Florida Journal of International Law

Volume 17 | Issue 3 Article 2

December 2005

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Florida Journal of International Law

VOLUME 17 DECEMBER 2005 NUMBER 3

ESSAYS

CONSTITUTIONS AND INSTITUTIONS: JUSTICE, IDENTITY, AND REFORM

JUDICIAL REVIEW OF CONSTITUTIONAL AMENDMENTS IN THE BRAZILIAN SUPREME COURT

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I. INTRODUCTION

Economic reforms in several Latin American countries in the last fifteen years have brought some challenging questions to constitutional law, such as: "What is the role of constitutionalism in progressive politics? How should we face the dilemma between the 'social constitutional party' and the 'liberal statutory party'?"[1]

Such a dilemma between these two parties, or between the Brazilian Constitution and the statutory law is not entirely true in Brazil. The tide of the so-called "neoliberal reforms" did not have an impact on sub-constitutional law alone. In fact, this conflict rages within the Brazilian Constitution itself; a document which has been under intense reform for years. Not only does the impact of "neoliberalism" in Brazil neglect to spare the Brazilian Constitution, but also has it as a primary object for reform. As we shall see, this is due to some peculiarities in the text of the Brazilian Constitution.

At any rate, the challenge of thinking about the role of Brazilian constitutionalism in progressive politics leads me to a number of other questions. I would like to list some of them, not as a rhetorical strategy, but because, faced with such an intricate theme, I feel I still do not have clear answers for many of the questions it poses. Does the constitutionalist have anything to say, from a substantive standpoint, about all this process of structural reforms in the economy? Does he have anything to say about "neoliberalism?"

The constitutionalist has a crucial role within a constitutional democracy. Above all, he is expected to offer sound arguments for the protection of the fundamental rights, not in the courts alone, but also in the various institutional spaces which form the public sphere. Such rights include today not only those derived of classic liberalism but also those of social and economic character which require the State to perform quite complex and costly tasks in the implementation of public policies of promotion and redistribution in these areas.

If, as a first thought, the so-called neoliberal reforms do not have a direct impact on rights — as it seems to be the case in Brazil — but if they only alter the ways in which the state acts in the economic arena, how can one resist them by using the Brazilian Constitution? Can the Brazilian Constitution be an effective tool in resisting transnational economic movements which threaten the ability of national states to promote fundamental rights — as modern constitutionalism promises?

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1. These questions were presented in the program of Latcrit's "South-North Exchange on Theory, Culture and Law" (Puerto Rico, Dec. 2004), where this Paper was debated.

Is the Brazilian Constitution compatible with neoliberalism? Does it protect us from neoliberalism? Do the "cláusulas pétreas"[2] forbid neoliberal reforms? As of today, we do not have a comprehensive enough analysis on the topic, one that articulates all its conflicts and institutional effects — and understandably so, as this is still an ongoing process.

I would like, nevertheless, to offer a brief report of the Brazilian case and bring a few questions that constitutional theory poses for anyone trying to analyze these phenomena. Such questions, due to their theoretical nature, transcend the Brazilian case insofar they present phenomena common to all contemporary democracies, especially since they are usually called the judicialization of politics.

My goal is, therefore — in spite of this long introduction — not to make a judgment on the value of such constitutional reforms. As neoliberalism has become an ideologically charged topic, and as the term "neoliberal" itself was transformed into a derogatory adjective, public debate has often incurred in a mistaken identification, monolithically, all and every "neoliberal" reform as incompatible with the principles of social justice. To avoid such misunderstanding I will thus refrain from assessing them here.

What I would like to discuss, however, is the decision process through which such themes have been absorbed by Brazilian constitutional institutions. More specifically, I would like to discuss the possibility of the judicial control of the constitutionality of constitutional amendments. Three less ambitious questions are the center of this presentation: what is the institutional consequence of admitting the judicial control of constitutional amendments? Why should such control be seen as a problem? How should or could a theory of democracy look at this phenomenon?

This presentation has five parts. Parts II, III, and IV present, briefly, the Brazilian case so that it may be analyzed later on. Part II presents some aspects of the 1988 Brazilian Constitution. Part III describes the process of reform the Constitution underwent in the 1990s. Part IV shows the judicial battle such reforms entailed and the stand the Brazilian Supreme Court took in the control of amendments. Finally, in part V, I will offer my analysis, in which I will attempt to place the Brazilian case within a theory of democracy.

2. "Cláusulas pétreas" are the constitutional clauses that cannot be altered by constitutional amendments.

II. THE BRAZILIAN FEDERAL CONSTITUTION OF 1988

The 1988 Brazilian Constitution appeared at a very special moment. The final product of a transition to democracy after twenty-one years of military rule, it bears witness, in its text, to the specificity of that moment. The overthrowing of the military regime, by itself, entailed a multitude of social demands which had previously been repressed or silenced by political violence. Apart from that, it was one of the last moments of the directive kind of constitutionalism, with its strong intention of bringing social change through a vigorous state intervention in the economy and in society.

At that point, inscribing into the Brazilian Constitution the demands of each social movement was a symbolic and legitimizing act which had to be performed. Everything that was seen as relevant for the state to promote or protect had to be in the constitution, even if in the most generic form, and even if the form of its implementation was left to the statutory law. With the Brazilian Constitution, such social movements gained one more weapon to push their demands forward. The text that sprung up from this political catharsis bears the marks of a whole set of opposed and controversial demands.

From a comparativist point of view, the Brazilian Constitution of 1988 is surprising as it goes far beyond the fundamental constitutional compromises, even within the context of the directive kind of constitutionalism, in which the "economic Constitution" was added to the underlying political pact. Its lengthy text puts together minute detail and casuism with all-encompassing abstract principles. It burdens statutory lawmakers with the task of regulating a number of principles. It deals with typically constitutional issues — with a large section for the guarantee of rights — but it also covers the tax system, the economic area, public policies and administration, social security, and a vast array of other topics.

The 1988 Constitution has an important innovation vis-à-vis its seven predecessors. It sets explicit limits to constitutional reform, and these limits are listed in the so-called "cláusulas pétreas." Such precaution is not, to speak the truth, unheard of in Brazilian constitutional history, once five other Republican constitutions (with the exception of that of 1937) prohibited amendments suppressing the federation and the republican form of government. What sets the 1988 Constitution apart is the fact that it transforms into "cláusulas pétreas" a large number of individual rights. From a wordy, lengthy, and fragmented text, it extracted a normative core not to be changed by future generations.

The Brazilian Constitution put it upon itself to play a leading role in progressive politics and in the promotion of social justice. It points to the

future and it shows where it wants to get to. It limited the autonomy of the statutory lawmakers once it determined its role to pre-establish not only the goals of the State, but also the adequate means to achieve them.

III. GOVERNING BY CONSTITUTIONAL AMENDMENTS: SIXTEEN YEARS OF THE NEW REPUBLIC

The governments following the 1988 Constitution did not blindly follow its commands insofar as economic goals were concerned. Due to the encompassing character of the constitutional text, which limited ordinary political choices, a major orientation emerged: to govern one must start by reforming the Brazilian Constitution. Throughout the electoral periods which followed the 1988 Constitution, there was not a single political party that did not include constitutional reform in its political program.[3]

But there is still another critical element to understand this period: just a few years after it came into effect, the Brazilian Constitution started facing external pressure for changes.[4] No sooner had the Brazilian Constitution become a reality, then the model which produced the reforms began to show signs of exhaustion. The making of the Brazilian Constitution had been a celebration of a directive kind of constitutionalism. Right after that, it started to fall apart. The 1988 Constitution, with its "directive intent" seems to have been born out of sync with its own time.[5]

In stark opposition to the interventionist program of the original makers of the Brazilian Constitution, the constitutional reformers had a vast task ahead of them. Neoliberalism, in this sense, was filtered by the Brazilian State having, as a departing point, the strategy of getting rid of those constitutional elements which impaired the function of the free market.

Sixteen years after its promulgation, the 1988 Constitution has been reformed forty-two times and tens of other amendment projects are being or have been examined by Congress. This multitude of amendments shows that, in Brazil, the "poder constituinte derivado" (assembly power to amend the constitution) is performed by a permanent political agent, which

3. Reforming the Constitution was, for example, a routine in the governments of Presidents Fernando Collor de Mello, Fernando Henrique Cardoso and Lula.

4. Oscar Vilhena Vieira, *Realinhamento constitucional*, *in* DIREITO GLOBAL (Max Limonad ed., 1999).

5. *Id.*

lives along and gets mixed with the ordinary lawmakers and which cannot be seen as a chance political agent.

An ever-changing constitution begets perplexity. In sheer numeric terms, the Brazilian Constitution has in fact received a large number of amendments. This observation, however, tells very little in itself. A closer, qualitative examination shows that the Constitution has not been fundamentally changed, nor has its original project been abandoned insofar its political architecture and the protection of rights are concerned. Some amendments, however, created room for new ways of State intervention in the economy.

In concrete terms, the amendments altered the original structure of the text less than one might suppose. The amendments deriving from neo-liberal ideas affected the bureaucracy of the State (through administrative reform), and public finances (from changes in the tax and social security areas). For example, these ideas eliminated the special regime for national companies and ended the monopoly of a number of sectors in the economy which were previously run exclusively by the state.

Although one might regret the new developments in the State's economy which these amendments have created, there also have been important institutional gains. The most obvious — albeit not always noticed — is the acknowledgment by the political forces that the Brazilian Constitution is a norm to be taken seriously. In the past, ignoring constitutional norms was not much of a problem. In recent years, there is no thinking of ignoring the Brazilian Constitution. When it stood in the way of some state interest, the political forces faced the inevitable marathon of political negotiations to reform it.

In the face of all these amendments, two questions remain: Whether the material limits to the power of amending the constitutional text have played their role? Is there any "cláusula pétrea" which serves as an island of resistance to the changes in the economy? These questions lead us to the two ensuing parts which analyze the arguments underlying the assumption that constitutional supremacy can only be effective if there is judicial control of constitutionality that is operational.

IV. THE ROLE OF THE BRAZILIAN SUPREME COURT IN THE CONTROL OF CONSTITUTIONAL AMENDMENTS

The Brazilian Supreme Court is at the heart of the complex system of constitutional control. The current Brazilian system of judicial review can be better understood if, instead of looking to the 1988 text only, we look at its historical formation. It was inspired in the American judicial review,

as an exclusively incidental control, established in the First Republican Constitution of 1891. In the following decades, other devices for a greater centralization of control were created, in a manner which complemented — and did not suppress — the original pattern.

A proper centralized control was created in 1965 through a constitutional amendment. It can only be legally exerted, however, by the Attorney General who is subordinated to the President. This reform has the mark of a Brazilian model which still exists. For example, this is similar to a hybrid model, which creates a conflict between the incidental model, boldly carried out by single judges, and the centralized system, which can only be exerted by the Brazilian Supreme Court.

The 1988 Constitution, in spite of maintaining this hybrid model, transformed it. This Constitution radically enlarged the number of those capable of exerting the centralized constitutional jurisdiction including, among others, state agents, political parties, unions, and the OAB (The Brazilian Bar Association).

This enlarging of the numbers of actors changed the position of the Brazilian Supreme Court within the political system in Brazil. The Court became an active part in key political debates; it became an arena in which the most varied political and social conflicts are fought. The act of interpreting the Brazilian Constitution becomes an everyday task in the legal profession. The political battles waged in Congress are taken, by the political parties defeated, to the Court where the same battle is fought again, — but now translated into constitutional language.

The Brazilian Supreme Court establishes itself, then, as a "super power." Two reasons for that have already been mentioned. First, the access to the Brazilian Supreme Court has become easier. Second, the all-encompassing nature of the 1988 text, with its minute details and its overbroad principles, makes it possible for virtually every legislative decision to be questioned.

A third aspect reinforces, yet again, this preeminence of the Brazilian Supreme Court. It is that of the possibility of constitutional control via constitutional amendments. It is not hard to understand this mechanism. Since there are articles which cannot be altered even by amendments, every amendment that disrespects this core rules can be declared unconstitutional by the Brazilian Supreme Court. The "cláusulas pétreas" create a material hierarchy within the text. The same logic the Brazilian Supreme Court uses to test the constitutionality of ordinary laws, it uses to test that of any given amendment vis-à-vis the "cláusulas pétreas."

In practice, this constitutional jurisdiction has become an arena for the discussion of neoliberalism, mainly when it appears in the form of a constitutional amendment. The way the Brazilian Supreme Court has been

receiving neoliberal ideas is far from being free of controversy. The most important constitutional amendments have been taken to the Brazilian Supreme Court. In three of these cases, the Court has declared the unconstitutionality of the amendment, something almost unheard of in modern constitutionalism.[6]

This practice of judicial control of amendments is widely accepted in Brazilian constitutional doctrine. There is a curious reason for that; the Brazilian Constitution does not explicitly grant the Brazilian Supreme Court the power to control constitutional amendments. As Justice Marshall affirmed in *Marbury v. Madison*, the power of the Court is based on deductive reasoning springing from the notions of normative hierarchy and constitutional supremacy, without a clear textual basis, that affirms its own power. It never hesitated to acknowledge that it had this power. The Brazilian Supreme Court decision to control the constitutional amendment springs from a similar inference: if the Brazilian Constitution is the supreme norm, there must be an independent Brazilian institution which controls the acts of other Brazilian organizations. The problems inherent in this kind of reasoning have already been discussed by a number of authors and they are not the object of this presentation.[7]

The discussion I would like to propose is not about the interpretation of the Brazilian Constitution. It is at a pre-constitutional level and it has to do with the assumptions which guide and justify different institutional formats. The arrangement adopted by the 1988 Constitution places the Brazilian Supreme Court as the last link in the state decision chain. If the Court and the lawmaker disagree on any matter (assuming, obviously, that constitutional normality will not be threatened), it is the Court's decision which will prevail. After a long circuit, the Court has the last word and may end any dialogue creating a situation which can only be reversed, in the words of Justice Marco Aurélio,[8] "by a revolution, in which the might of weapons, and not that of the law, prevails." What does that mean from the perspective of a democratic government? It is about this arrangement that I would like to talk now.

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6. The main case in which Brazilian Supreme Court declared the unconstitutionality of an amendment was the "Ação Direta de Inconstitucionalidade — ACI n. 926/1993. Harris v. Minister of the Interior, 1952 S. Afr. Case; Minerva Mills v. Union of India, 1980 India Case. I thank my friend Dimitri Dimoulis for this commentary.

7. CARLOS SANTIAGO NINO, THE CONSTITUTION OF DELIBERATIVE DEMOCRACY 187-216 (1996).

8. Declaration to O Estado de São Paulo, in January 15, 2003. Justice of Supremo Tribunal Federal – STF.

V. WHAT DOES JUDICIAL REVIEW OF CONSTITUTIONAL AMENDMENTS MEAN TO DEMOCRACY?

I have finally arrived at the exact point I wanted to discuss here. I intend now to consider the argument that I have studied in my Masters' thesis.[9] In my thesis, I dealt with constitutional control adopting a procedural notion of democracy. The debate between Ronald Dworkin and Jeremy Waldron sheds some light on this matter.[10]

Ronald Dworkin is a well-known defender of judicial protagonism. Through his theory of law, he attempts to bring to the dominion of judicial interpretation the political morality present in the declarations of rights. According to him, one cannot escape the moral arguments when reading the constitutional text. Arguments dealing with fundamental rights, in this sense, do not spring from utilitarian concerns or public policies. They would be true arguments of principle.

It is from this notion of the legal phenomenon and adjudication that he considers democracy. For him, democracy is not just a means for making majority collective decisions. That would have just a statistical meaning. Democratic regimes are those that, above all, treat every individual with equal concern and respect. This is a substantive pre-condition for democracy to be able to make majority decisions. It is the constitutional court, through the judicial review, which will be able to safeguard this ethical minimum of democratic regimes and submit the fundamental moral questions to the forum of principle. To quote him briefly:

> Would a charter of constitutional rights help to restore the British culture of liberty? . . . "But though a written constitution is certainly not a sufficient condition for liberty to thrive again in Britain, it may well be a necessary one." "Would it offend democracy if a British court had the power to strike down the blasphemy law as

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9. "Controle de Constitucionalidade e Democracia," defended in the Political Science Department of the University of São Paulo (2004).

10. The argument of Ronald Dworkin about constitution, democracy, and rights is complex and is spread out through various parts of his work. RONALD DWORKIN, TAKING RIGHTS SERIOUSLY (1978) ch. Constitutional Cases; RONALD DWORKIN, A MATTER OF PRINCIPLE (1985) chs. Political Judges and the Rule of Law, The Forum of Principle; RONALD DWORKIN, LAW'S EMPIRE (1986) ch. The Constitution; RONALD DWORKIN, EL DOMINIO DE LA VIDA (S.A. Ariel ed., Barcelona 1994) ch. Constitutional Drama; RONALD DWORKIN, FREEDOM'S LAW: A MORAL READING OF THE AMERICAN CONSTITUTION (2000); RONALD DWORKIN, A BILL OF RIGHTS FOR BRITAIN (1990); Ronald Dworkin, *Equality, Democracy and Constitution: We the People in Court*, 28 ALBERTA L. REV. 324-46 (1990).

> inconsistent with the Convention? No, because true democracy is not just statiscal democracy, in which anything a majority or plurality wants is legitimate for that reason, but communal democracy, in which majority decision is legitimate only if it is a majority within a community of equals. That means not only that everyone must be allowed to participate in politics as an equal, through the vote or through the freedom of speech and protest, but that political decisions must treat everyone with equal concern and respect, ..."[11]

Jeremy Waldron does not accept Dworkin's defense of the judicial review. The sheer perception that the decision on abstract clauses of the Constitution is a controversial task — one that raises an inescapable moral disagreement — leads him to reject any kind of anti-majority device. He asks a number of important questions which challenge common-sensical constitutional theory, especially the notion that the need for democracy is to guarantee minimum rights essential for its survival is a logical consequence of the adoption of judicial review.

In those moments of moral disagreement — and they occur, rigorously, every time that there is a decision that requires the Court to interpret abstract constitutional clauses — there could be no other institutional solution: either one respects the individual as an autonomous moral agent, capable of making decisions on rights, or one seriously strays from the democratic ideals of autonomy and self-government. Thus, in these circumstances, one must respect those who represent popular sovereignty.

Above all, Waldron tries to show that the rejection of judicial review as an institutional strategy for the protection of rights does not mean to adopt a simplistic procedural notion of democracy, or to a naïve majoritarism, according to which decisions can have any content, provided they are taken by the majority.[12] The debate on what a good decision is, on the minimum substance of justice, does not disappear. However, when there is a serious disagreement, it is imperative to establish the part responsible for the decision. It is at this point that the right to participate appears as the right of rights:

> However, given the inevitability of disagreement about all that, a theory of justice and rights needs to be complemented by a theory of authority. Since people disagree about what justice requires and

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11. RONALD DWORKIN, A BILL OF RIGHTS FOR BRITAIN 14, 35 (1990).

12. JEREMY WALDRON, LAW AND DISAGREEMENT (2001); JEREMY WALDON, THE DIGNITY OF LEGISLATION (1999).

> what rights we have, we must ask: who is to have the power to make decisions . . . ? The issue of what counts as a good decision does not disappear the moment we answer the question "Who decides?." On the contrary, the function of a theory of justice and rights is to offer advice to whoever has been identified (by the theory of authority) as the person to take the decision.[13]

The dialogue between Waldron and Dworkin could be commented on through two questions. The first one asks whether there is a right answer in constitutional interpretation. The second asks if the judge would be the more apt to find such answer.

Dworkin answers the first question in the affirmative. He concedes, however, that it will not be always possible to demonstrate the veracity of the answer. This inability to demonstrate it, nonetheless, should not mean that there is no right answer. To Waldron, this intended moral objectivity would be absolutely irrelevant. Whether the answer is right or wrong, what Waldron is interested in is the fact that there is a disagreement. People simply disagree, even after all the arguments have been presented and the most demanding stages of public deliberation have been exhausted.

Why then not the judge or the lawmaker or any other arrangement of a majority nature would be more apt than the others to find a morally more cogent interpretation of the Court? Dworkin admits that judicial decisions may be wrong. Still, he holds his ground, that law-makers would not be in an adequate space to deliberate and to make decisions on principles, as the judges would be. Waldron criticizes this position as mystifying. He sees no reason why it should be assumed, from the perspective of the normative theory, that lawmakers are necessarily self-serving or incapable of making a decision on principles.

In this sense, the judicial review would guarantee not the supremacy of the Brazilian Constitution, but that of the constitutional court. As the Constitution is a text made of open norms, which require interpretation to become concrete, it cannot be said that judicial decisions preserve its supremacy. They would preserve, instead, the understanding that the Court has of those open norms. Do these conclusions have any bearing on the traditional ways of justifying constitutional control in a democratic regime?

As I see it, from a theoretical point of view, it would only be possible to propose the judicial review as an institutional device to safeguard the supremacy of the Constitution (or the preservation of fundamental rights)

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13. Jeremy Waldron, *A Right-Based Critique of Constitutional Rights*, 13 OXFORD J. LEGAL STUD. 32 (1993).

if one is ready to declare not only that the Brazilian Constitution admits a right answer but also that the Court invariably finds this right answer. One would have to commit himself to the presumption of judicial infallibility.

An over-enthusiastic celebration of the judicialization of politics may hide a disregard for the procedural aspect of democracy. And here I do not make a naïve or purist defense of representative democracy. Contemporary democracies have built a more complex arrangement than that of liberal democracy, founded almost exclusively on political representation. To understand it, we cannot be satisfied with an approach that focuses only on the consequences of making political decisions legitimate (matters of output), while at the same time, disregarding the procedural dimension (matters of input).

When one discusses the prevalence of the Judiciary over the lawmaker and sees in that a problem worth examining, what is really being discussed is the procedural dimension of democracy. Therefore, before we think of legitimacy *ex post*, worried about the substance of political decisions, we have to face the problem of legitimacy *ex ante*, establishing who gets to decide and under what circumstances.

The discourse that defends judicial activism — provided it makes progressive decisions — should be better criticized. Activism can be used for good or bad ends and the canonical example for that can be found in the history of the U.S. Supreme Court (i.e., the *Lochner* and *Warren* Court Eras). A consistent theory of authority must rest on a previous procedural agreement which must define who gets to decide, regardless of what it is that will be decided. From a procedural standpoint, the judicial decision is not necessarily the most defensible in highly controversial matters or, to use Waldron's phrase, in matters of moral disagreement.

An institutional arrangement cannot be built on the premise of leaving the responsibility of deciding to those reaching the right or best answer. Decisional sovereignty is to be established procedurally, not substantively. In moments of moral disagreement, there are no cognitive parameters to prove one solution better than another. Thus, even more important than establishing what has to be decided, it is paramount to determine who gets to decide, regardless of the matter at hand. In this sense, the quest for a procedural model of democracy cannot be left behind. Deprived from this parameter, we could little more than accept that any power can make any kind of decision, having as the only criterion of acceptance, its degree of truthfulness.

It is important for democracy that progressive decisions are made, but the question of who gets to make them is also significant. It may be hard to defend this kind of argument looking at Latin American reality, especially in a context in which the courts have played such an active role

in the preservation of rights. But the enthusiasm with it cannot eliminate the need of carrying on the task of designing more democratic arrangements for collective decision making. Judicialization is not the only answer for the crisis of representative democracy.

I do not suggest that the Judiciary stop acting as an important counterbalance to majority politics or as a means of promoting a quality institutional dialogue through the language of rights. Pushing Waldron's argument to the limit may create this kind of risk. The paralyzing deference to the "moral disagreement," departing point from which collective decisions are made in contemporary politics, leads to a conservative "answer, as one could say: '*it is irrelevant if the judicial decision is better than that of the law-maker, once there is disagreement on that; I know that, from a formal perspective of democracy, it is not for the judge to make this decision.*'" I just try to highlight the difficulties of justifying such an overstretching of judicial activism.

This may seem a stale and even unpopular discussion, apart from not being at the heart of the matters now relevant to Latin American constitutionalism. It would be unacceptable not to acknowledge the role of the Judiciary as a vital player who insurges against the lethargy of the public powers. It has been playing a crucial part in the promotion of social rights. Such activism generates enthusiasm, which I fully share. But this excitement cannot make us forget the need for discerning the different moments in which judicial decisions interfere with collective decisions.

In the case of amendments, as I have mentioned earlier, judicial decisions invalidate the last institutional route the will of the majority has to make itself heard. Admitting the judicial control of constitutional amendments brings a serious institutional consequence: the Supreme Court becomes the last link in the State decision circuit. I am not talking of a context of parliamentary indecision or omission. On the contrary, it could be a context of majority activism. When it controls constitutional amendments, the Judiciary is not acting on a decision void, nor is the representative system being defective. What happens is that there is a conflict on different, possible interpretations of open clauses of the Brazilian Constitution.