, possessing the power to review amendments, even such banning of power maybe declared as unconstitutional.