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FELIPE DE MENDONÇA LOPES

ESSAYS ON JUDICIAL BEHAVIOR

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Tese apresentada à Escola de Economia de São Paulo da Fundação Getulio Vargas, como requisito para obtenção do título de Doutor em Economia

Orientador Prof. Dr. Rodrigo Reis Soares

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ABSTRACT

What do judges want? Although apparently a straightforward question, the motivations that underly judge's decisions have been a persistent topic of debate in the literature. The discussion arises from the fact that judges, especially those in superior courts, are usually insulated from the ordinary incentives that other agents face. Most enjoy life tenure, their salaries cannot be decreased, and have no performance bonus. Hence, an assumption of economic self-interest would hardly provide useful insights into judicial preferences.

In the three essays that form this thesis, I contribute to the judicial behavior literature by providing empirical evidence of at least three different vectors that govern judicial decision-making.

In the first essay, I show that judges respond to transparency and scrutiny. The main idea is to explore how a shift in transparency – since 2002 the Brazilian Supreme Court (STF) broadcasts its deliberations live on television – may alter behavior. Here, I employ a research design seldom used in the judicial behavior literature – Differences-in-Differences – to test how STF judges have responded to increased transparency. The main finding is that STF justices, when given free television time, act to maximize their individual exposure. They achieve that by writing longer votes and by engaging in more discussions with their peers.

In the second essay, I show that political preferences matter. Here, in delving into the judicial activism literature, I test whether activism is related to politics in two ways. First, whether judges appointed by left-wing presidents are more (or less) likely to engage in activist voting than those appointed by right-wing presidents. Second, if judges appointed by presidents of either end of the political spectrum are sensitive to political context, that is, if they respond to the presence of their appointing party in the Executive. In doing so, I propose a new measure of judicial activism, which conditions votes to strike on the Prosecutor-General's brief. The main result is that activism – both in the traditional and new measures – is associated with ideology measured by presidential appointment. Also, in the new measure, judges are sensitive to political context – they are less likely to engage in activist voting when their appointing party is incumbent in the Federal Executive. Lastly, career matters. Justices that are former politicians are less likely to be activist.

Finally, in the third essay, I investigate the determinants of judicial dissent in the Brazilian Supreme Court. Particularly, I disentangle two features of judicial behavior that are known to affect the decision to dissent: ideological heterogeneity and dissent aversion. To do so, I explore the fact that voting in this Court is sequential, that there is a predetermined voting order that varies in nearly every case, to identify where dissent aversion will manifest. The main point is that after a majority has been formed, the justices who vote in sequence know that their votes cannot change the outcome of the case. Hence, they may deviate from

their preferred votes and join the majority to avoid the costs of dissenting. Here, I find strong evidence of dissent aversion in the Brazilian Supreme Court. Judges who vote after the pivotal judge are significantly less likely to dissent. The evidence for ideology, however, does not survive all robustness checks.

KEY WORDS: Brazilian Supreme Court, judicial behavior, judicial politics, judicial activism, dissent aversion, television, sequential voting, differences-in-differences.

RESUMO

O que os juízes querem? Embora uma pergunta aparentemente simples, as motivações subjacentes às decisões dos juízes têm sido um tópico persistente de debate na literatura. A discussão surge do fato de que os juízes, especialmente aqueles em cortes superiores, normalmente são isolados dos incentivos que outros agentes enfrentam. A maioria tem cargo vitalício, seus salários não podem ser reduzidos e não têm bônus por desempenho. Desta forma, uma suposição de auto interesse econômico dificilmente forneceria conclusões úteis sobre preferências judiciais.

Nos três ensaios que formam esta tese, eu contribuo para a literatura de comportamento judicial, fornecendo evidências empíricas de ao menos três vetores diferentes que regem a tomada de decisões por juízes.

No primeiro ensaio, mostro que os juízes respondem à transparência e ao escrutínio. A ideia principal é explorar como uma mudança na transparência - desde 2002, o Supremo Tribunal Federal (STF) transmite suas deliberações ao vivo pela televisão - pode alterar o comportamento. Neste trabalho, emprego um método raramente utilizado na literatura de comportamento judicial - Diferenças-em-Diferenças - para testar como juízes do STF respondem a uma maior transparência. A principal conclusão é que ministros do STF agem para maximizar sua exposição individual quando lhes é dado tempo gratuito de televisão. Para isso, escrevem votos mais longos e interagem mais frequentemente com seus pares.

No segundo ensaio, mostro que preferências políticas são relevantes. Aqui, ao investigar a literatura do ativismo judicial, testo se o ativismo está correlacionado com preferências políticas de duas maneiras. Primeiro, se juízes nomeados por presidentes de esquerda são mais (ou menos) propensos a votar de modo ativista do que aqueles nomeados por presidentes de direita. Segundo, se juízes indicados por presidentes de ambos os extremos do espectro político são sensíveis ao contexto político, isto é, se respondem à presença, no Executivo, do partido que os indicou. Aqui, proponho uma nova medida de ativismo judicial, que condiciona votos pela inconstitucionalidade das leis ao parecer do Procurador Geral da República. O principal resultado é que ativismo - tanto na medida tradicional quanto na nova que proponho - é associado à ideologia política medida pela indicação presidencial. Além disso, na nova medida, juízes são sensíveis ao contexto político - são menos propensos a votar de modo ativista se o incumbente no Executivo Federal foi o responsável por sua indicação à corte. Por fim, a carreira anterior também é importante. Juízes que foram políticos são menos propensos a serem ativistas.

Finalmente, no terceiro ensaio, investigo os determinantes da divergência judicial no STF. Em particular, distingo duas características do comportamento dos juízes que reconhecidamente afetam a decisão de divergir: heterogeneidade ideológica e aversão à divergência. Com este objetivo, exploro o fato de que a votação nesta Corte é sequencial, ou seja, que há uma ordem de votação pré-estabelecida que varia

em quase todos os casos, para identificar onde a aversão à divergência deve se manifestar. O ponto principal é que depois que a maioria foi formada, os juízes que votam na sequência sabem que seus votos não mudarão o resultado do caso. Logo, eles podem se desviar de seus votos preferidos e se unir à maioria para evitar os custos de divergir. Aqui, encontro fortes evidências de aversão à divergência no Supremo Tribunal Federal. Juízes que votam após o juiz pivotal são significativamente menos propensos a divergir. Evidências a favor da heterogeneidade ideológica, no entanto, não sobrevivem aos testes de robustez.

PALAVRAS CHAVE: Supremo Tribunal Federal, comportamento judicial, política judicial, ativismo judicial, aversão à divergência, televisão, votação sequencial, diferenças-em-diferenças.

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1. Television and Judicial Behavior: Lessons from the Brazilian Supreme Court

1.1 Introduction

This paper explores an idiosyncrasy of the Brazilian Supreme Court – the fact that since 2002 all of its sessions have been broadcast live on television – to investigate the consequences to judicial behavior of an increase in transparency. The main point is that when the judiciary opens itself to the public, apart from possible effects on the public image of the judiciary, the behavior of judges may change as they respond to the increased scrutiny and become more exposed to their audiences. Thus, this paper investigates an aspect of judicial behavior overlooked by the literature.

The positive effects of judicial transparency are well known. Research shows that increased transparency has effects on public trust of the judiciary (i.e., Grimmelikhuijsen and Klijn 2015) and that the exposition to judicial symbols makes the public accept the "myth of legality" (Gibson and Caldeira 2009), thus reinforcing judicial legitimacy (Gibson at al. 2014). However, little has been written on the effects of transparency on the judges themselves. On the handful of times that the literature has touched on the subject, it has been in the context of judicial reputation (i.e., Garoupa and Ginsburg 2008; 2010).

The many models of judicial behavior (i.e., those in Posner 2008) are surprisingly silent in this dimension and offer little guidance as to how judges might change their actions in response to a shift in the level of transparency. Therefore, as I will show in further detail in the next section, the answer to this question must be found elsewhere. Two separate research bodies, not connected in any way with the judiciary, provide interesting, although opposite, indications.

First, the literature on the transparency of specialized committees, along with empirical studies that explore a change in the rules concerning the publication of FOMC[1] meetings transcripts (Swank et al. 2008; Meade and Stasavage 2008), points to a retraction in the behavior of members of such committees. Meetings become more formal, discussions diminish and, generally speaking, members' behavior becomes more scripted, which has led some researchers to suggest that informal pre-meetings have emerged in reaction to increased transparency (Swank et al. 2006; 2008).

Second, the literature that investigates the effects on the behavior of politicians of the introduction of C-SPAN in the U.S. House of Representatives and in the U.S. Senate indicates a different set of consequences. Studies document the increase in the length of sessions of both houses (Mixon et al. 2001), the growth in the frequency of filibustering in the Senate (Mixon et al. 2003) and, perhaps as consequence of both effects, the reduction of turnover in the Senate (Mixon and Upadhyaya 2002). Thus, these studies

[1] FOMC is acronym for Federal Open Market Committee, the Federal Reserve Board branch that makes monetary policy decisions.

show that politicians use C-SPAN as free political advertising and seek to maximize their exposition on television.

Therefore, the question that must be asked is: do judges in collegial courts behave as members of specialized committees or as politicians? If judges behave as politicians, their reaction to increased transparency would be in the direction of showing-off, grandstanding. On the other hand, if they behave as members of specialized committees, they would react differently, by avoiding discussions and sticking to the reading of votes prepared beforehand – or even by establishing informal pre-meetings.

The introduction of television in the Brazilian Supreme Court (*Supremo Tribunal Federal* in Portuguese, henceforth STF) provides a unique opportunity to test the consequences of a radical increase in transparency on the behavior of judges. In August 14, 2002, the STF became the first constitutional court in the world to broadcast its deliberations live on television. As I will show in greater detail further on, while the STF was certainly not the first court to allow cameras in their environment – the Supreme Court of Canada televises oral arguments since 1997 – it was the first (and, to the best of my knowledge, remains the only) constitutional court to allow live broadcasting of the deliberations between judges. In terms of U.S. Supreme Court proceedings, it would be equivalent to broadcasting the oral arguments, the conference and the announcement of the decision.

Using an original database and a research design little used in the judicial behavior literature – the Differences-in-Differences approach – I show that there were significant changes in the behavior of STF judges. As politicians, justices use television as free advertising and seek to maximize their exposure by writing longer votes (which are read aloud in court sessions) and by engaging in longer discussions with their peers.

The implications of this result are manifold. First, it is an indication that modelling judicial behavior as political behavior is correct in a further dimension. Not only judges have policy goals when they decide, but they also respond to other incentives the same way politicians do. Second, there are implications to the court's efficiency. If votes and discussions are longer, judges will decide fewer cases per session and the court's backlog will tend to increase. Therefore, when weighing in the pros and cons of allowing television in courtrooms, policymakers should consider unintended consequences on judicial behavior.

Other research, undertaken concurrently with this study (Hartman et al. 2017) reaches a similar result, that television broadcasting led to longer votes and longer discussions in the Brazilian Supreme Court. However, the authors have a weaker claim to causality, as they simply explore the time-series variation (before/after) and, strictly speaking, use no clear identification strategy. Further, they use case-level data, instead of vote-level, as I mostly do here, hence ignoring an important source of variation.

This paper is organized as follows. Section 2 presents the literature in greater detail, including information on previous empirical studies into the STF. Section 3 presents the institutional characteristics

of the court that are relevant to this research, with special focus on the context of the introduction of television. Section 4 discusses the empirical strategy and Section 5 presents the database I use. Section 6 presents and discusses the results and, lastly, Section 7 concludes this paper.

1.2 Literature review

In the context of contract theory, much has been written regarding transparency in agency relationships. For a long time, there was a general perception that agency relationships results would always be better with increased transparency, that increasing the principal's ability to monitor the behavior of the agent would lead to greater alignment of incentives. However, Prat (2005) shows that in the context of career concerns for experts, more transparency can lead the agent to ignore valuable private signals and act in a conformist manner. In this context, the best the principal could do is to commit to keep the agent's actions secret.

If, as Posner (1993) and Epstein et al. (2013, p. 34) argue, we can model the relationship between the judiciary and the public (or the government) as a principal-agent problem, then Prat's results would lead to interesting questions regarding the optimal level of transparency of the judiciary. Would more transparency lead to "better" decisions?

Lessons can be drawn from other public agencies and committees that have been under pressure to increase their transparency and have done so in the past years, such as the Federal Reserve's Federal Open Market Committee (FOMC). One of the most radical ways through which the FOMC has increased its transparency was by the decision, in 1993, of publishing the transcripts of their meetings, albeit with a five-year delay. Interestingly, this decision included publishing the transcripts of the meetings of the past five years as well. This means that it is possible to compare the behavior of FOMC members when they believed their words would remain secret and when they knew they would eventually be made public.

This is precisely the strategy Meade and Stasavage (2008) employ to assess the impact of transparency on the incentive of FOMC members to dissent. The authors obtained dissent and concurrence data from all FOMC meetings in the 1989-1997 period and verified whether the probability of dissent is in some way associated with the increased transparency of the committee. In doing so, they explore the distinction between a "voiced dissent" and a real (vote) dissent. This distinction arises from the way FOMC meetings work. First, the chairman makes a policy recommendation. Then, the other members talk, voicing agreement or disagreement and, lastly, a formal vote is taken. Hence, members may switch position between the discussion and the final vote. In other words, disagreements voiced in the discussion do not necessarily materialize in dissenting votes.

The authors find that there is an effect of increased transparency on voiced preferences, but not on the final vote outcome. FOMC members tended to voice less dissents after the decision to publish the

transcripts. Also, members became less likely to change their views between the discussion and the actual casting of the vote.

Other studies verify the emergence of pre-meetings when committees are forced to increase their transparency. Using the same data as Meade and Stasavage (2008) and supplementing it with further (anecdotal) evidence, Swank et al. (2008) argue that, after 1993, the focus shifted from the formal FOMC meeting to pre-meetings and that the formal meetings have become more "scripted", that is, less spontaneous.

Further useful parallels can be drawn from the literature that studies the effects of televising Senate and Congress sessions. Starting in 1979 in the House of Representatives and 1986 in the Senate, C-SPAN has offered broad television coverage of legislative proceedings. Mixon et al. (2001) is perhaps the first empirical attempt to assess the effects of the introduction of C-SPAN on the behavior of senators and congressman. By means of an event-based study, the authors show that the length of sessions in both houses has increased, although the effect in each house was different. They estimate the effect of C-SPAN to be, on average, of two minutes per bill introduced in the House and four minutes per bill in the Senate. The fact that the effect of television is larger on the Senate then the House is "due to the Constitutional features and specific rules of the Senate that allow senators to take better advantage of the presence of cameras than their House counterparts" (Mixon et al. 2001, p. 359).

Furthermore, televising legislative proceedings seems to have led to broader effects other than increasing the length of sessions, particularly in the Senate. Mixon et al. (2003) show that the frequency of filibustering in the U.S. Senate has increased in connection with the introduction of C-SPAN. Also, Mixon and Upadyaya (2002) show that the introduction of television in the Senate has led to lower turnover in this house. They argue that, as filibustering and grandstanding in the Senate are cheap political advertising, this gives incumbents an advantage against their opponents in electoral disputes, thus reducing the turnover of politicians in this house.

Thus, the two literatures point to different directions. The contract theory argument, supported by the empirical literature on FOMC meetings, is that an increase in transparency may have some detrimental effects in the sense that it may generate secret pre-meetings and reduce the members' freedom to disagree and to discuss with each other. On the other hand, literature of behavioral effects of television (an extreme case of transparency) in politicians shows that they use it as free advertising, leading to longer sessions, grandstanding, higher frequency of filibustering in the Senate and, consequently, to lower turnover of politicians.

However, to assess the potential consequences of increased transparency in the behavior of supreme court justices, it is necessary to analyze the incentives that are placed before them. Do judges face the same incentives politicians and committee members do? If so, can the conclusions of the FOMC and/or C-SPAN

literatures be translated into assumptions regarding judicial behavior in the face of increased transparency and scrutiny? In other words, can we expect judges to behave as politicians or as committee members (or neither) in the face of increased transparency?

The set of incentives judges face, especially those of the Supreme Court, is certainly closer to those before committee members. Identically to FOMC members, Supreme Court justices are appointed by the president and confirmed by the Senate. Removal is very unlikely. Yet, while FOMC members are appointed to 14-year non-renewable terms, appointments to the Supreme Court are for life. This means that FOMC members most likely have career considerations beyond their term, which is probably not the case for Supreme Court justices.

However, a large part of the literature argues that, in all relevant dimensions, U.S. Supreme Court Justices are political beings. According to Posner (2005), the combination of the court's constant conflict with Congress and "the lack of guidance that conventional legal materials provide in truly novel cases" (2005, p. 1277) makes the Supreme Court a political body. Thus, "analysis of the behavior of justices should parallel that of the behavior of conventional political actors" (2005, p. 1277).

Most models of judicial behavior seem to agree with the basic idea that judges are political beings. For example, in the attitudinal model (Segal and Spaeth 2002) judges are seen as political actors that seek clear policy objectives. There is a vast empirical literature that tests this model and frequently uses presidential appointment as a proxy for the judges' true political preferences. The popularity of the attitudinal model is attested by the extraordinary number of studies, in all levels of the U.S. Judiciary, with special emphasis in the Supreme Court, and also elsewhere in the world. More recently, this explanation of judicial behavior has been tested on constitutional courts of different legal traditions (i.e. Spain, Italy) and results show that political preferences are indeed a major determinant of court outcomes (see Epstein et al. 2013 p. 89-99 and references therein).

Two other models can perhaps be seen as refinements of attitudinal, for they take the same principle (judges have political preferences) but consider the existence of outside restrictions to judicial behavior. First, there is the strategic model which, in broad terms, is the idea that, to understand the behavior of judges, we must take into account how they interact with other relevant actors. That is, when judges make their decisions, they consider the (expected) behavior of their peers (in collegial courts), the judges in other instances of the judiciary (both superior and inferior), the public and Congress. One example is Caldeira et al. (1999), in which the authors develop a formal model and empirically test the existence of sophisticated voting in the U.S. Supreme Court. Sophisticated voting is the idea that, when deciding whether to grant certiorari, justices take into account the likely outcome of the case. Therefore, a justice might vote not to grant certiorari in a case he would wish to reverse if he believes the court as a whole will affirm, rather than reverse, the lower court's decision.

Then, there is the institutional (or neo-institutional) model, where judges are perceived to be constrained by the institutional characteristics of the body to which they belong. Some of the empirical studies related to this model are those that exploit differences in rules governing the appointment of judges – an institutional characteristic of the court – to explain several dimensions of variation in the judges' behavior. Examples include Brace and Hall (1995) and Choi et al. (2010).

Therefore, explanations of judicial behavior that altogether remove the role played by ideology and political preferences are rare the in the literature. Perhaps the only one is the legalist theory, which is the somewhat naïve idea that judges are impartial arbiters of the law and that their personal traits and beliefs have no relationship whatsoever with the decisions they issue.

In Brazil, the empirical literature into the behavior of judges is still in its infancy. The few published studies have as focus the analysis of issues related with the Brazilian Supreme Court. For instance, both Ferreira and Mueller (2014) and Desposato et al. (2014) estimate ideal points for STF justices and conclude that they are highly correlated with presidential appointment. The latter study also tests the consequences of a 2004 reform that introduced a form of docket control in the STF and finds that it enabled the emergence of political cleavage on the court. Also, Arlota and Garoupa (2014) look for political alignment in the STF in cases that oppose the union and the states and find little evidence of it. Further, Oliveira (2008) shows the importance of the justice's previous careers in determining votes in the STF and Oliveira (2012) shows how the vote of the Justice Rapporteur is the single best predictor of the outcome of a case. Finally, Taylor (2004; 2008) and Nunes (2008) document how political parties use the STF to continue political battles lost in congress.

1.3 Institutional characteristics

The STF is one of the world's oldest constitutional courts. Its roots can be traced to Imperial Brazil's *Supremo Tribunal de Justiça*, created in 1829. The first republican constitution, of 1891, established the basic institutional characteristics of the STF and much of it remains unaltered, with justices appointed by the President and confirmed by the Federal Senate. While clearly inspired in the U.S. Supreme Court, both in terms of institutional arrangement and legal competences, during the twentieth century the STF gradually became closer to its European counterparts, with the introduction of abstract review mechanisms typical of Kelsenian courts.

The overall assessment of the court's performance throughout the century is a somewhat contentious issue in the literature. While some (Brinks 2011, p. 147) criticize the court for being too deferent towards the executive, others (Kapiszewski 2012, p. 155-191) take a more positive view, noting that throughout the years the court has been able to create a statesman-like image, alternating between stringent checks to the executive and a more accommodating behavior.

Unlike the U.S. Supreme Court, where access to the court is limited to a single legal instrument (the request for certiorari), there are dozens of ways a dispute may end up in the STF (Falcão et al. (2011) lists 52 types of petitions, writs, etc.). There are three clearly defined groups of legal proceedings: the first is comprised of three types of petitions that seek abstract constitutional review (see Section 5 for more details); the second is comprised of concrete review appeals, it includes the Extraordinary Appeal (*Recurso Extraordinário*, in Portuguese) and a few other types of grievances and writs and, finally; the third group includes *habeas corpus* petitions, extradition requests and criminal lawsuits involving persons who only the supreme court can judge[2] (congressmen, the president, ministers, etc.), that is, disputes that typically begin and end at the STF.

Numerically, the group which dominates the agenda of the court is the second. According to Falcão et al. (2011), over 90% of all demands to the STF between 1988 and 2009 fall into this group, while about 8% are the in third group and only less than 1% in the first group. Just to give an idea of what these proportions represent, in 2016 the court received over 57 thousand new petitions, of which over 46 thousand were in the second group.

The court issues its decisions in three ways. The first, and most numerous, is when justices decide by themselves, that is, as an ordinary judge and not in a panel (they are called *monocratic* decisions). The second is in one of the two chambers with five judges each (the Chief Justice belongs to neither). The third way is when the full court, with eleven judges, decides together.

The constitution, the codes of procedure and the court's internal rules of procedure regulate which kinds of cases are decided by individual judges, the chambers or the full court. Broadly speaking, justices can decide by themselves only in repetitive cases (where the full court has already established precedent), to dismiss cases that do not fulfill the most basic procedural requirements, and on injunctions where the delay to decide could lead to irreparable losses (*periculum in mora*). Monocratic decisions on injunctions must always be ratified by the full court or chamber and monocratic decisions on other issues can be appealed against (by the regimental grievance, *agravo regimental* in Portuguese).

The two chambers decide on *habeas corpus* petitions, criminal lawsuits involving government ministers, congressman and senators, and extraditions. The full court decides everything else, from abstract and concrete review cases to internal appeals of monocratic decisions. The logic of this division is fairly simple: the full court reviews all cases which can lead to the declaration of unconstitutionality of a law or create a binding precedent to the lower courts. The chambers analyze matters that tend to have only *inter pares* effects and the justices alone only replicate decisions already taken by the full court or dismiss cases in procedural grounds, apart from granting injunctions in emergencies.

[2] In Brazil, certain authorities enjoy the privilege of being tried by the Supreme Court in criminal cases. For more details see Reddy et al. 2013.

The court elects the Chief Justice every two years in a non-competitive election to a non-renewable two-year term. The chosen candidate is always the most senior judge that has not served as chief before, so it is perfectly predictable who will win the election and who the next chief justices are going to be. The Chief Justice does not participate in either chamber and is not required to vote in most cases (although he usually does), his main discretionary power is in the setting of the agenda of the full court (each chamber has its own chief, who sets its agenda as well).

1.3.1 The STF and television

While the court has always been open to the public, television cameras were usually not allowed inside the building. The first time this occurred was in November 23, 1992. On that day, the court decided on an injunction filed by Fernando Collor de Mello, then President of Brazil who, facing impeachment charges in Congress, tried to stop the process by appealing to the court. The President of the STF at the time, Justice Sydney Sanches, allowed cameras into the building, as he feared the public interest would be so great that it might threaten to overwhelm the space limitations of the court. Thus, by allowing the cameras in, people would watch the session on television instead of flocking to the court[3].

The introduction of television on a permanent basis occurred only in 2002. A law enacted by Congress and sanctioned by the president on May 17, 2002 enabled the creation of a public television channel (on cable, called *TV Justiça*) dedicated to the judiciary and, more specifically, to the Supreme Court. On August 14 that same year, live broadcasting began in the STF.

It is important to highlight, however, exactly what part of the court's decision-making process is broadcast live on television. In order to do so, I must first explain how the STF decides its cases.

When a case reaches the court, it gets randomly[4] assigned to a judge, who is called its rapporteur. The main function of the rapporteur is to handle the day-to-day aspects of the case. This includes: to notify and receive briefs from all parties concerned (in abstract review cases, this includes the legislative or executive body that created the piece of legislation in debate) and to decide on preliminary matters (admission of *amici curiae*, injunctions, etc.). After this part is over, then he/she indicates to the Chief Justice that the case is ready to be presented before the full court (or chamber) and distributes copies of the report of the case - hence the name rapporteur - to his peers.

In the *en banc* session (*sessão plenária*, in Portuguese), which is broadcast live on television, the process goes the following way. First, the rapporteur reads aloud the report of the case, in which he briefly summarizes the legal question in dispute and the position of all parties involved, including (or especially) that of the Prosecutor General (PGR) and Solicitor General (AGU). Then the litigants, *amici curiae* (if there

[3] On Justice Sydney Sanches's recollections of this event, see Fontainha et al. 2015 (in Portuguese).
[4] Article 66 of the court's internal rules of procedure determine that the draw is random within each class of lawsuits.

are any) and the PGR have fifteen minutes each to present their views to the court. Although there is nothing that formally prohibits it, it is not usual for justices to ask questions to the lawyers. Following, the rapporteur reads his vote aloud and so do the other justices, in reverse seniority order. The Chief Justice is the last to vote and he then declares the final result. It is very common for judges to interrupt each other while they are voting, asking questions, providing information and raising other issues.

At any moment after the vote of the rapporteur a judge can ask for "*vista*", which means he needs more time to consider the question at hand before voting. If such request occurs, the voting sequence is interrupted. The judgment will only resume when the judge indicates to the court he is ready to vote and another date is set.

Hence, in the STF, a very large part of the decision-making process is televised. Only what happens in judges' chambers is left out of the public eye. This is in stark contrast to what other constitutional courts around the world have allowed the television to record and broadcast. The Supreme Court of Canada televises the part of the decision-making process known as Oral Arguments, that is, when litigants present their arguments and are questioned by the members of the court. Another example is the Supreme Court of the United Kingdom, which broadcasts the summary of the judgment (for more details, see Youm 2012, p. 2005-15).

The extent to which the STF has allowed its proceedings to be broadcast often impresses foreign observers. Justice Samuel Alito Jr. expressed his disbelief that the conference that is broadcast is the *real* conference (Alito Jr. et al. 2010, p. 39), implying that what goes on TV is just for show and the real deliberation happens behind closed doors. Others, such as Professor Nancy S. Marder, describe the STF's arrangement as "one of the most unusual" ones (Marder 2012, p. 1561).

In Brazil, the introduction of television in the STF has divided the opinions of justices, law scholars and lawyers alike. A project of oral history into the STF conducted by FGV Law Rio has interviewed many current and retired justices, thus enabling a rare glimpse into the backstage of the STF. In these interviews, one subject that is nearly always raised is the creation of *TV Justiça* and its consequences to the court. I summarize the positions of those interviewed in Table 1.1.

From Table 1.1, it is interesting to notice that sometimes justices that have opposite assessments of the existence of *TV Justiça* mention the same consequences of its introduction. This happens because there are other qualities that are not related to judicial behavior, such as increased transparency and increased public awareness of the court, that weigh in their assessment of broadcasting court sessions. Some former justices, such as Carlos Velloso (Fontainha et al. 2015, p. 134-135) and Moreira Alves (Fontainha et al. 2016, p. 81-83) say they believe sessions should be recorded and edited prior to broadcasting, so that while there would still be the benefit of increased transparency and public awareness of the court, some harsher disagreements between justices could be kept from the public eye.

Table 1.1 – Summary of interviews

Justice	Status	Overall Assessment	Cited consequences on judicial behavior
Rafael Mayer	Retired	None	None
Aldir Passarinho	Retired	None	None
Sepúlveda Pertence	Retired	Ambiguous	Longer votes, grandstanding
Cezar Peluso	Retired	Negative	Less willingness to change point of view, more discussion between justices
Sydney Sanches	Retired	Positive	More discussion between justices
Célio Borja	Retired	None	None
Carlos Velloso	Retired	Positive	Longer votes, more votes read aloud
Néri da Silveira	Retired	Positive	None
Nelson Jobim	Retired	Negative	Strong change in behavior, longer votes, more votes read aloud
Eros Grau	Retired	Negative	Change in the purpose of debate: not to add knowledge, but to show off
Roberto Barroso	Active	Positive	Less spontaneity, longer votes, less consensus
Luiz Fux	Active	Negative	More discussions, harsher discussions
Moreira Alves	Retired	Negative	Longer votes, grandstanding
Ilmar Galvão	Retired	Ambiguous	Longer votes, more votes read aloud
Francisco Rezek	Retired	Ambiguous	Longer votes, more votes read aloud

Notes: Information taken from interviews conducted by researchers from FGV Law Rio. See references.

The most cited consequences are on the length of votes and discussions, both of which supposedly became longer after the introduction of television. Also, some justices say that the number of votes read aloud increased. This requires further explaining. In the STF, when judges are voting, they can choose either to read the vote they (or, more likely, their clerks) prepared in advance or just to say something in the line of "I agree with the rapporteur" or "I follow the dissent started by Justice X" (naturally the first to dissent should explain his reasons). Thus, the perception of some justices is that, due to the television, judges refrain from merely agreeing or disagreeing with the rapporteur and seek to justify their votes more firmly. Other less cited, however relevant, consequences include the increased reluctance of judges to change their views and the difficulty to reach a consensus.

It is interesting to notice that, in relation to the literature presented in the previous session, justices from the STF, by their own evaluation, seem to behave more like politicians than like members of specialized committees. As politicians, when given free television time justices behave in a way to increase

their exposition and public profile. Almost all the cited consequences can be linked to some form of showing off.

However, some justices do mention effects that can be associated to the literature on transparency of specialized committees. An example is Justice Barroso, who says that because of television plenary sessions have become more scripted, less spontaneous. Also, he mentions that it hinders the deliberation process in the sense that it becomes more unlikely that justices will adjust their positions and compromise with their colleagues to reach a consensus (Fontainha et al. 2016, p. 123).

Hence, the anecdotic – or testimonial – evidence given by the justices themselves provides indications, but not a conclusive answer, to which were the effects of the introduction of television in the STF. Therefore, it is the purpose of this study to verify empirically which were the effects of television broadcasting on the behavior of justices of the STF. In the next section, I explain the research design I use to do so.

1.4 Empirical strategy

Evidence presented in the previous section provides a first flavor of which effects could be detected in an empirical analysis. However, before presenting the regression approach I use in this study, it is necessary to highlight some hypotheses that are important to the validity of the research design and, therefore, to the plausibility of the conclusions drawn from it. These hypotheses cannot be tested directly, but I argue that they hold true.

First, I assume that, alone, television broadcasting has no effect in the behavior of judges, that is, the simple placement of cameras in the courtroom does not affect judicial behavior. What matters is whether, in each session, judges expect people to watch them on television. Supreme Court sessions are unsurprisingly long and monotonous, with a succession of judges reading votes prepared beforehand in a language that is loaded with jargon and far beyond the comprehension of the average citizen. The only thing that sometimes breaks the monotony are discussions between judges, which can be somewhat harsh in tone and personal in content. However, those are rare and tend to be concentrated in cases which are politically and economically sensitive.

Thus, apart from the parties directly involved in the disputes under review, few people would be interested in what is going on in the court on an average day. Also, as the court lacks docket control[5], it is compelled to rule on cases that have neither policy implications nor any sort of original legal question.

[5] The STF has no docket control in cases where it has original jurisdiction, including the abstract review cases that are the main concern here. A constitutional reform introduced some docket control for appellate jurisdiction cases in 2004. For more details, see Desposato et al. 2014.

Therefore, most cases handled by the STF are of little interest to the general public or even to the legal community.

Accordingly, I argue that for the majority of cases, the introduction of television in the STF will have no discernible effect on the behavior of the justices. Any effect will be restricted to those cases that have broader economic and political implications. I also argue that, given the characteristics of the Brazilian legal system, those groups of cases can be identified with an objective attribute: whether they challenge state laws or federal laws.

This distinction is mostly based on the population affected by a STF decision. Rulings that strike down (or uphold) federal laws have nationwide impacts, while those that challenge state laws only have statewide effects. Also, given the way constitutional control is exercised by courts in Brazil, if two states enact identical laws and only one of them is questioned and struck down by the STF, the other remains valid. This makes constitutional control of state laws in the STF a repetitive task, and one with few legal innovations.

Another hypothesis I hold to be true is that the introduction of television in the STF can be treated as an exogenous event. That is, unlike Staton (2010), which explores how the Mexican Supreme Court uses transparency and communication strategically to enhance its legitimacy and power, I assume that the introduction of television in the STF was an event exogenous to the preferences and strategic considerations of (most of) its members. While there are few records of how the decision to broadcast STF sessions was taken, two facts are known: (1) it was not an imposition of Congress – the law that created *TV Justiça* does not mention any requirement that STF sessions should be broadcast live[6] and; (2) there was no vote among justices in this matter – Justice Moreira Alves mentions that he questioned Justice Marco Aurelio (then Chief Justice) at the time and he replied that he did not put the question to a vote because he knew he was going to lose (Fontainha at al. 2016, p. 82). Also, Justice Nelson Jobim says he has no recollection of any discussion in the court regarding this issue, that it was Justice Marco Aurelio's decision (Fontainha at al. 2015, p. 256). Hence, the available evidence points to the conclusion that, while Chief Justice, Justice Marco Aurelio used one the reserve powers of his office to implement his desired policy.

Therefore, in this research I explore these two dimensions, whether the case was heard by the court before or after the introduction of television and whether the case challenges a state or federal statute, to identify the effects of television in the behavior of justices. To verify empirically whether there are any effects, I use the research design known in the literature as Differences-in-Differences (hence, DD)[7].

The DD approach is a research design for estimating causal effects. While highly popular in economics, despite of its known shortcomings (i.e., Bertrand et al. 2004), it has rarely been used in the

[6] Law 10461 of May 17, 2002.

[7] For an introduction to the DD approach see, for instance, Angrist and Pischke (2008), p. 221-243.

context of Law & Economics and, to the best of my knowledge, never in the judicial behavior literature. Typically, when estimating effects of an event (i.e., a change of law or policy), a difficulty faced by researchers is how to distinguish the real effect of this event from other underlying changes such as time trends. The DD approach overcomes this difficulty by comparing two groups before and after the event, known as treatment and control groups. Ideally, control would be similar to treatment in all relevant characteristics other than the fact that it was not affected by the event under analysis. Thus, by comparing the two groups before and after the event, this approach provides an estimate of the effect of the event on treatment that is free from interference from any underlying changes that are common to both groups.

Hence, in this study, the control group is comprised of cases that challenge state laws, the treatment group includes cases that question federal laws and, naturally, the event is the introduction of live broadcasting in August 2002. As argued, any effects of television on the behavior of judges will be restricted to cases that challenge federal laws because justices respond not simply to television broadcasting but rather to the expected audience of their sessions, which is itself a function of how broad the implications of the case at hand are. Therefore, the DD specification is given by the following equation:

$$y_i = \alpha + \beta_1 D_{TVi} + \beta_2 D_{FEDi} + \beta_3 D_{TVi} D_{FEDi} + X_i'\theta + \varepsilon_i$$

Where D_{TVi} is the dummy variable that indicates treatment, that is, whether the session where case i was discussed was broadcast on TV or not. Dummy D_{FEDi} separates treatment and control groups, that is, those that involve federal laws from those that do not. The interaction between these two dummies accordingly indicates cases that question federal laws decided on sessions which were televised. Hence, coefficient β_3 is the DD effect. Also, y_i is the generic notation given to the dependent variable. Lastly, X_i is the matrix of control variables and θ the vector of parameters associated with them. Typical control variables include time fixed effects, judge fixed effects, and other case characteristics.

Discussion in Section 2 provides some indication as to where possible changes in the behavior of judges due to the introduction of television can be identified and, therefore, to which variables are good candidates for the dependent variable in the DD specification. The empirical literature on FOMC meetings is mostly based on voting records – concurrences and dissents, hence the dissent rate is a natural candidate to observe changes in the behavior of STF justices. Further, the literature on the introduction of television in the U.S. Congress uses a few aspects of congressional behavior that can be quantified, namely the length of sessions (in hours) and the frequency of filibustering. While it is not possible to measure the length of STF sessions and there is no such thing as filibustering in courts, other measures in the same spirit can be used, such as the length of votes (which are read aloud in court) and the length of discussions between justices – all in terms of pages from court transcripts.

If judges from the STF, as politicians, act to maximize their individual exposure, then the shift in behavior due to television broadcasting will be in the direction of writing longer votes and engaging in more discussions. In such case, positive results for both length of votes and of discussions are expected. However, the expected outcome for dissents is less clear. A possible line of argument is that, given the context of television, dissenting may be another way of showing off, and of signaling to the public that each judge is independent and forms his convictions regardless of the view of the court's majority. In this way, the relationship between dissents and television would be positive. However, another possible argument is that dissents are mainly the result of ideological differences between judges (as in the attitudinal model) and therefore television would have no direct effect on the dissent rate.

On the other hand, if judges behave like members of specialized committees, the expected results differ. In this case, the introduction of television should have no impact on vote length and a negative impact on discussions, as judges stick to reading their votes and refrain from discussing the case in front of a live audience. Also, we would expect no effect on dissents, as Meade and Stasavage (2008) did not find it in the FOMC context.

1.5 Data

To estimate the econometric models proposed in the previous section, it is necessary to obtain a database with decisions from the STF's full court. As there exists no publicly available consolidated database of STF decisions, the path usually undertaken by researchers, as I do here, is to obtain them individually from the court's website. The database I created for this study includes all abstract constitutional review cases decided by the full court between 1988 and the end of 2015. It includes the three types of abstract review mechanisms available in the Brazilian legal framework, the ADI, ADC and ADPF.

Of the three, the Direct Action of Unconstitutionality (*Ação Direta de Inconstitucionalidade* in Portuguese, henceforth ADI) is by far the most common. It enables certain parties to directly challenge the validity of state or federal laws in the STF. Among the entities allowed to file ADIs are the Prosecutor General, political parties, state governors, unions and class associations (i.e. the Bar Association). The Declaratory Action of Constitutionality (*Ação Declaratória de Constitucionalidade* in Portuguese, henceforth ADC) is the exact opposite of the ADI. While in the ADI the petitioner asks the STF to overturn a law or statute, in the ADC it asks the STF to declare its constitutionality. As such, it is clearly a defensive mechanism, in which the petitioner (usually the President or the Prosecutor General) tries to avoid legal uncertainty resulting from conflicting decisions in lower courts. Lastly, the Claim of Non-Compliance with a Fundamental Precept (*Arguição de Descumprimento de Preceito Fundamental* in Portuguese, henceforth ADPF) is a mechanism that allows petitioners to directly question laws that cannot be questioned via an ADI or ADC, which are basically laws that predate the constitution.

Of the few empirical studies into the Brazilian Supreme Court available in the literature, a large proportion of them use ADIs as I do here, such as Ferreira and Mueller (2014) and Desposato et al. (2014). The reason why this class of actions has become popular is easy to explain. First, the number of such cases decided by the court is, at the same time, small enough to permit compiling a database case-by-case and large enough to enable convincing statistic and econometric analysis. Second, all cases except those dismissed by the justice rapporteur must be decided by the full court. Decisions on the merits of a case are always taken by the entire collegiate, never by one of the chambers or by one judge individually. This is especially useful to scholars who try to study political alignment and collegial dynamics. Lastly, unlike the other main tool of constitutional review available to the court, the Extraordinary Appeal (*Recurso Extraordinário*), the ADI has not undergone any radical changes in this period.

Therefore, one innovation of this research is that I include in the database not only the ADI but also the other two instruments of abstract constitutional review, the ADC and the ADPF. While numerically it may not represent a very significant addition, these instruments have been used in the recent past to challenge important legislation and have attracted a lot of public attention, thus being good candidates to be examples of the kind of behavior one might expect from judges in highly relevant cases.

It is important to highlight that only final decisions by the full court are included in the database. In other words, I exclude rulings that are temporary (injunctions - *medida cautelar*) and on internal appeals (more notably, the *agravo regimental* and *embargos de declaração*). I also exclude from the sample cases which were dismissed on procedural grounds by the justice rapporteur and thus never reached the full court.

Hence, I collected data on all ADIs, ADCs and ADPFs decided by the full court between the end of 1988 and the end of 2015. This sums up to 1678 decisions: 1649 ADIs, 11 ADCs and 18 ADPFs. For each one, I obtained the full decision from the court's website and some other information from the case webpage. The full decision – in Portuguese, *Acórdão* – contains the report of the case, the vote from each justice and the transcript of their discussions. It also has a cover page where the main elements of the case and legal arguments of the decision are summarized and a final sheet where the vote tally is described.

From each *Acórdão* I extracted information concerning its length, that is, its full length, of the report, of each vote and of the discussions (all in terms of pages). I also obtained the identity all justices that participated in the case and their position – if they agreed or disagreed with the rapporteur. Finally, from the case webpage I obtained all relevant dates (petitioning, rapporteur assignment, judgment session), the outcome of the case and the identity of the petitioner.

1.5.1 Descriptive analysis

Table 1.2 summarizes the basic statistics (mean and standard deviation) of the main variables of interest: length of decision, of discussions, of votes, of the report and the dissent rate (defined here as the

number of dissents per case). It also provides the number of cases in each group. The first thing to notice is that, overall, cases that involve federal laws tend to have longer decisions, with longer votes and discussions, as well as a higher dissent rate, when compared to cases that challenge state laws. Second, it is important to consider the orders of magnitude. On average, decisions on cases that question federal laws are over three times longer than those concerning state laws, and both discussions and votes are nearly four times longer. Also, dissents are over twice more frequent in federal cases.

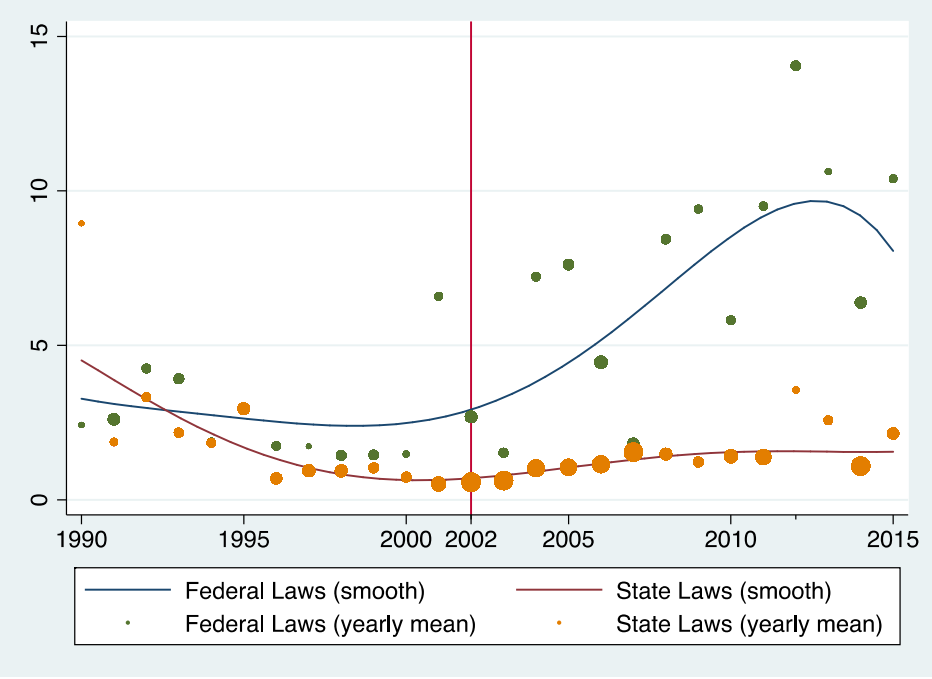
Table 1.2 – Summary Statistics

		Before TV	After TV	Total
Federal Laws	Decision length	37.095	85.932	64.067
		(3.730)	(6.852)	(4.319)
	Report length	7.329	6.592	6.922
		(0.589)	(0.355)	(0.356)
	Vote length	2.623	6.465	4.740
		(0.204)	(0.306)	(0.194)
	Discussions length	1.173	12.199	7.262
		(0.268)	(1.327)	(0.794)
	Dissent rate	1.065	1.413	1.257
		(0.112)	(0.111)	(0.079)
	N	167	206	373
State Laws	Decision length	20.652	20.788	20.743
		(0.961)	(0.718)	(0.575)
	Report length	6.176	4.369	4.974
		(0.225)	(0.078)	(0.095)
	Vote length	1.253	1.204	1.221
		(0.059)	(0.040)	(0.033)
	Discussions length	0.318	2.502	1.770
		(0.061)	(0.225)	(0.153)
	Dissent rate	0.629	0.437	0.501
		(0.055)	(0.030)	(0.027)
	N	437	868	1305
Total	Decision length	25.198	33.283	30.373
		(1.277)	(1.634)	(1.146)
	Report length	6.495	4.796	5.407
		(0.231)	(0.097)	(0.105)
	Vote length	1.644	2.254	2.033
		(0.073)	(0.072)	(0.053)
	Discussions length	0.554	4.362	2.991
		(0.087)	(0.333)	(0.220)
	Dissent rate	0.750	0.625	0.669
		(0.051)	(0.034)	(0.028)
	N	604	1074	1678

It is also important to observe the differences over time. Before live television was introduced in the STF, decisions on cases that challenged federal laws were, on average, 37.09 pages long. After television, this number jumped to over 80 pages long - it more than doubled. In those cases, the length of votes nearly tripled. Perhaps more impressively, the average length of discussions jumped from 1.17 pages to 12.19 pages, an increase of over 1000%. However, the same differences are not observed on cases that deal with state laws. The average length of decisions remained virtually stable, going from 20.65 to 20.78 pages, although we would not reject the hypothesis of no change. The length of the report and votes display a slight decrease, along with the dissent rate. The only variable that behaves in the opposite direction is the length of discussions, which increased from 0.31 to 2.50 pages.

A final comment on data presented on Table 1.2 is regarding the frequencies of each type of case. Cases challenging state laws correspond to nearly 80% of cases, while those that question federal laws are just over 20%. Lastly, even though the time frame is roughly balanced (12 years between the first ADI decided under the new Constitution and the start of TV broadcasting and 13 years since then), cases are not evenly distributed over those two periods. Roughly two thirds of cases were decided after the introduction of television in August 2002, and this pattern is consistent over cases that question state and federal laws.

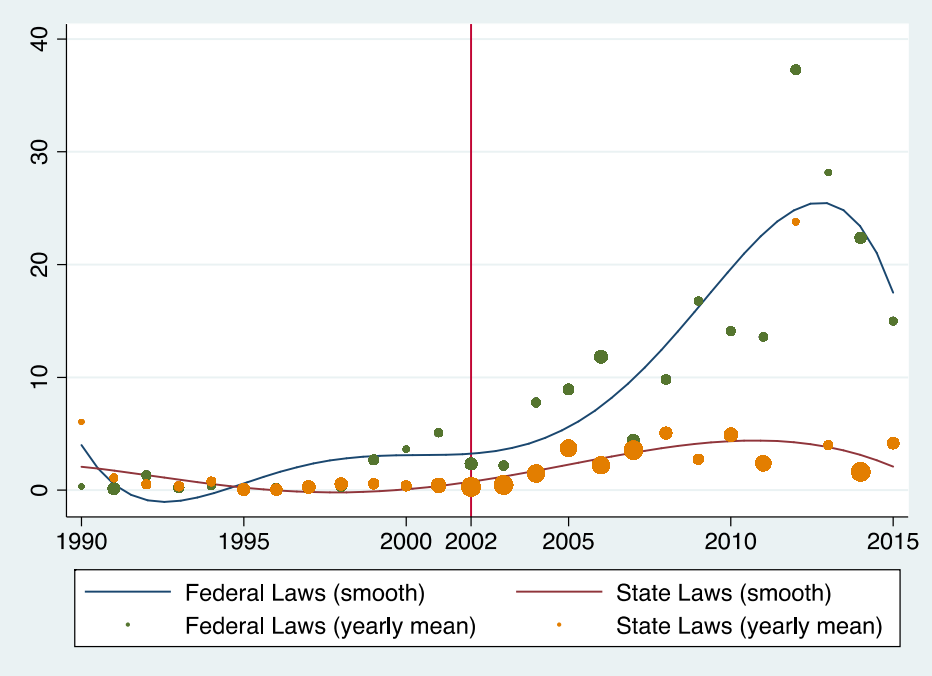
Figure 1.1 – Vote Length



Note: Yearly means weighed by frequency. The vertical line indicates the year television was introduced in the Supreme Court.

To illustrate the behavior of these variables over time, Figure 1.1 and 1.2 present the yearly means and smoothed trends of the length of votes and discussions for each group of cases, that is, those challenging state laws and federal laws. In Figure 1.1 it is clear that, while the average length of votes in cases that question state legislation has been fairly stable over the twenty-five-year period, for cases that question federal laws the behavior is much more erratic, with a clear increasing trend starting in the early 2000s and then decreasing slightly after 2013.

Figure 1.2 – Discussions Length



Note: Yearly means weighed by frequency. The vertical line indicates the year television was introduced in the Supreme Court.

Figure 1.2 tells a slightly different story. The average length of discussions was practically zero for both groups of cases until the late 90s, when it started to grow slowly for federal law cases. For state law cases, the average length of discussions remained close to zero until 2003, after which it grew to about 5 pages per case and remains roughly in the same level. However, for federal laws, growth is more rapid after 2003, reaching a peak in 2012. Although discussions in cases that question federal laws declined after 2012, they remain in a much higher level than in cases that challenge state laws.

1.6 Results

As explained in Section 4, the empirical strategy I adopt in this study entails the division of cases decided by the STF in two groups, according to which type of legislation each particular case questions. If a case challenges a state law it is considered to be in the control group, as the potential legal/policy implication of such cases is considerably narrow. On the other hand, if a case challenges federal law, it is placed in the treatment group, as the potential consequences of those cases are greater.

Here, I test whether the introduction of television produced changes in the behavior of STF justices in three measures: length of votes, of discussions and the probability of dissent. The first two measures are inspired by the literature that measures changes in the behavior of politicians due to the introduction of CPAN; the latter comes from the literature on the transparency and publicity of FOMC meetings. In the first and third measures, the unit of analysis is the vote of the individual justice; in the second, the unit is the case.

For each dependent variable, there are at least six regressions. The first is the simplest, where the basic differences-in-differences (DD) model is tested without the inclusion of any control variables. Regression (2) includes year fixed effects, that is, dummies that indicate in which year the case was judged. Following, regression (3) includes judge fixed effects, regression (4) includes information on the outcome of each case, regression (5) adds information on the proponent of each case and, finally, regression (6) includes type of case (ADI, ADC or ADPF), *vista* requests, and dissents (where plausible). In the regression for vote length, the unit of analysis is the individual vote, hence there are two further specifications. Regression (7) includes controls to account for the nature of each vote, that is, whether the it is a rapporteur vote, a concurrence, dissent, the first dissent (due to the sequential nature of voting at the STF) or a "vista" vote. Lastly, regression (8) is identical to (7) except for clustering on the justice rather than on the case.

Table 1.3 shows the regression results for the length of votes. The first thing to notice is that the DD coefficient has the expected signal and is statistically significant in all seven regressions. Also, the coefficient associated with the dummy variable that indicates cases that challenge federal legislation is positive and statistically significant. This means that the average vote length was already larger for cases that question federal legislation before the introduction of television and the DD coefficient shows that what television did was to magnify this difference. The fact that the coefficient associated with the television dummy is consistently negative, although not always statistically significant, is an indication that for the control group – cases that question state laws – the effect of television was in the opposite direction, making votes slightly shorter. Taken together, these results seem to suggest a kind of substitutability. As justices allocate their time and effort between cases, they prioritize those they believe will attract larger audiences to their TV channel, thus making judgments on unimportant cases even more brief and summary.

Results for the length of discussions are shown in Table 1.4. While there are many similarities between these results and those for the length of votes, some important aspects differ. First, while the DD coefficient has the expected signal and is significant in all regressions, the coefficient associated with Federal Laws loses significance in the more complete specifications. This indicates that, in this aspect, there were no significant differences between cases that challenge state laws and those that question federal laws before the introduction of television in the court. Further, just as in the regressions for vote length, the

Table 1.3 – Regressions for Vote Length

Y = Vote Length	(1)	(2)	(3)	(4)	(5)	(6)	(7)	(8)
DD	3.891***	3.526***	3.551***	3.288***	3.170***	2.293***	2.229***	2.229***
	(0.660)	(0.635)	(0.639)	(0.631)	(0.625)	(0.559)	(0.548)	(0.676)
Federal Laws	1.370***	1.270***	1.265***	1.718***	1.547***	1.204***	1.184***	1.184***
	(0.340)	(0.371)	(0.372)	(0.373)	(0.378)	(0.338)	(0.331)	(0.310)
Television	-0.0488	-1.160**	-1.297***	-1.549***	-1.428***	-0.776*	-0.804*	-0.804**
	(0.103)	(0.460)	(0.462)	(0.496)	(0.502)	(0.470)	(0.466)	(0.304)
Year FE	No	Yes	Yes	Yes	Yes	Yes	Yes	Yes
Judge FE	No	No	Yes	Yes	Yes	Yes	Yes	Yes
Case Outcome FE	No	No	No	Yes	Yes	Yes	Yes	Yes
Petitioner FE	No	No	No	No	Yes	Yes	Yes	Yes
ADCs						1.329	0.776	0.776
						(2.133)	(2.040)	(1.128)
ADPFs						8.668***	8.816***	8.816***
						(2.289)	(2.286)	(2.188)
Dissent Rt.						1.114***	0.967***	0.967***
						(0.123)	(0.127)	(0.110)
Rapporteur							7.720***	7.720***
							(0.283)	(0.818)
Dissent							-0.130	-0.130
							(0.281)	(0.430)
First Dissent							1.904***	1.904*
							(0.418)	(0.942)
Vista							11.88***	11.88***
							(1.030)	(1.352)
Constant	1.253***	3.248***	2.553***	1.478**	2.027*	1.595*	1.216	1.216
	(0.0880)	(0.683)	(0.701)	(0.739)	(1.074)	(0.946)	(0.943)	(0.819)
Observations	15,583	15,583	15,583	15,583	15,583	15,583	15,583	15,583
R-squared	0.069	0.094	0.104	0.109	0.112	0.165	0.330	0.330

Robust standard errors in parentheses (clustered on the case in (1) - (7); on the judge in (8)).
Significance of regression coefficients: *** p<0.01, ** p<0.05, * p<0.1

Table 1.4 – Regressions for Length of Discussions

Y = Discussions Length	(1)	(2)	(3)	(4)	(5)	(6)
DD	8.841***	7.157***	6.606***	6.884***	6.667***	5.339***
	(1.372)	(1.256)	(1.134)	(1.167)	(1.129)	(1.027)
Federal Laws	0.856***	0.901***	0.605**	0.726**	0.624	-0.0702
	(0.275)	(0.313)	(0.297)	(0.340)	(0.398)	(0.449)
Television	2.184***	-1.873***	-3.615***	-3.791***	-3.648***	-2.994***
	(0.233)	(0.524)	(0.773)	(0.799)	(0.800)	(0.678)
Year FE	No	Yes	Yes	Yes	Yes	Yes
Judge FE	No	No	Yes	Yes	Yes	Yes
Case Outcome FE	No	No	No	Yes	Yes	Yes
Petitioner FE	No	No	No	No	Yes	Yes
ADCs						7.282
						(8.499)
ADPFs						2.863
						(2.956)
Vista						2.812***
						(0.894)
Dissents						2.259***
						(0.257)
Constant	0.318***	4.874***	-16.55***	-18.06***	-12.65**	-10.14
	(0.0617)	(1.296)	(5.147)	(5.083)	(6.398)	(7.110)
Observations	1,678	1,678	1,678	1,678	1,678	1,678
R-squared	0.156	0.265	0.325	0.336	0.348	0.444

Robust standard errors in parentheses
Significance of regression coefficients: *** p<0.01, ** p<0.05, * p<0.1

coefficient associated the television dummy is usually negative (except for regression (1)) and significant, again suggesting a trade-off in the justices' allocation of time between cases.

Following, Table 1.5 shows regression results for dissents. Here, as the dependent variable is binary (dissent=1; concurrence=0), I use the logit model to estimate de various specifications. Results are similar to those presented in previous tables. The coefficient associated with the DD dummy has the expected (positive) signal and is statistically significant in all six regressions. Also, the coefficient associated with Federal Laws is positive and significant in the first four regressions, indicating that, before the introduction of television, the likelihood of dissenting was already larger in cases that question federal laws. Furthermore, the coefficient associated with the television dummy is negative and significant in most regressions, pointing to a decrease, on average, of the likelihood of dissents in cases involving state laws after the introduction of television in the court.

The result on dissents merits further comments. In the literature, dissents are considered to impose costs to both the dissenter and the collegiate (i.e., Epstein et al. 2011), in the sense that there is an effort cost of writing a dissent and a reputation cost to the collegiate that gets to be seen as a less united body[8]. In constitutional courts of European tradition, there are stronger incentives to avoid dissents and some courts even keep them from being published (i.e., Garoupa and Ginsburg 2011). All characteristics of the STF would point to it having an extremely low dissent rate: no docket control, enormous workload and small number of judges. However, almost half of abstract constitutional review cases have at least one dissenting vote, which is a rate comparable to that of the U.S. Supreme Court and much higher than that of its European counterparts. Also, the effect of television on the probability of dissent points to the notion that dissents are costly to the dissenter, since the increase in dissents in federal law cases due to the introduction of television was accompanied by a slight decrease in state law cases.

[8] The other – more direct – cost on the majority mentioned by Epstein et al. (2011), that judges may have to rewrite parts of the majority opinion to address criticisms in the dissent, doesn't exist in the STF, as votes are mostly written before judges know who will compose the majority and if there are going to be any dissents at all.

Table 1.5 – Regressions for Dissents

Y = Dissent	(1)	(2)	(3)	(4)	(5)	(6)	(7)
DD	0.704***	0.726***	0.810***	0.709***	0.667***	0.653***	0.653***
	(0.186)	(0.208)	(0.225)	(0.226)	(0.228)	(0.231)	(0.221)
Federal Laws	0.527***	0.429**	0.461**	0.349*	0.266	0.252	0.252**
	(0.148)	(0.171)	(0.184)	(0.189)	(0.190)	(0.189)	(0.126)
Television	-0.375***	-0.728*	-0.740	-0.846*	-0.791*	-0.781*	-0.781**
	(0.117)	(0.439)	(0.457)	(0.444)	(0.443)	(0.437)	(0.376)
Year FE	No	Yes	Yes	Yes	Yes	Yes	Yes
Judge FE	No	No	Yes	Yes	Yes	Yes	Yes
Case Outcome FE	No	No	No	Yes	Yes	Yes	Yes
Petitioner FE	No	No	No	No	Yes	Yes	Yes
ADCs						0.727	0.727*
						(0.470)	(0.386)
ADPFs						0.185	0.185
						(0.431)	(0.343)
Constant	-2.616***	-2.385***	-2.902***	-3.565***	-3.693***	-3.680***	-3.680***
	(0.0923)	(0.503)	(0.638)	(0.709)	(0.811)	(0.806)	(0.662)
Observations	15,583	15,573	15,573	15,573	15,573	15,573	15,573
Pseudo-R^2	0.029	0.048	0.151	0.167	0.171	0.172	0.172

Robust standard errors in parentheses (clustered on the case in (1) - (6); on the judge in (7)).
Significance of regression coefficients: *** p<0.01, ** p<0.05, * p<0.1

1.6.1 Robustness checks

The main robustness check I conduct here entails the elimination of ten years of the timespan of analysis: the earliest five years and the latest five years. This timespan cut resulted in the removal of around 27% of the cases but, most importantly, it eliminated two potentially problematic periods that might have been contaminating the results. First, the earliest period was one when the court adapted to a brand-new constitution and crafted the first precedents that would guide future decisions. Therefore, it is only natural that those first decisions were more hotly debated and thoroughly considered, with longer votes, discussions and more dissents. Even though the STF is not bound by its own precedent, the court's high workload means justices are unlikely to keep revisiting questions they already decided, as pointed out by Garoupa and Ginsburg (2011), so the first decisions under the new constitution were particularly important. Second, the latest period includes the problematic year of 2012, when the court dedicated a full semester to hear an important corruption case, thus judging only a handful of other cases.

Tables 1.6, 1.7, and 1.8 display results for the same set of regressions for the length of votes, of discussions and dissents respectively, with the timespan reduced in ten years. As per Table 1.6, results for the length votes remain mostly unchanged. The coefficient associated with DD is positive and significant in all six regressions, although it decreased in magnitude when compared with those for the full sample. The same applies for the results on the length of discussions on Table 1.7: the coefficient remains positive and statistically significant, although with a smaller magnitude.

However, the results for dissents shown on Table 1.8 tell a different story. Here, even though the coefficient for DD remains positive, it loses statistical significance and, especially in the final three regressions, is numerically very close to zero. Note also that the coefficient associated with the federal laws dummy remains positive and significant. Hence, the effect of television broadcasting on dissents has not survived the removal of ten years of data. This may be an indication that what the DD dummy was capturing was an increase in dissents in cases that challenge federal laws that occurred much later, distorting the results. However, there is no simple explanation as to why there would be an increase in dissents between 2010 and 2015. The attitudinal model, for instance, isn't likely to produce a satisfactory answer. Even though there were many changes to the court's composition during this period, they just tended to increase the Worker's Party (PT) domination of the STF (it already had a majority since June 2006), which would lead to greater ideological homogeneity and, therefore, a decrease in dissents, not an increase.

Other changes were conducted in the regressions and have not altered substantially the results; therefore, I omit displaying and discussing them in depth. They include: running the regression for the length of votes in logs instead of level (it is not possible to do that for the length of discussions because there are cases in which there were no discussions at all) and removing the 10% most extreme cases.

Table 1.6 – Regressions for Vote Length (limited sample)

Y = Vote Length	(1)	(2)	(3)	(4)	(5)	(6)	(7)	(8)
DD	2.325***	2.072***	2.068***	1.904**	1.776**	1.603**	1.502**	1.502**
	(0.774)	(0.769)	(0.771)	(0.751)	(0.742)	(0.675)	(0.663)	(0.715)
Federal Laws	1.507***	1.654***	1.665***	1.830***	1.691***	1.139***	1.136***	1.136***
	(0.467)	(0.497)	(0.497)	(0.488)	(0.499)	(0.429)	(0.426)	(0.362)
Television	0.111	-0.880**	-1.005**	-1.148**	-1.112**	-0.660	-0.676	-0.676**
	(0.0851)	(0.429)	(0.431)	(0.463)	(0.469)	(0.438)	(0.437)	(0.282)
Year FE	No	Yes	Yes	Yes	Yes	Yes	Yes	Yes
Judge FE	No	No	Yes	Yes	Yes	Yes	Yes	Yes
Case Outcome FE	No	No	No	Yes	Yes	Yes	Yes	Yes
Petitioner FE	No	No	No	No	Yes	Yes	Yes	Yes
ADCs						-1.195	-1.463	-1.463
						(1.804)	(1.836)	(1.945)
ADPFs						8.122***	8.246***	8.246***
						(2.898)	(2.921)	(2.430)
Dissent Rt.						0.963***	0.869***	0.869***
						(0.166)	(0.171)	(0.106)
Rapporteur							6.998***	6.998***
							(0.326)	(0.826)
Dissent							-0.315	-0.315
							(0.254)	(0.501)
First Dissent							2.069***	2.069*
							(0.392)	(1.030)
Vista							10.30***	10.30***
							(1.257)	(1.416)
Constant	0.984***	3.413***	2.914***	2.412**	1.458	-1.114	-1.122	-1.122*
	(0.0681)	(1.010)	(1.087)	(1.096)	(1.054)	(0.799)	(0.787)	(0.593)
Observations	10,980	10,980	10,980	10,980	10,980	10,980	10,980	10,980
R-squared	0.048	0.061	0.072	0.074	0.078	0.126	0.291	0.291

Robust standard errors in parentheses (clustered on the case in (1) - (7); on the judge in (8)).
Significance of regression coefficients: *** p<0.01, ** p<0.05, * p<0.1

Table 1.7 – Regressions for Length of Discussions (limited sample)

Y = Discussions Length	(1)	(2)	(3)	(4)	(5)	(6)
DD	4.132***	3.752***	3.588***	3.631***	3.536***	2.991***
	(1.159)	(1.118)	(1.053)	(1.076)	(1.059)	(0.993)
Federal Laws	1.587***	1.593***	1.314***	1.144***	1.250***	0.392
	(0.461)	(0.458)	(0.425)	(0.443)	(0.474)	(0.462)
Television	2.100***	-1.244***	-1.930***	-2.056***	-2.032***	-1.644***
	(0.234)	(0.437)	(0.650)	(0.683)	(0.704)	(0.582)
Year FE	No	Yes	Yes	Yes	Yes	Yes
Judge FE	No	No	Yes	Yes	Yes	Yes
Case Outcome FE	No	No	No	Yes	Yes	Yes
Petitioner FE	No	No	No	No	Yes	Yes
ADCs						-1.306
						(2.575)
ADPFs						8.190*
						(4.452)
Vista						2.823***
						(0.921)
Dissents						1.724***
						(0.247)
Constant	0.230***	5.981***	-7.600***	-7.675***	-13.12***	-6.311
	(0.0560)	(1.918)	(2.199)	(2.094)	(3.216)	(4.421)
Observations	1,187	1,187	1,187	1,187	1,187	1,187
R-squared	0.124	0.178	0.221	0.239	0.244	0.358

Robust standard errors in parentheses
Significance of regression coefficients: *** p<0.01, ** p<0.05, * p<0.1

Table 1.8 – Regressions for Dissents (limited sample)

Y = Dissent	(1)	(2)	(3)	(4)	(5)	(6)	(7)
DD	0.219	0.230	0.281	0.139	0.0312	0.0141	0.0141
	(0.231)	(0.243)	(0.266)	(0.264)	(0.264)	(0.264)	(0.219)
Federal Laws	0.924***	0.894***	0.979***	0.804***	0.738***	0.725***	0.725***
	(0.187)	(0.200)	(0.216)	(0.220)	(0.222)	(0.221)	(0.132)
Television	-0.0582	-0.579	-0.568	-0.609	-0.565	-0.536	-0.536
	(0.141)	(0.417)	(0.438)	(0.419)	(0.423)	(0.411)	(0.356)
Year FE	No	Yes	Yes	Yes	Yes	Yes	Yes
Judge FE	No	No	Yes	Yes	Yes	Yes	Yes
Case Outcome FE	No	No	No	Yes	Yes	Yes	Yes
Petitioner FE	No	No	No	No	Yes	Yes	Yes
ADCs						0.577	0.577*
						(0.438)	(0.312)
ADPFs						0.684	0.684
						(0.536)	(0.431)
Constant	-2.912***	-1.815***	-11.91***	-12.11***	-12.82***	-12.87***	-12.87***
	(0.113)	(0.460)	(1.120)	(1.216)	(1.378)	(1.385)	(1.130)
Observations	10,980	10,980	10,895	10,895	10,895	10,895	10,895
Pseudo R2	0.031	0.046	0.163	0.181	0.190	0.191	0.191

Robust standard errors in parentheses (clustered on the case in (1) - (6); on the judge in (7)).
Significance of regression coefficients: *** p<0.01, ** p<0.05, * p<0.1

1.6.2 Timing of effects

The above analysis shows that there are measurable effects of the introduction of television on the behavior of STF judges in two dimensions: judges write longer votes and engage in more discussion with their peers. However, a question that remains unanswered is on the timing of this effect. It seems natural to presume that any effects of television in the behavior of judges are not instantaneous. Frequently, changes in policy take time to achieve its intended (and unintended) effects.

As I have argued, STF judges respond to the expected audience of their channel. At first, as the transmission of *TV Justiça* was restricted to just a couple of cable providers, hence their expected audience was very limited. With time, more cable providers added *TV Justiça* to their channel listings and the largest broadcast television networks started selecting short clips of important cases to use in news reports. This greatly increased the exposure of the STF and, therefore, the expected audience of the court when deciding relevant cases.

Thus, to identify the moment when television began to have a measurable effect on the behavior of judges, I estimate several DD regressions for the length of individual votes. I take the most complete specification (regression (7) in Table 3) and vary the inclusion of data after the start of broadcasting. In this way, the first regression includes data until the end of 2002 (less than six months of television). The following includes data until the end of 2003, and thus successively until the most complete one, with the entire database, totaling fourteen regressions. On Table 1.9, I report the DD coefficient, its p-value and the sample size for each of them.

Results on Table 1.9 show that television began to have a significant effect on the behavior of judges by the end of 2005, two and a half years after the start of broadcasting. Interestingly, in the regressions that include data only up to the end of 2002 and 2003 the DD coefficient is negative, which might indicate that the short-term effects of the introduction of television are in the opposite direction of long-term effects. However, as those coefficients are non-significant, it would be ill-advised to draw any conclusions from them.

To summarize, the results presented here indicate that the introduction of television in the STF had effects on the behavior of judges on two measurable dimensions: longer votes and longer discussions. Also, that those effects were not instantaneous. The effect on dissents, while significant in the regressions that include the full sample, does not survive the robustness checks. Thus, to answer the question posed on the introduction to this paper, results from the empirical analysis indicate that STF justices behave as politicians. The increase on vote length and discussions points to judges attempting to maximize their personal exposure on television, just as politicians do.

Table 1.9 – Timing of effect

	DD	P-Value	N Votes	N Cases
2002	-1.156	0.089	6339	679
2003	-1.138	0.122	7377	794
2004	0.184	0.831	8254	866
2005	1.267	0.022	9140	977
2006	1.485	0.018	10190	1088
2007	0.944	0.045	11324	1212
2008	1.220	0.011	11800	1262
2009	1.284	0.011	12134	1299
2010	1.397	0.003	12702	1363
2011	1.642	0.001	13414	1443
2012	1.767	0.000	13636	1465
2013	1.887	0.000	13867	1490
2014	2.043	0.000	14960	1610
2015	2.229	0.000	15583	1678

Note: DD is the Differences-in-Differences coefficient for regression (7) in Table 3 including data up to the end of the year reported in the first column. The dependent variable is the length of the individual vote. Standard errors are clustered by case.

1.7 Conclusion

In the U.S. Supreme Court, deliberations among justices are the most secret part of the decision-making process. In conferences, no one other than the justices – not even clerks – is allowed inside the room. The few glimpses researchers have of the dynamics of the discussions are obtained from interviews and, occasionally, when retired justices give access to their private papers. The Brazilian Supreme Court is unique among constitutional courts in the sense that it allows an unprecedented level of scrutiny of its deliberations. Not only transcripts of the discussions are part of the published decisions, but everything is broadcast live on television.

In this research, I explore this drastic increase in transparency – the decision to broadcast court sessions on television – to show how the behavior of judges responds to transparency and scrutiny. I find that it does so in two measurable dimensions. First, justices write longer votes. Second, they engage in more discussions with their peers. Taken together, these results point to the notion that justices seek to maximize their exposition on television and, in this sense, behave as politicians.

These findings raise relevant questions to countries that are considering measures to increase the transparency of their judicial systems. While there is ample evidence that more transparency has positive impacts in the legitimacy of the justice system, the results of this paper suggest that there is a trade-off involved in this decision. As transparency increases and judges are more exposed to public scrutiny, they respond to this change by engaging in actions that reinforce their exposure. In other words, judges do not shy away in response to exposure and scrutiny, they revel in it. This fact has potential consequences in terms of court dynamics, as judges compete for the spotlight, and of court efficiency, as decisions take longer and therefore demand more court resources.

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2. Judicial Activism in the Brazilian Supreme Court: A New Measure

2.1 Introduction

Over the years, the allegedly "activist" behavior of Brazilian Supreme Court justices has been a persistent topic of criticism from the press and the political world. A simple *Google* search on the terms "judicial activism" and "Brazilian Supreme Court" generates over a hundred thousand hits. The legal scholarship, in turn, has produced a broad variety of articles (i.e., Barroso 2012) and books (i.e., Campos 2014) which seek to describe and analyze this feature of judicial behavior in the Brazilian context. However, completely absent from the debate has been any rigorous attempt to quantify activism in this Court. So far, the discussion has been centered on theoretical arguments and on the analysis of individual cases.

In this paper, I explore a peculiarity of the Brazilian Supreme Court – the fact that the Prosecutor-General is required to present a brief (as "amicus") to every single abstract review case heard by the Court – to propose and explore a new measure of judicial activism. The main idea is that the most common measure of activism in the literature – the probability of striking down federal and state laws – fails to distinguish between legitimate constitutional control and the ideologically-motivated striking of statutes. The new measure I propose, by conditioning votes to strike on the brief filed by the Prosecutor-General, is an attempt to overcome this issue.

But what exactly is judicial activism? Judicial activism is a term frequently employed by the press and the judicial audiences to qualify, usually negatively, a court decision. While there is much debate into its exact meaning, the criticism usually implies that the decision was illegitimate on some dimension, either by invalidating a law crafted though legitimate democratic processes, by interpreting the constitution beyond its literal meaning, or by reverting established precedents.

While activist was an attribute usually given to the liberal justices of the Warren and Burger courts, the more conservative Rehnquist court has also been accused of activism (Marshall 2002). Some observers even suggest that the term has been used so broadly and in such different contexts that it has ceased to have any meaningful value and just reflects ideological disagreement with the court's ruling (i.e., Easterbrook 2002). However valid those criticisms may be, the basic notion behind the label "activism" – the misuse of judicial authority – is legitimate considering the proper functioning of the democratic system of checks-and-balances (Cross and Lindquist 2006, p. 1754).

Activism is better defined as the end of a continuum that measures the preferences of judges as to how much they can (or should) impose their views on the elected powers. On the opposite end of this continuum is judicial self-restraint. Posner (2012, p. 521) argues that the preference for restraint is based on "respect for the elected branches of government", which is itself based on the belief that legislatures are better policy-makers than courts. However, as Epstein and Landes (2012) show, in the U.S. Supreme Court preference for restraint has vanished since the 1960s, being replaced for what they call "selective restraintists

(or activists)", that is, judges that opt selectively for restraint or activism when it suits their ideological preferences.

In a similar vein, Lindquist and Cross (2009, p. 39) define judicial activism as "a measure of decisions rendered according to judge's personal ideologies rather than neutral dictates of the law". While the notion that the law is "neutral" is debatable – indeed, a good part of the literature (i.e., Epstein and Landes 2012) assumes precisely the opposite, that law is ideological – the core idea is sound. Activist judges, regardless of political inclination, are more likely to impose their personal views rather than to defer to the choices of the elected branches.

Researchers have attempted to classify all the possible ways through which a court decision can be activist. Young (2002), for instance, provides six ways through which judges can behave in an activist manner: (1) by second-guessing the federal political branches or state governments; (2) by departing from text or history; (3) by departing from judicial precedent; (4) by issuing broad or "maximalist" holdings rather than narrow or "minimalist" ones; (5) by exercising broad remedial powers and; (6) by deciding cases according to their partisan political preferences.

Naturally, as some of those dimensions are difficult – if not outright impossible – to measure objectively, most of the empirical literature has focused on the first of Young's dimensions of activism, the propensity to strike down federal or state statutes (Howard and Segal 2004; Cross and Lindquist 2006; Soldberg and Lindquist 2006; Lindquist and Soldberg 2007; Lindquist and Cross 2009; Clark and Whittington 2010; Epstein and Martin 2011). To assess empirically the second or fourth dimensions, for instance, would entail normative judgments by the researcher, and any results could be more a reflection of the researcher's ideological preferences than an accurate measure of judicial activism.

However, the literature recognizes explicitly or implicitly that not all votes to strike down a law can be considered activist. As Cross and Lindquist (2006) note, this measure of activism fails to distinguish between "legitimate" and "illegitimate" annulments of statutes. As they put it, "a standard of judicial activism that focuses solely on statutory invalidation […] fails to account for the possibility that the exercise of authority is justified on legal grounds" (p. 1760). As courts are part of the democratic check-and-balances system, there may very well be instances when striking laws is perfectly legitimate and necessary. Otherwise, if courts should always defer to elected powers, what is their purpose?

Thus, this paper has two main objectives. The first is to present and describe a new measure of judicial activism. The purpose of this new measure is to overcome a defect of the traditional (or, as Posner calls it, canonical) measure of activism, namely, the inability to differentiate between legitimate constitutional control exercised by courts and ideological judging. To do so, I condition votes to strike on the brief filed by the Prosecutor-General. Hence, votes to strike when the brief is to uphold the law under review are activist.

To support the suitability of this new measure, I compare the relationship between the Prosecutor-General and the Brazilian Supreme Court with the one enjoyed by the Solicitor General and the U.S. Supreme Court. Here, similarities abound. Both the Prosecutor-General in Brazil and the Solicitor General in the U.S. are the most frequent and most successful litigants in the courts they practice. Also, both are more successful as amicus curiae than as petitioners. However, unlike its American counterpart, the Prosecutor-General is not the government's representative at the Supreme Court. In Brazil, the Prosecutor-General acts in the Supreme Court as *custos legis* – the custodian of legality – and, as such, pursues (at least in theory) the broader interests of society. These facts – along with other institutional characteristics of the Prosecutor General – support the argument to use the briefs presented in abstract review cases as a "neutral" measure of the law.

The second objective is to determine, in the context of the Brazilian Supreme Court, the extent to which activism is related to ideology and whether it is sensitive to political context. Here, I borrow from the judicial politics literature on courts in civil-law systems (i.e., Amaral-Garcia et al. 2009 on Portugal; Garoupa et al. 2013 on Spain) on how to measure and distinguish ideology and party alignment. In the empirical analysis conducted here, I explore both the traditional and the new measures of activism, comparing the results obtained with each one of them.

The main result is that politics is an important explanation of activism in the Brazilian Supreme Court. In both old and new measures, ideology measured by presidential appointment is significant in cases that challenge federal laws. Also, in the new measure, judges are sensitive to political context. In federal law cases, the presence of the appointing party in the Federal Executive significantly decreases the probability of activist voting. Furthermore, the justices' past career matters – former politicians are less likely to engage in judicial activism. Interestingly, neither effects are present in state law cases.

This paper proceeds as follows. Section 2 describes the institutional and political setting in Brazil, including brief descriptions of the Brazilian Supreme Court and the Public Prosecution. Section 3 sets out the argument for the new measure of activism I propose here, detailing the its theoretical and empirical foundations. Section 4 describes the research design I use in this study and Section 5 briefly describes the database I use. Further, Section 6 presents the descriptive analysis of both measures of activism (the traditional and the new), Section 7 presents the regression analysis results and, finally, Section 8 concludes.

2.2 Institutional and political setting

2.2.1 The Supreme Court

The Brazilian Supreme Court (*Supremo Tribunal Federal* in Portuguese, henceforth STF) is the highest court in the land. It has broad powers to decide on a multitude of cases, ranging from appeals to decisions by lower courts to abstract constitutional review petitions and extraditions. These broad powers,

however, come at a cost: a tremendous workload. As Falcão et al. (2011) show, the Court receives tens of thousands of new cases each year. Further, as it has no docket control[9] and is composed by a relatively small number of justices – eleven – it lacks the capacity to decide with sufficient speed, making the backlog of cases equally enormous.

Among the institutional characteristics of the STF, one is particularly relevant for this research, the appointment rule. Following the American model, justices are appointed by the President and confirmed by the Senate. Presidents can nominate anyone over thirty-five and under sixty-five years of age of "notable juridical learning" and "spotless reputation" (Art. 101). Appointees are subject to a confirmation hearing, after which the commission (the Senate's Constitution and Justice Commission) votes to confirm or to reject the nomination, followed by the full Senate. In both votes, a simple majority is required.

Only once in history did the Senate reject an appointment to the Court – in 1893. Confirmation is usually a very simple process. Often, all three proceedings – hearing, vote on the commission, and plenary vote – are held on the same day or in two consecutive days.

Once in the Court, removal is nearly impossible. Although the Constitution allows the impeachment of STF judges by the Senate, this has never happened. In fact, the Senate has never even started impeachment proceedings against an STF judge, much less concluded one. Further, unlike most of its Latin-American counterparts, Brazilian presidents do not manipulate the court's composition to further their political agenda. Empirical research shows that the Brazilian Supreme Court is the only in the region to enjoy high stability regardless of the electoral cycle (Pérez-Liñán and Castagnola, 2009).

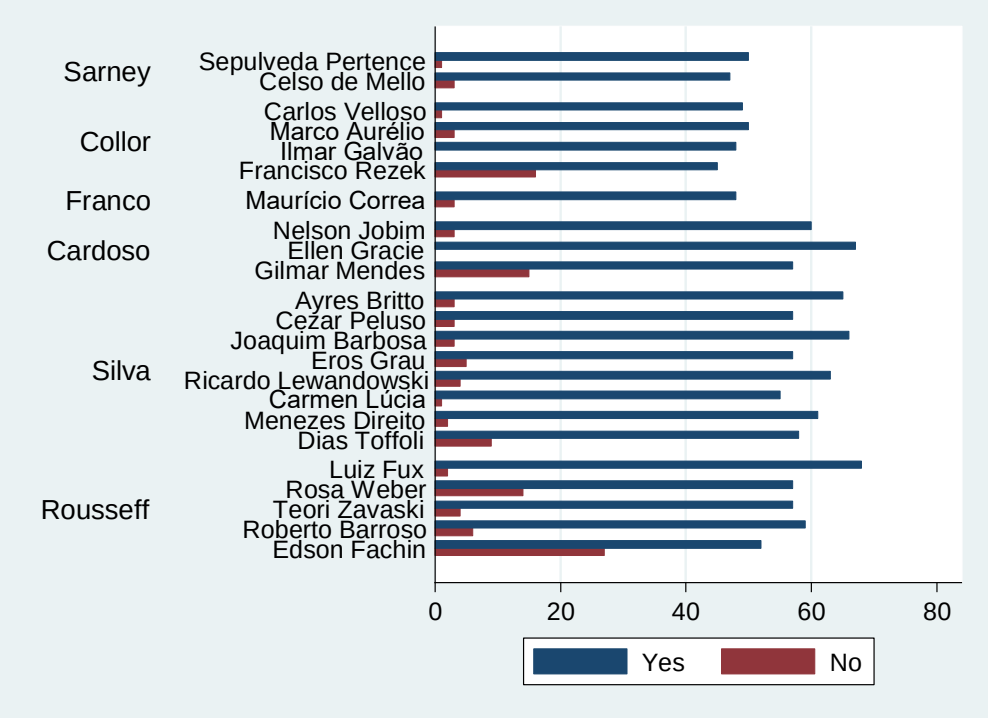
The simple fact that the Senate has not rejected a nomination to the court in over a century, however, is not evidence that the legislative simply rubberstamps the president's choice. Some research (i.e., Llanos and Lemos 2013) has gone into documenting the political bargaining that goes on behind closed doors to choose the right candidate to fill a court vacancy. When selecting a future supreme court justice, presidents consider a broad variety of factors, ranging from the acceptability of the nominee among the current justices, the position of key-players (mostly party leaders) in the Senate, regional pressures for representation in the court, and the views of the legal community.

These many considerations often mean that the chosen candidate is not the one that was on the top of the president's list at the start of the process. However, as there is high predictability on the timing of court vacancies, since judges typically retire only when they reach the mandatory retirement age (70 up until May 2015; since then, 75), presidents usually have plenty of time to consult with the relevant players to test

[9] Historically, the STF had no docket control. A constitutional reform in 2004 introduced a form of docked control restricted to the Court's appellate jurisdiction. As here I deal solely with cases of original jurisdiction (abstract review cases), this is a lesser issue. For more details see, for instance, Depostato et al. (2014).

the acceptance and ease the path of his preferred candidates (Appendix A lists all justices in the database, along with their appointing presidents).

Figure 2.1 – Senate confirmation votes



Notes: Information from the Senate Archives. Data is available for all justices appointed after the 1988 Constitution except the first one, Paulo Brossard. Ordered by date of appointment (least to most recent).

Those characteristics of the appointment process mean that when the name of the nominee reaches the Senate, there is indeed very little discussion, for the relevant political process has already taken place via informal arrangements. If this is true, then what explains the variability of the votes in the Senate? As shown in Figure 2.1, some justices have received sizable portions of "No" votes, while others received just a few. The record holder is Justice Fachin, exactly a third of the Senate voted against him. On the other extreme, Justices Ellen Gracie and Ilmar Galvão were both given unanimous consent by the Senate. The explanation put forward by Llanos and Lemos (2013) is that "presidential" candidates, that is, candidates perceived to be close to the appointing president, tend to get a more negative reaction from the press and the Senate, thus receiving more negative votes.

However true this explanation may be, the simple fact is that no matter how controversial the appointment, all of them eventually get through. Many candidates who were strongly criticized for lack of qualifications, partisanship, and cronyism, were nevertheless approved with ease. Naturally, it is impossible

to know which candidates would have been chosen if the Senate did not have this role in screening the president's choice. But the evidence at hand indicates that, at best, the existence of the confirmation process only succeeds in keeping the most extreme candidates out of consideration.

Lastly, it is relevant to point out the possibility that the outcome of the Senate roll-call votes may be more a reflection of the quality of the executive-legislative relationship rather than the result of the perceived quality of the appointee. Interestingly, each president's last appointee to the Court received the largest number "no" votes in the Senate, which raises the possibility of a "lame-duck" effect. Nevertheless, this observation comes with the benefit of hindsight since, as both Collor and Rousseff had their terms cut short by impeachment proceedings, there was no way for senators to know that justices Rezek and Fachin would be their last appointments to the STF.

Hence, the available evidence points to the notion that presidents are relatively free to appoint whoever they desire to the Court. Although this choice is certainly restricted by political context and regional demands, there is nothing to suggest that judicial preferences would be poorly represented by the preferences of the appointer. It is worth noting that, where the appointment process more closely resembles the Brazilian case, the United States, there is abundant literature (i.e., Epstein and Segal 2005, p. 121-135) showing that judicial preferences are related with the identity of the appointer.

2.2.2 The Public Prosecution

Article 127 of the Federal Constitution states that the duty of the Public Prosecution (*Ministério Público* in Portuguese, henceforth MP) is "to defend the juridical order, the democratic regime and the inalienable social and individual interests". It also guarantees its "functional independence" and the autonomy to prepare its own budget within the limits established by the overall federal budget. Admission to the career of public prosecutor takes place by means of civil service examinations and presentation of academic credentials. Postulants must have a B.A. in Law and at least three years of legal practice (Art. 129). To public prosecutors, the constitution guarantees life tenure after two years in office, stability, and impossibility of salary reduction (Art. 128).

The head of the MP is the Prosecutor-General[10] (*Procurador Geral da República* in Portuguese, henceforth PGR), appointed by the president (and confirmed by the Senate) from within the ranks of the MP for two-year terms, which can be renewed. Since 2001, it has been the practice of the MP to present a list with three recommended names to the president whenever the term of the current PGR is about to expire. This recommendation is based on an internal election and, although not legally binding, has been followed

[10] The official English version of the Brazilian Constitution translates *Procurador-Geral da República* as Attorney-General of the Republic. However, the function of the Attorney-General in the U.S. and other common-law jurisdictions is closer to the Brazilian Minister of Justice, so I translate it as Prosecutor-General.

by every president since Lula in 2003 (Cardoso ignored the first MP recommendation in 2001). Table 2.1 displays the relevant information of all PGRs that have held this office since the new (1988) Constitution.

Table 2.1 – PGRs since 1988

Name	Start	End	Terms	Appointed by	PGR List?
José Paulo Sepúlveda Pertence	15/08/85	17/05/89	N.A.*	Sarney	No
Aristides Junqueira Alvarenga	28/06/89	28/06/95	3	Sarney/Collor	No
Geraldo Brindeiro	28/06/95	28/06/03	4	Cardoso	No
Cláudio Lemos Fonteles	30/06/03	29/06/05	1	Silva	Yes
Antonio Fernando Barros e Silva de Souza	30/06/05	28/06/09	2	Silva	Yes
Roberto Monteiro Gurgel Santos	22/07/09	15/08/13	2	Silva/Rousseff	Yes
Rodrigo Janot Monteiro de Barros	17/09/13	17/09/17	2	Rousseff	Yes

Note: * Prior to the 1988 Constitution there was no fixed term for PGR, the office was held at the discretion of the President.

It is important to highlight that one of the many duties of the PGR is to file briefs[11] to every case heard by the Brazilian Supreme Court (Art. 103 of the Constitution), presenting his views on the constitutionality of the statutes under review. Also, the PGR is among those with legitimacy to petition for abstract review and is one of the most frequent litigants in those cases (about 15% of all petitions for abstract review between 1988 and 2002, according to Taylor (2008, p. 81)).

The MP as defined in the 1988 Constitution is formally independent from the other branches of government. Still, I argue that this independence is not merely a legal – *de jure* – characteristic but a concrete – *de facto* – trait of the institution. This can be attested by the extent to which the MP has defied and properly checked the other powers in recent years. Two cases illustrate this point: the "*Mensalão*" case and the ongoing "*Lava Jato*" investigation. In the "*Mensalão*" case, the MP successfully prosecuted in the Supreme Court several government officials, including congressmen and cabinet members of the Lula administration (2003-2010), for multiple crimes including corruption, money laundering, and conspiracy. Many of them were convicted to long jail sentences. Also, in the ongoing "*Lava Jato*" case, the MP is prosecuting congressmen, senators, and powerful businessman. Former president Lula has already been convicted on multiple counts of corruption and money laundering, a senator (Delcídio do Amaral) lost his seat, as did the Speaker of the House (Eduardo Cunha).

[11] These briefs have the characteristic of amicus curiae briefs for they are unrelated to both the petitioner and the respondent of each case and therefore have no *a priori* position. However, unlike other amicus briefs, those presented by the PGR are mandatory.

Another indication of the *de facto* independence of the MP is the decreasing politicization of the office of PGR. Apart from the already mentioned internal elections for the position, which decreases the president's discretion in appointing the PGR, there is other evidence of the increasing distance between the Executive and the PGR. It is telling that the last PGR to be appointed to the STF, Sepúlveda Pertence in 1989, was also the last prosecutor appointed to PGR under the old (1967) constitution, when the MP was part of the Executive branch and not an independent institution. Since the establishment of the position in 1993, the Solicitor-General (*Advogado-Geral da União* in Portuguese, henceforth AGU) has apparently replaced the PGR as the president's "natural candidate" for the STF. So far, two AGUs have been appointed to the court: Gilmar Mendes in 2002 and Dias Toffoli in 2009.

The discussion above shows how the MP (and the PGR) has displayed a real (*de facto*) independence from the Executive and Legislative branches, successfully prosecuting its members in a multitude of crimes. A final issue is whether the Supreme Court itself could influence the MP, making the PGR brief a poor measure of the law. Possibly, if the PGR wants to foster a good relationship with STF judges, his briefs would tend to be close to the position of the majority of the court. However, it is unclear why this would be so, for if the PGR wants another term in office, he needs to please his constituents - the other federal prosecutors - not STF justices. Also, empirical work on the estimation of ideal points for STF justices and the PGR (Ferreira and Mueller, 2014) shows that the PGR is hardly ever close to the court's median justice. Hence, influence from the Court seems not to be an issue.

2.2.3 Political panorama

Ever since the end of the military dictatorship and reestablishment of civil rule in 1985, the Brazilian political landscape has been characterized by a fragmented party system, with presidents that rely on broad coalitions to remain in power. Coalitions are maintained with broad distribution of pork and coalition goods, such as cabinet positions and jobs in state-owned companies (Raile et al., 2011). The recent ousting of Rousseff and, earlier, of Collor, have demonstrated that the president's ability to remain in power is highly dependent upon his capacity to keep the coalition satisfied.

Another remarkable trait of the Brazilian political system is its fluidity. Mergers and splits of parties are common, and so are changes in party affiliation by congressmen (Desposato, 2006), although this last characteristic has somewhat changed since the Supreme Court decided that, due to the proportional nature of elections to the lower house, seats in the Chamber belong to the party, not to the individual representative.

Notoriously, parties in Brazil have a very limited ideological component[12]. Only a few parties of the hard left openly advocate an ideologically consistent program. Further, as Power (2000) notes, there are

[12] This "conventional wisdom" on Brazilian political parties has been challenged by some such as Desposato (2006).

no openly rightwing parties. The term "right" has become so deeply associated with the military regime that even the parties from the ideological right eschew the term and adopt names that portray them as leftwing parties, such as "progressive" and "labor".

As of 2017, there are thirty-five political parties in Brazil, of which twenty-eight have been able to elect at least one representative to the Chamber of Deputies, the lower house of Congress. The largest one, PMDB (Party of the Brazilian Democratic Movement, *Partido do Movimento Democrático Brasileiro* in Portuguese), holds just 12% of seats in the Chamber. The upper house – the Senate – is also fragmented, as seventeen parties have at least one senator. Its largest party, also PMDB, holds about 26% of seats.

Scholars have attempted to place this multitude of parties in a traditional right-left ideological divide. Perhaps the most successful approach so far has been Timothy Power's and Cesar Zucco's Brazilian Legislative Surveys (Power and Zucco, 2009; 2012), in which the authors periodically survey politicians' views on the ideological position of the main parties in congress. Among their findings, two are particularly relevant for this paper. First, the largest party in congress, PMDB is also the center party in the ideological spectrum. Second, even though there is a shift in the relative position of PSDB (Party of the Brazilian Social Democracy, *Partido da Social-Democracia Brasileira* in Portuguese) and PMDB between the 1993 and 1997 surveys (until 1993 PSDB was to the left of PMDB and, from 1997, it has been to its right), since 2001 both parties are statistically undistinguishable.

Table 2.2 displays each president of Brazil since the return to civil rule in 1985, the party to which they belong, their term in office and the ideological position of the party. Ideology is drawn from Power and Zucco (2012) and reflects the relative position of the ideal point of each party while it held office.

A brief take on those parties is required. First, PMDB, as noted earlier, is the center party in the political-ideological spectrum and has been so ever since the first measurements by Timothy Power in 1990 (see Power and Zucco, 2012). The origins of PMDB are in the government-sanctioned opposition party of the military regime. As such, it congregated politicians from all backgrounds that, while opposing the military rule, managed not to have their political rights suspended by the regime. Since the end of the military dictatorship, PMDB has been part of every single governing coalition.

Table 2.2 – Presidents and political identification.

President	Party	Term	Ideology
José Sarney[#]	PMDB	1985-1990	Center
Fernando Collor de Melo*	PRN	1990-1992	Right
Itamar Franco[#]	none	1992-1995	n.a.
Fernando Henrique Cardoso	PSDB	1995-2003	Center-Right
Luis Inácio Lula da Silva	PT	2003-2011	Left
Dilma Rousseff*	PT	2011-2016	Left

Notes: *Did not end term; [#] Elected as vice-president. Partially based on Power and Zucco (2012).

Interestingly, PSDB began as a dissidence of PMDB. As Power (2000) notes, in the last years of the Sarney administration, the most "progressive" members of PMDB were uncomfortable with the direction the government was taking. As Sarney's popularity plunged due to the failure of successive economic plans, he sought support in his political base – the right. Hence, traditional members of PMDB who were unhappy with the new tone of the administration articulated the formation of a new party. As those politicians were from the "left" of PMDB, the new party was clearly more left leaning, as Power's measurements show. The inversion described above would only occur after Cardoso took office in 1995.

Collor ran for office as a member of PRN (Party of the National Reconstruction, *Partido da Reconstrução Nacional* in Portuguese), a small party created with the sole purpose of launching a presidential bid in 1989. While, as most parties, it had no clear ideological program, PRN drew members from the old right that had dispersed following the implosion of the official party that supported the military rule. Thus, as Power and Zucco (2009; 2012) show, until its demise after the 1994 elections, PRN was among the rightmost parties in Congress.

A common misconception is that Franco, when president, belonged to the ranks of PMDB. While it is true that he was a member during the 1980s and returned to the party to run (successfully) for governor of Minas Gerais in 1997, the fact is that in the years of his presidency, Franco had no party affiliation. As required by the electoral rules of the time, Franco had joined PRN in 1989 to be Collor's running mate. However, in May 1992, as the scandal that would lead to Collor's impeachment erupted, Franco left the party and broke ranks with the president. Therefore, to infer Franco's (and his appointees') ideology from party ideal point estimates is not possible. However, as Franco only appointed one judge to the STF, this is a minor issue.

2.3 A new measure of judicial activism

As previously noted, one of the problems with the most common measure of judicial activism – the propensity to invalidate statutes – is that it fails to differentiate legitimate constitutional control exercised by courts from the ideologically-motivated invalidation of statutes, which is the main concern of those that criticize courts for being activist. As Lindquist and Cross (2009, p. 39) put it, "there must be some means to distinguish judicial activism from legitimate enforcement of the Constitution". The new measure I propose is thus an attempt to overcome this issue.

Here I define activism in the Brazilian Supreme Court as the propensity of judges to strike down laws against the PGR brief. In other words, in cases in which the PGR brief is in the direction of upholding the statute under review, votes for unconstitutionality are activist. Hence, in this subset of cases, I interpret the PGR brief as a "neutral" measure of the legality of the statute, and deviations from it (in the direction of striking laws) are activist.

Note that I do not include in this measure of activism votes to uphold the law when the PGR brief is to strike it. Even though some (i.e., Barnett 2002; Lipkin 2008) argue that the failure to strike down a law that contradicts the constitutional text is as activist as invalidating a constitutional law, here I follow the majority of the empirical literature (i.e., Howard and Segal 2004; Lindquist and Cross 2009) in only considering votes to strike as potentially activist. As Garoupa (2016) points out, the failure to strike down an unconstitutional law is conceptually different from activism, as it indicates an excess of deference to the elected powers, while activism relates to the lack of deference. In the Colby-Solum framework (Colby 2011; Solum 2013), the excess of deference that leads to the validation of unconstitutional statutes is called judicial denial.

In Section 2.2, I have shown that the MP and the PGR, apart from being granted legal – *de jure* – independence by the Constitution, have indeed displayed a *de facto* independence from the political branches in the last decades, successfully prosecuting high-ranking members of the legislative and the executive. Accordingly, political pressure should not be a concern when using the PGR brief as a "neutral" measure of the statutes under review at the Supreme Court.

Useful insights can be drawn from the "special relationship" between the U.S. Supreme Court and the Office of the Solicitor General (OSG). The OSG represents the U.S. Government before the Court and it does so both as a litigant and as amicus curiae, often presenting briefs both in the certiorari phase (occasionally at the invitation of the Court) and on the merits. As broadly documented in the literature (i.e., Black and Owens 2012), the OSG enjoys an extraordinary win rate. This success ranges from the acceptance of certiorari petitions to actually winning on the merits of the case – both as litigant and amicus.

Several explanations have been advanced to explain OSG's unrivaled success. For instance, some (i.e., McGuire 1995) suggest that it is related to the OSG's characteristic as a "repeat player". Experience

in dealing with the Court means that OSG lawyers know what sort of information justices look for in briefs and hence strive to provide them with it. Further, as Black and Owens (2012, p. 35-36) note, the frequent interaction between justices and OSG lawyers present the repeat players with incentives to provide justices with credible information. As repeat players know they will need the Court's support in the future, they act to protect their reputation, hence providing the court with reliable information.

Other studies, such as McAtee and McGuire (2007) suggest that the reason behind OSG's success is found in the quality and experience of its lawyers. Interestingly, the authors find that, after controlling for litigation experience and the quality of the oral argument (as graded by Justice Blackmun), results indicate that the affiliation of a lawyer to the OSG has no significant impact on the likelihood of success. Hence, the OSG has little intrinsic "institutional" value, what explains its success is that it tends to have better and more experienced lawyers in its ranks.

A final explanation lies on ideology. Bailey, Kamoie and Matlzman (2005), for instance, find that the justices tend to vote with the OSG amicus brief when there is ideological alignment between the justice and the OSG. However, they also find that justices vote along with the OSG when the brief is inconsistent with the OSG's ideological position (and the brief is consistent with the justice's ideology). Their point is that justices believe the information in the OSG brief to be credible when it is the same as theirs and when it is contrary to the OSG's ideological predisposition. On the other hand, Wohlfarth (2009) verifies that the OSG tends to lose when it behaves politically. The idea is that, in such cases, the Court perceives the information provided in the OSG brief as less credible.

However, Black and Owens (2012) argue that, while the literature is effective (at least partly) in explaining the OSG's success in the Supreme Court, it does not answer the question of whether the OSG is able to influence the behavior of justices. In other words, of whether the OSG is somehow able to change justice's votes. Their answer is that the OSG does indeed influence judicial behavior, but this is not due to the repeat player characteristic, ideology, or to the quality of its lawyers. The authors propose instead that the reason behind OSG's success lies in its professionalism and perceived impartiality. Justices, to reach their decisions, need high quality legal and policy arguments, and the OSG lawyers provide them with that: "[j]ustices will rely on the information provided to them by the OSG, as that office has built up a reputation as a truth-telling firm" (Black and Owens, 2012, p. 48).

While no such argument has been advanced in favor of the PGR in the Brazilian context, the similarities abound. As the OSG, the PGR is a highly professional body (Sadek and Cavalcanti, 2003) and the constitutional requirement to present briefs in every single case makes it the leading repeat player in the court, as is the OSG. Furthermore, although the empirical literature on the relationship between the PGR and the STF is almost non-existent, a recent study (Hartman, Ferreira and Rego, 2016) places the PGR as the single most successful litigant at the STF.

The PGR in its role as a brief-maker has received even less attention from the empirical literature. Ferreira and Mueller (2014), for instance, while estimating the ideal points of STF justices, also estimate an ideal point for the PGR, but they do not evaluate the determinants of PGR's success as amicus curiae or as petitioner. In Section 6 I show that PGR is highly successful as amicus curiae, with a win rate of over 84%, higher than that of any petitioner, including the PGR itself. This is evidence that the Court relies more on the information provided in the PGR brief in cases where it is not party to the dispute, consistent with data available for the OSG. As Black and Owens (2012, p. 26) show, while the OSG's success rate as petitioner fluctuates around 60%, when amicus it varies between 70 and 80%, reaching 100% in some court terms.

However, while similarities between the OSG and the PGR abound, it is also important to point out the differences between the two institutions. Perhaps the most significant is that, while the OSG has a clear mandate to support the policies of the federal administration of the day, the PGR owes no allegiance to the government. This distinction is made clear by noting, as in Section 2.2, that the role of representing the government in the Brazilian Supreme Court lies not with the Prosecutor-General (PGR), but with the Solicitor-General (AGU). In this court, the PGR acts as *custos legis* – the custodian of legality. This difference means that, in theory, the PGR's brief has a much greater claim of neutrality, of representing a neutral point of view of the law, than the OSG's.

2.4 Methods

In this empirical analysis, I investigate the determinants of judicial activism in the Brazilian Supreme Court. First and foremost, I estimate the extent to which politics is a determinant of judicial activism. Here, I test not only whether ideology matters, that is, whether judges appointed by left or right-wing presidents are more likely or less likely to vote to invalidate laws, but also if they are sensitive to the presence of the appointing party in the executive. This question is frequently considered in the judicial politics literature (i.e., Amaral-Garcia et al., 2009; Garoupa et al., 2013), and seeks to distinguish sincere ideology from strategic political considerations by judges.

The basic econometric specification I use is given by the following equation,

$$y_{ij} = \beta_0 + \beta_1 Left_j + \beta_2 Right_j + \beta_3 PartyinGovernment_{ij} + \sum_K \gamma_k Career_{k,j} + \varepsilon_{ij} \qquad (1)$$

Where y_{ij} is a dichotomous variable that indicates whether the vote of Justice *j* in case *i* is to strike or to uphold the law under review. Note that I do not estimate a coefficient for each appointing president but rather assemble them in two groups according to ideological affinity. In the *Left* group are included all justices appointed by Worker's Party (PT) presidents, Lula da Silva and Dilma Rousseff. Conversely, in the *Right* group are included all justices appointed by the military (either General Geisel or General Figueiredo)

and by President Collor[13] (see discussion in Section 2.3). In this way, justices appointed by Presidents Sarney and Cardoso are the benchmark against which the coefficients of *Left* and *Right* should be interpreted. I opt to include Cardoso appointees along with Sarney's in the benchmark (in a theoretical *Center* group) since, as Power and Zucco (2012) show, PSDB (Cardoso's party) and PMDB (Sarney's party) are mostly undistinguishable in the left-right political spectrum.

Further, *PartyinGovernment* is equal to one if, at the time case *i* was heard by the Court, the party responsible for Justice *j*'s appointment to the court was incumbent in the federal (or state) executive. The purpose of this variable is to verify whether judges are sensitive to political context, that is, if the presence of their appointing party in the executive makes them less (or more) activist.

I likewise test whether activism is related to the justices' backgrounds. Dummy variables indicate whether each justice, before being appointed to the Court, was a judge in a lower court (either federal or state), a prosecutor, or a politician (congressman or senator). I also include a dummy variable to indicate if the judge belonged to the other superior court of Brazil, the Superior Court of Justice (*Superior Tribunal de Justiça* in Portuguese, hence STJ). Still, I control for the justices' age of appointment to the Court, experience in the Court (measured in days between appointment and the judgement of any given case), gender, and academic qualification (whether the judge holds a S.J.D. or not).

It is important to highlight that I use the same specification, given by equation (1), to establish the determinants of judicial activism in both the traditional measure of activism and in the new one that I propose in this study. Crucially, what changes from one measure to the other is the sample I use. While in the traditional measure I use the entire database to estimate equation (1), in the new one I restrict the sample to include only cases where the PGR brief is to uphold the law under review. Hence, the fundamental hypothesis of the new measure of activism is that the PGR brief can be used as a neutral measure of the law. In this way, deviations from the brief – by voting to strike down statutes – are activist[14].

Since the new measure of activism uses information of the PGR briefs, it is appropriate to control for observable characteristics of the PGR. Hence, I include fixed effects for the identity of the PGR who wrote the brief to each case and variables to account for whether the PGR was appointed under the "list" mechanism (which, in theory, could make the brief more credible to STF justices) and for the ideological alignment between the PGR and STF justices (whether the PGR was appointed by the same president as the justice).

[13] I also include President Franco's sole appointment to the court, Justice Maurício Corrêa. Other possibilities are tested as robustness checks.

[14] As a robustness check, I test the other possible deviation from the PGR brief, that is, voting to uphold when the brief is to strike down the law under review.

Other controls include fixed effects for justice and petitioner. Also, instead of placing a standard year fixed effect, I include dummies according to the identity of the Chief Justice[15]. At the STF, the position of Chief Justice rotates every two years by means of an internal election. The election is not competitive – the selected candidate is always the most senior justice who has not served in this position before. Most importantly, the Chief Justice has the power to set the Court's schedule. Every week, he/she picks the cases that will be heard by the full court the following week from among those the justices have indicated that are prepared. This relates with the problem of selection. If justices behave ideologically (and strategically), then, when presiding over the Court, they may select cases they believe are more likely to have their preferred outcome. In this way, case selection would be far from random, potentially impairing results. By controlling for the identity of the Chief Justice, I limit the possibility that results are affected by this issue.

Lastly, it is worthwhile to ponder which are the expected results. If activism is indeed related with political ideology, then the coefficients associated with "Right" and "Left" should be, respectively, negative and positive, indicating that conservative judges favor a "restraintist" approach, deferring to the elected powers, while "progressive" judges are more activist, using the court to put forward their preferred policies. Also, if judges are sensitive to the presence of their appointing party in the executive, the coefficient associated with this variable should be negative, as they strategically defer to the elected powers.

2.5 Data

The database I use in this research is comprised of all abstract review cases decided by the full court from 1988 until the end of 2015. This sums up to 1.678 cases, or 15.583 individual votes. I extracted information about each case from the court's website. Some information was taken from the docket page of each case while the remaining were obtained from the official court ruling (in Portuguese, *Acórdão*). Among the data extracted from these sources are the vote of each justice in each case, the identity of the petitioner, the nature of the law under review (federal/state), the outcome of the case and the position of the PGR brief, along with the relevant dates (petitioning, judgement, and PGR brief).

Information on the judges was obtained from their biography and CV, which are also available on the court's website. Especially relevant for this study are the identity of the president responsible for the appointment of each justice and their previous career (judge; prosecutor; politician). I also collected information on their dates of birth, appointment to the court and retirement/death (where applicable).

Of the 1.678 cases, the majority (1.649) are Direct Actions of Unconstitutionality (*Ação Direta de Inconstitucionalidade* in Portuguese, henceforth ADI), where the petitioner asks the court to strike down a federal or state statute. Two other abstract review mechanisms are included in the database: eleven

[15] Alternatively, year fixed effects are included as part of the robustness checks.

Declaratory Actions of Constitutionality (*Ação Declaratória de Constitucionalidade* in Portuguese, henceforth ADC), which is the exact opposite of the ADI, and eighteen Claims of Non-Compliance with a Fundamental Precept (*Arguição de Descumprimento de Preceito Fundamental* in Portuguese, henceforth ADPF), a special type of ADI mostly used to question the validity of laws that predate the current (1988) constitution.

2.6 Descriptive analysis

Central to the argument of this study is the idea that certain institutional characteristics of the PGR, both *de jure* and *de facto*, makes the brief it presents to the court a good measure of the law in a subset of cases. In this argument, two elements are of the utmost importance. First, the PGR is the leading repeat player in the court. Aside from presenting briefs to every single abstract review case, which alone would place the PGR as the foremost repeat player, it is also one of the most frequent petitioners. As shown in Table 2.3, the PGR is the petitioner in over 26% of abstract review cases heard by the court, second only to the State Governors as a group (and higher than any State Governor individually).

Table 2.3 – Basic statistics, by petitioner

	Petitioning	Dismissals	Success (Federal)	Success (State)
State Governors	34,8%	4,6%	40,7%	81,3%
PGR	26,4%	3,6%	60,8%	83,7%
Class Associations	18,3%	25,4%	30,4%	62,6%
Political Parties	14,7%	20,2%	20,7%	62,7%
Bar Association	4,3%	6,9%	40,0%	73,1%
State Legislatures	1,0%	29,4%	36,4%	50,0%
President	0,5%	0,0%	75,0%	-
Total	100%	10,8%	35,7%	76,9%

Second, the PGR is a highly professional body that enjoys high reputation before the court. Two facts support this statement. First, as shown in Table 2.3, only 3.6% of cases petitioned by the PGR are dismissed by the court on procedural grounds[16]. This indicates that when the PGR chooses to petition for review, it does so with good legal standing and fulfils the requirements[17] to enable discussion on the merits

[16] There are two types of procedural dismissals. One is related with meeting some procedural requirements (*Não Conhecido*) and the other is related with the repealing of the law under dispute prior to its analysis by the court (*Prejudicado*). Here I use just the first type of procedural dismissal, as the second does not relate with the "quality" of the petitioner, but rather to the court's delay to analyze a case (or to the petitioner's delay in filing the case).

[17] Among these requirements are: to have constitutional legitimacy (as per art. 103) to petition for abstract review, to have a stake in the case (the PGR is assumed to always have a stake in the case due to its role as *custos legis*) and for

of the case. Further, the PGR is one of the most successful petitioners in the STF. In cases that question federal laws, it has a win rate of over 60%, higher than that of any other petitioner except the president (who is a very sporadic litigator - only eight cases). As to state laws, it has the highest win rate, 83.7%.

However, the PGR is even more successful when it does not petition, but rather presents briefs in cases started by other petitioners. In those cases, 84.5% of justice's votes are in line with the PGR brief, compared to 79.9% when the PGR is the petitioner (see Table 2.4). This finding is consistent with the idea that when the PGR choses to file for abstract review in the STF it takes sides, so in those instances the court does not view the PGR a "neutral" party.

Hence, to consider the PGR brief as a "neutral" measure of the law makes more sense in cases where it has chosen not to petition, that is, where its brief has the nature of an amicus brief, not an active part in the dispute. Therefore, the new measure I propose here both excludes cases in which the PGR is petitioner (naturally, the PGR does not present briefs that argue for constitutionality in cases where it has chosen to petition) and restricts them to those where the PGR brief is to uphold.

A further issue is whether the PGR behaves politically, and if this behavior affects how its briefs are perceived by the Supreme Court. Table 2.4 displays the success rate for each PGR as petitioner and as amicus. Although there is some variability according to the identity of the PGR, there is no obvious pattern relative to the PGR's success. There is, however, evidence that the identity of the prosecutor matters in the sense that some are more active – petition more often – than others. For instance, PGR Brindeiro, who held office for eight years, petitioned about 18% of cases, while PGR Fonteles, who had only one term in office – two years – petitioned nearly 24% of cases. Results on the last two prosecutors – Gurgel and Janot – should be taken with a grain of salt. As it takes the court, on average, 5.2 years to rule on cases petitioned by the PGR, it is only natural that the database contains very few cases by those PGRs.

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the request to be legally possible (i.e., the petitioner does not ask the court to strike down an article of the original constitutional text).

Table 2.4 – PGR Statistics

	Proportion		Success	
PGR	Petitioner	Brief-Maker	Petitioner	Brief-Maker
Junqueira	43,6%	14,9%	79,8%	89,9%
Brindeiro	18,1%	48,5%	80,0%	85,9%
Fonteles	23,7%	17,3%	84,8%	81,4%
Fernando	8,1%	12,0%	88,9%	78,8%
Gurgel	4,5%	5,8%	40,0%	72,1%
Others*	2,0%	1,5%	77,8%	85,0%
Total	100,0%	100,0%	79,9%	84,5%

Note: * Includes acting PGRs, PGR Janot (only two cases as petitioner) and PGR Pertence (only three cases).

On Table 2.5 I report the rate at which STF justices agree with the PGR's "amicus" brief according to whether the PGR and the justice were appointed by the same political group. As noted in Section 3, one of the sources of the OSG's success at the U.S. Supreme Court is related to ideology. When the OSG is ideologically aligned with the court's majority, it tends to win more often. Here, however, the relationship seems weak. Although agreement between justices and the PGR tends to be higher when the justice and the PGR share the same appointer, this effect is not consistent to all political groups and is mostly non-significant (in a simple means comparison test). The only group of justices for which the effect is both in the theoretical direction (when aligned, concurs more often with PGR) and statistically significant is that of justices appointed by President Cardoso.

Table 2.5 – Justice-PGR concurrence rate according to political alignment

	% Agree		
Justice appointed by	Aligned	Not Aligned	P-Value
Military	N.A.	91,7%	
Sarney	88,2%	85,7%	0,1263
Collor	81,5%	81,2%	0,8681
Franco	N.A.	92,9%	
Cardoso	89,1%	84,1%	0,0006
Silva	82,4%	82,3%	0,9802
Rousseff	78,4%	85,2%	0,0104
Total	83,9%	85,8%	0,0013

Note: President Franco never appointed a PGR; There are no briefs from PGRs appointed by the military. P-Values from a standard t-test by appointing president.

Hence, this preliminary analysis suggests that in at least two aspects the relationship of the PGR with the STF resembles that of the OSG and the U.S. Supreme Court. First, the PGR is the ultimate repeat

player at the Court. Second, the brief it provides the Court in abstract review cases is a valuable source of information for justices – as indicated by the elevated success rate of the amici curiae briefs – higher than that of any petitioner, including the PGR.

However, in other dimensions, the PGR and the OSG differ. Although there is evidence that the OSG's success before the U.S. Supreme Court is higher when there is ideological alignment, for the STF there seems to be little indication of that. For most justices, grouped according to presidential appointment, it does not matter whether the PGR belongs to the same political group of their appointer. For further descriptive analysis see Appendix B.

2.7 Regression analysis

2.7.1 The traditional measure of activism

Judicial activism is most commonly measured in the literature as the propensity to strike down federal and state legislation (i.e., Soldberg and Lindquist, 2006; Epstein and Martin, 2011). Hence, here I begin with the investigation of this measure. In this analysis, I separate cases according to which kind of legislation they question (either federal or state). It is necessary to point out that I use the logit model to estimate equation (1) in Section 4. To facilitate interpretation, only the marginal effects results[18] are displayed.

For the traditional measure of activism, there are seven regressions. The first is the simplest, it includes only the two political appointment variables and the party in government dummy. Following, regression (2) includes all judge-specific variables, including career, age of appointment, gender, and court experience. Regression (3) includes judge fixed effects, regression (4) adds information of the PGR and AGU briefs and a control for unanimous cases. Regression (5) adds information on the petitioner of each case and, finally, regression (6) includes fixed effects for the court term[19]. The last specification, regression (7), is identical to (6) but the sample is restricted to only non-unanimous cases. Table 2.6 displays the results for cases that challenge federal laws.

First and foremost: politics matters. Judges appointed by right-wing presidents are less likely to vote to strike federal laws than those appointed by "center" parties. Conversely, justices appointed by left-wing presidents are more likely to vote against the validity of federal statutes. However, results on Table 2.6 show that, while the signal of the coefficients is consonant with the expected (positive for Left, negative for Right), only those for Right are significant in all regressions.

[18] See Appendix C for the logit regression output.

[19] In the STF, the Chief Justice is elected by its peers for two-year nonrenewable terms. As it is the prerogative of Chief to select cases that go before the court each week, I control for his/her identity. Thus, the court term fixed effects are dummy variables that indicate each Chief Justice's term.

The coefficient associated with Party in Government has the expected signal – negative – but is mostly non-significant. Further, career background does not seem to be a relevant explanation of judicial activism in this measure. Not a single career variable is significant throughout the six specifications in which they appear. Other personal traits of the justices, such as gender, academic qualifications and age on appointment to the court likewise have no effect on activism.

Interestingly, of the two briefs that are presented to each case, only that of the PGR is significant in explaining judicial activism. In fact, of all the explanatory variables included in the econometric models, the PGR brief seems to be the leading factor in determining votes to strike down federal legislation. On the other hand, the AGU brief has no significant effect on the justices' votes. This could be due to AGU's role in representing the government in the Court, which may lead justices to perceive its brief as less credible than the PGR's. Furthermore, up until May 2001 (ADI 1616), the Court's interpretation of the Constitution held that the AGU must necessarily defend any legal norm challenged in an abstract review petition. Since then, the AGU was given more freedom to present its views before the court, but it was only in 2009 that the STF decided (ADI 3916) that, like the PGR, the AGU is free to present briefs as it sees fit. Hence, a large proportion (over 75%) of briefs presented by the AGU argue to uphold the law under review.

Results on state laws, on Table 2.7, show a different picture. None of the variables that measure ideology and political alignment are significant across all six regressions. They lose significance once controls for the direction of the PGR brief and unanimity, which are both highly significant, are added. Further, there is more variability across regressions in the coefficients of career variables. Interestingly, the only career variable that is consistently significant (in five out of six regressions), the public prosecutors', has the opposite signal that was expected. Here, former prosecutors are less likely to vote to strike down state laws than other justices.

Table 2.6 – The traditional measure – marginal effects (federal laws)

Marginal Effects	(1)	(2)	(3)	(4)	(5)	(6)	(7)
Left	0.289***	0.252***	0.207*	0.133	0.121	0.013	0.029
	(0.058)	(0.063)	(0.114)	(0.098)	(0.101)	(0.108)	(0.193)
Right	-0.093***	-0.110***	-0.107***	-0.094***	-0.098***	-0.066**	-0.134**
	(0.026)	(0.033)	(0.037)	(0.032)	(0.032)	(0.029)	(0.060)
Party in Gov.	-0.194***	-0.121**	-0.126*	-0.067	-0.063	-0.082	-0.071
	(0.051)	(0.057)	(0.069)	(0.054)	(0.054)	(0.050)	(0.096)
Prosecutor		0.023	-0.103	-0.081	-0.084	-0.184**	-0.278**
		(0.016)	(0.091)	(0.081)	(0.083)	(0.073)	(0.138)
Judge		0.009	-0.128	-0.031	-0.028	0.022	0.113
		(0.019)	(0.136)	(0.115)	(0.116)	(0.110)	(0.189)
STJ		0.038	0.025	-0.018	-0.021	-0.145***	-0.238***
		(0.025)	(0.081)	(0.078)	(0.077)	(0.055)	(0.082)
Politician		0.005	-0.109	-0.118	-0.124	-0.250***	-0.423***
		(0.031)	(0.098)	(0.087)	(0.089)	(0.079)	(0.148)
S.J.D.		0.006	0.027	-0.027	-0.030	-0.169**	-0.293***
		(0.013)	(0.096)	(0.087)	(0.087)	(0.066)	(0.102)
Gender		0.017	0.249	0.071	0.065	-0.225	-0.444
		(0.024)	(0.252)	(0.215)	(0.215)	(0.177)	(0.288)
Age on App.		-0.001	-0.007	-0.001	-0.001	0.003	0.011*
		(0.001)	(0.007)	(0.005)	(0.005)	(0.004)	(0.006)
Experience		0.037***	0.038**	0.026*	0.025*	-0.011	-0.008
		(0.014)	(0.017)	(0.015)	(0.014)	(0.014)	(0.023)
Unanimous				-0.011	-0.013	-0.005	
				(0.034)	(0.035)	(0.035)	
PGR to Strike				0.368***	0.345***	0.337***	0.205***
				(0.023)	(0.029)	(0.031)	(0.047)
AGU to Strike				0.021	0.043	0.048	0.146
				(0.082)	(0.079)	(0.078)	(0.095)
Judge F.E.	No	No	Yes	Yes	Yes	Yes	Yes
Petitioner F.E.	No	No	No	No	Yes	Yes	Yes
Court F.E.	No	No	No	No	No	Yes	Yes
Observations	3,598	3,598	3,597	3,597	3,597	3,597	1,917

Note: Clustered standard errors in parentheses (cluster on case); *** p<0.01, ** p<0.05, * p<0.1

Table 2.7 – The traditional measure – marginal effects (state laws)

Marginal Effects	(1)	(2)	(3)	(4)	(5)	(6)	(7)
Left	0.034**	0.016	0.054	0.036	0.031	0.045	0.098
	(0.015)	(0.019)	(0.044)	(0.035)	(0.035)	(0.029)	(0.088)
Right	-0.051***	-0.066***	-0.047**	-0.008	-0.007	0.012	0.041
	(0.014)	(0.017)	(0.019)	(0.015)	(0.015)	(0.013)	(0.035)
Party in Gov.	-0.005	-0.003	-0.001	-0.015	-0.014	-0.012	-0.007
	(0.015)	(0.015)	(0.015)	(0.012)	(0.012)	(0.012)	(0.021)
Prosecutor		-0.023***	-0.099***	-0.114***	-0.115***	-0.042**	-0.099
		(0.007)	(0.035)	(0.028)	(0.028)	(0.018)	(0.062)
Judge		0.006	-0.072	-0.007	-0.005	-0.005	-0.014
		(0.008)	(0.054)	(0.041)	(0.041)	(0.032)	(0.091)
STJ		-0.014	-0.042	-0.107***	-0.109***	-0.041*	-0.081
		(0.013)	(0.039)	(0.032)	(0.032)	(0.023)	(0.081)
Politician		-0.016	-0.072*	-0.114***	-0.117***	-0.033	-0.041
		(0.014)	(0.042)	(0.034)	(0.034)	(0.024)	(0.074)
S.J.D.		0.031***	0.015	-0.087**	-0.091**	-0.036	-0.062
		(0.007)	(0.047)	(0.037)	(0.037)	(0.027)	(0.089)
Gender		0.033***	0.062	-0.156	-0.162*	-0.049	-0.039
		(0.011)	(0.120)	(0.095)	(0.096)	(0.070)	(0.200)
Age on App.		0.001	-0.005	0.001	0.001	0.001	0.001
		(0.001)	(0.003)	(0.003)	(0.002)	(0.002)	(0.004)
Experience		0.012**	0.023***	0.005	0.004	0.005	0.004
		(0.005)	(0.007)	(0.006)	(0.006)	(0.005)	(0.014)
Unanimous				0.097***	0.096***	0.095***	
				(0.014)	(0.015)	(0.015)	
PGR to Strike				0.382***	0.386***	0.382***	0.318***
				(0.011)	(0.012)	(0.012)	(0.029)
AGU to Strike				0.030	0.033	0.037	0.057
				(0.021)	(0.021)	(0.025)	(0.041)
Judge F.E.	No	No	Yes	Yes	Yes	Yes	Yes
Petitioner F.E.	No	No	No	No	Yes	Yes	Yes
Court F.E.	No	No	No	No	No	Yes	Yes
Observations	11,985	11,985	11,983	11,983	11,983	11,983	3,496

Note: Clustered standard errors in parentheses (cluster on case); *** p<0.01, ** p<0.05, * p<0.1

2.7.2 The new measure of activism

As discussed in Section 3, the new measure of activism I propose entails the conditioning of the justice's votes on the brief filed by the PGR. In this sense, activist votes are those that go for the unconstitutionality of the law when the PGR brief is to uphold it. Thus, in the econometric analysis I undertake here, I restrict the sample to all cases where the brief presented by the PGR argued for the constitutionality of the law. Hence, in this subset of cases, votes to strike the law are activist.

Naturally, all votes that are considered activist in this measure are also included in the traditional measure of activism, for it does not in any way conditions votes to strike. However, I argue that the traditional measure lacks accuracy, for it includes cases in which the court is perfectly justified in striking down the law. As Cross and Lindquist (2007) note, this is one of the main problems with measuring activism by the propensity to strike laws, the failure to distinguish legitimate constitutional control from the ideological striking of laws. Hence, the measure I propose, while most likely underestimating the overall level of activism in the court, is more precise in detecting it in a subset of cases.

Now, there are eight regressions for each type of law (federal and state). The first is the simplest, it includes only the two political appointment variables and the party in government dummy. Following, regression (2) includes all judge-specific variables, including career, age of appointment, gender, and court experience. Regression (3) includes judge fixed effects, regression (4) adds a control for unanimous cases, and regression (5) adds information on the petitioner of each case. Further, regression (6) adds PGR fixed effects and a control for political alignment between the PGR and the justices. Finally, regression (7) includes fixed effects for the court term. The last specification, regression (8), is identical to (7) but the sample is restricted to only non-unanimous cases.

Table 2.8 displays the results for cases that challenge federal laws. The main message, again, is that politics matter. But, in this new measure of activism, politics are important in a further dimension. Note that, unlike in the traditional measure, the coefficient associated with Party in Government is negative and significant in all eight regressions. This indicates that STF justices respond to political context: they are less likely to engage in activist voting when the incumbent party in the executive is the same responsible for their appointment to the Court. In other words, judges exercise restraint, deferring to the elected powers, when it matters the most for their appointing party.

Further, in this new measure, the justices' past career matters. Justices that have held elected office are less likely be activist. This effect is significant in all eight regressions, especially the most complete ones. As expected, experience in the legislative makes judges place higher value in the democratic law-making process and, consequently, those justices are less likely to impose their views on the decisions of the elected powers.

Also, political alignment between the PGR and STF justices does not seem to affect the justices' votes. Even though the coefficient has the expected sign (negative), it is mostly non-significant. The most likely explanation for this result is that PGR briefs have indeed a very low political content. As results reveal that justices do behave politically in at least two ways, by voting according to ideology and to political context, the fact that they are not sensitive to the identity of the PGR can only mean that the PGR itself is not political (or, at the least, not perceived as political by STF justices).

Note that, in the new measure, it is not possible to estimate a coefficient for the position of the brief presented by the AGU. This is because there is not a single federal case in the sample in which the PGR brief is to uphold the law and the AGU's is to strike it down. As previously noted, this may relate to the AGU's role in representing the government's interests in the court and to the circumstance that, up until the early 2000s, the AGU had a constitutional command to defend the validity of any law under review.

Regarding state laws, results displayed on Table 2.9 are strikingly different. In all regressions, the coefficients associated with political appointment variables have the expected signal. However, statistical significance quickly disappears with the inclusion of controls. The same is true for the Party in Government variable, which is negative although non-significant in most regressions. Hence, this result indicates that, while judges are sensitive to the presence of their appointing party in the federal government, it does not translate to the state executives.

Additionally, career does not offer a relevant explanation of judicial activism in state law cases. Coefficients are hardly ever significant and vary widely across regressions. Other personal traits of the justices, such as gender and experience in the court, also do not seem to have an effect on judicial activism in this subset of cases.

Table 2.8 – The new measure of activism – marginal effects (federal laws)

Marginal Effects	(1)	(2)	(3)	(4)	(5)	(6)	(7)	(8)
Left	0.412***	0.354***	0.413***	0.344**	0.336**	0.310**	0.294**	0.215
	(0.112)	(0.105)	(0.150)	(0.154)	(0.152)	(0.135)	(0.118)	(0.185)
Right	-0.136***	-0.151***	-0.260**	-0.271***	-0.281***	-0.294***	-0.351***	-0.466***
	(0.046)	(0.057)	(0.101)	(0.097)	(0.099)	(0.094)	(0.092)	(0.137)
Party in Gov.	-0.354***	-0.259**	-0.258**	-0.229**	-0.222**	-0.204**	-0.191**	-0.221**
	(0.108)	(0.103)	(0.112)	(0.108)	(0.111)	(0.095)	(0.079)	(0.107)
Prosecutor		0.008	-0.142	-0.154	-0.165	-0.230*	-0.267**	-0.232
		(0.018)	(0.123)	(0.118)	(0.126)	(0.119)	(0.124)	(0.159)
Judge		-0.046	-0.191	-0.151	-0.154	-0.069	-0.076	0.093
		(0.029)	(0.230)	(0.223)	(0.226)	(0.197)	(0.188)	(0.270)
STJ		0.082*	0.117	0.073	0.066	-0.041	-0.057	-0.092
		(0.042)	(0.105)	(0.101)	(0.101)	(0.092)	(0.069)	(0.104)
Politician		-0.125**	-0.275**	-0.339**	-0.345**	-0.421***	-0.450***	-0.631***
		(0.057)	(0.140)	(0.132)	(0.138)	(0.135)	(0.133)	(0.187)
S.J.D.		-0.028	-0.013	-0.048	-0.050	-0.192	-0.182	-0.259
		(0.018)	(0.148)	(0.141)	(0.141)	(0.126)	(0.119)	(0.181)
Gender		0.014	0.241	0.124	0.123	-0.211	-0.163	-0.410
		(0.028)	(0.421)	(0.405)	(0.407)	(0.352)	(0.320)	(0.474)
Age on App.		0.002	-0.005	-0.002	-0.002	0.004	0.002	0.014
		(0.002)	(0.013)	(0.012)	(0.012)	(0.009)	(0.008)	(0.013)
Experience		0.044***	0.043**	0.027	0.026	-0.025	-0.025	0.012
		(0.016)	(0.021)	(0.019)	(0.019)	(0.026)	(0.019)	(0.029)
Unanimous				-0.212***	-0.212***	-0.188***	-0.174***	
				(0.051)	(0.050)	(0.053)	(0.056)	
PGR-Judge Align.						-0.069*	-0.046	-0.018
						(0.039)	(0.036)	(0.054)
Judge F.E.	No	No	Yes	Yes	Yes	Yes	Yes	Yes
Petitioner F.E.	No	No	No	No	Yes	Yes	Yes	Yes
PGR F.E.	No	No	No	No	No	Yes	Yes	Yes
Court F.E.	No	No	No	No	No	No	Yes	Yes
Observations	1,660	1,660	1,651	1,651	1,651	1,642	1,642	901

Note: Clustered standard errors in parentheses (cluster on case); *** p<0.01, ** p<0.05, * p<0.1

Table 2.9 – The new measure of activism – marginal effects (state laws)

Marginal Effects	(1)	(2)	(3)	(4)	(5)	(6)	(7)	(8)
Left	0.079***	0.081**	0.316**	0.234*	0.220*	0.182	0.016	0.264
	(0.028)	(0.038)	(0.124)	(0.126)	(0.117)	(0.121)	(0.109)	(0.291)
Right	-0.143***	-0.150***	-0.092	-0.075	-0.083	-0.071	-0.027	-0.034
	(0.044)	(0.051)	(0.067)	(0.065)	(0.063)	(0.064)	(0.053)	(0.108)
Party in Gov.	-0.037	-0.037	-0.029	-0.005	-0.003	-0.009	-0.009	-0.087*
	(0.038)	(0.037)	(0.038)	(0.037)	(0.035)	(0.035)	(0.035)	(0.049)
Prosecutor		0.003	-0.023	0.001	-0.004	0.003	-0.004	-0.270
		(0.017)	(0.091)	(0.094)	(0.088)	(0.084)	(0.058)	(0.348)
Judge		-0.033	0.127	0.075	0.033	0.038	0.008	-0.324**
		(0.025)	(0.133)	(0.124)	(0.116)	(0.104)	(0.090)	(0.163)
STJ		0.029	-0.135	-0.068	-0.049	-0.036	-0.018	0.053
		(0.033)	(0.095)	(0.088)	(0.082)	(0.079)	(0.063)	(0.257)
Politician		-0.035	-0.051	-0.026	-0.032	0.003	-0.018	-0.287
		(0.041)	(0.118)	(0.121)	(0.113)	(0.111)	(0.076)	(0.379)
S.J.D.		0.018	-0.238**	-0.145	-0.109	-0.101	-0.061	-0.074
		(0.016)	(0.118)	(0.109)	(0.105)	(0.109)	(0.089)	(0.288)
Gender		0.029	-0.494*	-0.311	-0.221	-0.203	-0.117	0.125
		(0.021)	(0.288)	(0.265)	(0.249)	(0.243)	(0.195)	(0.342)
Age on App.		0.002	0.015	0.011	0.007	0.008	0.006	0.008
		(0.002)	(0.009)	(0.008)	(0.007)	(0.006)	(0.006)	(0.011)
Experience		0.031*	0.042**	0.032	0.031	0.017	0.001	0.003
		(0.016)	(0.021)	(0.021)	(0.019)	(0.022)	(0.017)	(0.034)
Unanimous				-0.175***	-0.149***	-0.146***	-0.100*	
				(0.044)	(0.047)	(0.046)	(0.054)	
AGU to Strike				0.333	0.407**	0.373*	0.394*	0.799***
				(0.231)	(0.207)	(0.217)	(0.209)	(0.209)
PGR-Judge Align.						-0.041	-0.011	-0.003
						(0.028)	(0.026)	(0.050)
Judge F.E.	No	No	Yes	Yes	Yes	Yes	Yes	Yes
Petitioner F.E.	No	No	No	No	Yes	Yes	Yes	Yes
PGR F.E.	No	No	No	No	No	Yes	Yes	Yes
Court F.E.	No	No	No	No	No	No	Yes	Yes
Observations	1,797	1,797	1,784	1,784	1,784	1,784	1,759	651

Note: Clustered standard errors in parentheses (cluster on case); *** p<0.01, ** p<0.05, * p<0.1

Unlike in federal law cases, in state law it was possible to identify situations where the AGU brief contradicts the PGR's in the direction of striking down the statute. Here, the AGU brief has a positive impact on activism, although the statistical significance is mostly weak (significant at 1% only where the sample is restricted to non-unanimous cases).

Thus, results presented here are a strong indication that politics matter when judging. Not only presidents select justices that conform with their political preferences but judges themselves are sensitive to presence of their appointing party in the executive. This is perhaps the most significant gain of the new measure of activism I propose in this research. It manages to detect more accurately the sensibility of justices to the incumbent in the executive. These effects, however, are restricted to cases that challenge federal statutes. For state laws, as in the traditional measure of activism, politics is a poor explanation for justice's votes.

2.7.3 Robustness checks

In this analysis I conduct two sets of robustness checks. The first entails minor changes to the regression specification, namely, the introduction of year fixed effects instead of court fixed effects and a variation on the construction of variable *Right*. As noted on Section 4, Justice Maurício Corrêa, President Franco's sole appointment to the court, is included on the *Right* group. However, as President Franco's ideological stance is unclear (see Section 2.2), here I test the other plausible alternative, that is, to include Justice Corrêa along with the justices appointed by President Cardoso and President Sarney in a theoretical *Center* group.

Table 2.10 displays the results for cases that challenge federal laws (I omit the results on state laws since I do not find any effects for those cases – see Table 2.9). Regressions (1) and (2) on Table 2.10 are identical to (7) and (8) on Table 2.8, except that now I include Justice Corrêa in the control group. Note that the coefficient of *Right** is significant, although of decreased magnitude. Further, in regressions (3) and (4) I exchange Court fixed effects for year fixed effects. Again, note that results remain very similar to those on Table 2.8.

In the second set of robustness checks I explore the other possible deviation from the PGR brief, that is, when justices vote to uphold the law under review in cases where the PGR brief is to strike it down. Here, I test this possibility for both federal and state laws. All four specifications are the most complete possible, that is, they are similar to (7) in Table 2.8. The difference between (1) and (2) (and (3) and (4)) on Table 2.11 is that the even-numbered regressions include only non-unanimous cases.

Here, I find no evidence of political cleavage on the decision to vote against the PGR brief to uphold the law under review.

Table 2.10 – Robustness checks (marginal effects)

Marginal Effects	(1)	(2)	(3)	(4)
Left	0.261**	0.192	0.313***	0.365*
	(0.107)	(0.173)	(0.115)	(0.193)
Right			-0.339***	-0.486***
			(0.092)	(0.130)
Right*	-0.183**	-0.312**		
	(0.075)	(0.124)		
Party in Gov.	-0.191**	-0.221**	-0.202**	-0.249*
	(0.079)	(0.107)	(0.081)	(0.141)
Prosecutor	-0.267**	-0.232	-0.242**	-0.297**
	(0.124)	(0.159)	(0.105)	(0.142)
Judge	-0.076	0.093	-0.080	0.021
	(0.188)	(0.270)	(0.169)	(0.256)
STJ	-0.057	-0.092	-0.038	-0.103
	(0.069)	(0.104)	(0.061)	(0.100)
Politician	-0.450***	-0.631***	-0.388***	-0.631***
	(0.133)	(0.187)	(0.115)	(0.173)
S.J.D.	-0.182	-0.259	-0.140	-0.258
	(0.119)	(0.181)	(0.112)	(0.179)
Gender	-0.163	-0.410	-0.086	-0.352
	(0.320)	(0.474)	(0.291)	(0.459)
Age on App.	0.002	0.014	0.001	0.009
	(0.008)	(0.013)	(0.007)	(0.012)
Experience	-0.025	0.012	-0.008	-0.002
	(0.019)	(0.029)	(0.015)	(0.027)
Unanimous	-0.174***		-0.198***	
	(0.057)		(0.058)	
PGR-Judge Align.	-0.046	-0.018	-0.042	-0.012
	(0.036)	(0.055)	(0.035)	(0.054)
Observations	1,642	901	1,609	901

Note: Clustered standard errors in parentheses (cluster on case); *** p<0.01, ** p<0.05, * p<0.1

Table 2.11 – Voting to uphold against the PGR brief (marginal effects)

	Federal Laws		State Laws	
Marginal Effects	(1)	(2)	(3)	(4)
Left	-0.360	-0.671	-0.026	-0.144
	(0.292)	(0.463)	(0.026)	(0.091)
Right	0.096	0.233	-0.033	-0.122
	(0.078)	(0.188)	(0.039)	(0.153)
Party in Gov	0.095	0.225	0.003	-0.011
	(0.136)	(0.170)	(0.011)	(0.023)
Prosecutor	-0.020	0.042	0.047***	0.156***
	(0.058)	(0.137)	(0.012)	(0.050)
Judge	-0.602	-1.423***	0.034	0.184
	(0.481)	(0.532)	(0.055)	(0.198)
STJ	0.399**	0.993***	0.017	0.007
	(0.196)	(0.381)	(0.036)	(0.150)
Politician	0.158	0.797	-0.001	-0.144
	(0.350)	(0.804)	(0.063)	(0.234)
S.J.D.	0.376	1.001**	0.006	-0.038
	(0.244)	(0.479)	(0.048)	(0.185)
Gender	1.037	2.604**	-0.033	-0.346
	(0.658)	(1.300)	(0.130)	(0.497)
Age on App.	-0.023	-0.071	0.003	0.019
	(0.021)	(0.049)	(0.004)	(0.015)
Experience	0.009	0.026	-0.001	-0.004
	(0.029)	(0.043)	(0.005)	(0.016)
Unanimous	-0.270***		-0.136***	
	(0.074)		(0.013)	
PGR-Judge Align.	-0.027	-0.065	0.003	-0.003
	(0.036)	(0.059)	(0.009)	(0.027)
Observations	1,183	725	9,453	2,599

Note: Clustered standard errors in parentheses (cluster on case); *** p<0.01, ** p<0.05, * p<0.1

2.8 Conclusion

The traditional measure of activism fails to distinguish legitimate constitutional control from the ideologically-motivated striking of laws. The new measure I propose on this paper, by conditioning the justices' votes on the brief the PGR is required to present to each case (which has the characteristic of an amicus brief in cases which it is not the petitioner) is an attempt to overcome this issue. As I have argued, the PGR was granted *de jure* independence from the executive in the 1988 Constitution, and its record over the past decades shows that this independence became a *de facto* characteristic of the institution. Further, the analysis of the PGR's record on the Supreme Court has shown that it presents high quality information to the court and the justices rely on this information, especially when the PGR is not the party to the case. Hence, it is sensible to use the PGR brief as a "neutral" measure of the law in this subset of cases, particularly where the brief is to uphold the law under review.

Two findings are especially relevant. First, justices are sensitive to the presence of their appointing party in the executive. When there is alignment, justices are less likely to engage in activist voting, strategically deferring to the elected powers. Of particular significance is the fact that his holds only with regard to the federal government. Justices do not respond to the presence of their appointing party in state executives. Second, justices that have experience in the legislative, that is, that were elected either as deputies or senators, are less likely to be activist. Again, this effect only holds for federal law cases.

Further, while most of the literature on the U.S. Supreme Court points to the notion that justices from either end of the political spectrum can be equally activist, here I find that activism in the Brazilian Supreme Court is correlated with ideology. Justices appointed by right-wing presidents are less likely to engage in activist voting – this holds for federal laws in both measures of activism analyzed here.

It is also noteworthy that, in the new measure of activism, experience in the legislative means deference to the national legislature, not to the states' legislatures. Justices who held elected office (either as deputy or senator) are less likely to vote to strike federal laws. The fact that this effect is not repeated when it comes to state laws means that the greater value those judges place on the views of parliamentarians does not apply to the entire legislative, but rather is restricted to the national legislature.

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Appendix A

Table 2.12 – Justices of the Brazilian Supreme Court

Justice	State of Birth	Appointing President	Appointment	Retirement
Moreira Alves	São Paulo	General Geisel	6/20/1975	4/20/2003
Néri da Silveira	Rio Grande do Sul	General Figueiredo	9/1/1981	4/24/2002
Aldir Passarinho	Piauí	General Figueiredo	9/2/1982	5/22/1991
Francisco Rezek*	Minas Gerais	General Figueiredo	3/24/1983	3/15/1990
Sydney Sanches	São Paulo	General Figueiredo	8/31/1984	4/27/2003
Octávio Galloti	Rio de Janeiro	General Figueiredo	11/20/1984	10/28/2000
Carlos Madeira	Maranhão	José Sarney	9/19/1985	3/17/1990
Célio Borja	Rio de Janeiro	José Sarney	4/17/1986	3/31/1992
Paulo Brossard	Rio Grande do Sul	José Sarney	4/25/1989	10/24/1994
Sepúlveda Pertence	Minas Gerais	José Sarney	5/17/1989	8/17/2007
Celso de Mello	São Paulo	José Sarney	8/17/1989	-
Carlos Velloso	Minas Gerais	Fernando Collor de Melo	6/13/1990	1/19/2006
Marco Aurélio	Rio de Janeiro	Fernando Collor de Melo	6/13/1990	-
Ilmar Galvão	Bahia	Fernando Collor de Melo	6/26/1991	5/3/2003
Maurício Corrêa	Minas Gerais	Itamar Franco	12/15/1994	5/8/2004
Nelson Jobim	Rio Grande do Sul	Fernando Henrique Cardoso	4/15/1997	3/19/2006
Ellen Gracie	Rio de Janeiro	Fernando Henrique Cardoso	12/14/2000	8/5/2011
Gilmar Mendes	Mato Grosso	Fernando Henrique Cardoso	6/20/2002	-
Ayres Britto	Sergipe	Luiz Inácio Lula da Silva	6/25/2003	11/17/2012
Cezar Peluso	São Paulo	Luiz Inácio Lula da Silva	6/25/2003	8/31/2012
Joaquim Barbosa	Minas Gerais	Luiz Inácio Lula da Silva	6/25/2003	7/30/2014
Eros Grau	Rio Grande do Sul	Luiz Inácio Lula da Silva	6/30/2004	7/30/2010
Ricardo Lewandowski	Rio de Janeiro	Luiz Inácio Lula da Silva	3/16/2006	-
Cármen Lúcia	Minas Gerais	Luiz Inácio Lula da Silva	6/21/2006	-
Menezes Direito[#]	Pará	Luiz Inácio Lula da Silva	9/15/2007	9/1/2009
Dias Toffoli	São Paulo	Luiz Inácio Lula da Silva	10/23/2009	-
Luiz Fux	Rio de Janeiro	Dilma Rousseff	3/3/2011	-
Rosa Weber	Rio Grande do Sul	Dilma Rousseff	12/19/2011	-
Teori Zavaski[#]	Santa Catarina	Dilma Rousseff	11/29/2012	1/19/2017
Roberto Barroso	Rio de Janeiro	Dilma Rousseff	6/26/2013	-
Edson Fachin	Rio Grande do Sul	Dilma Rousseff	6/16/2015	-

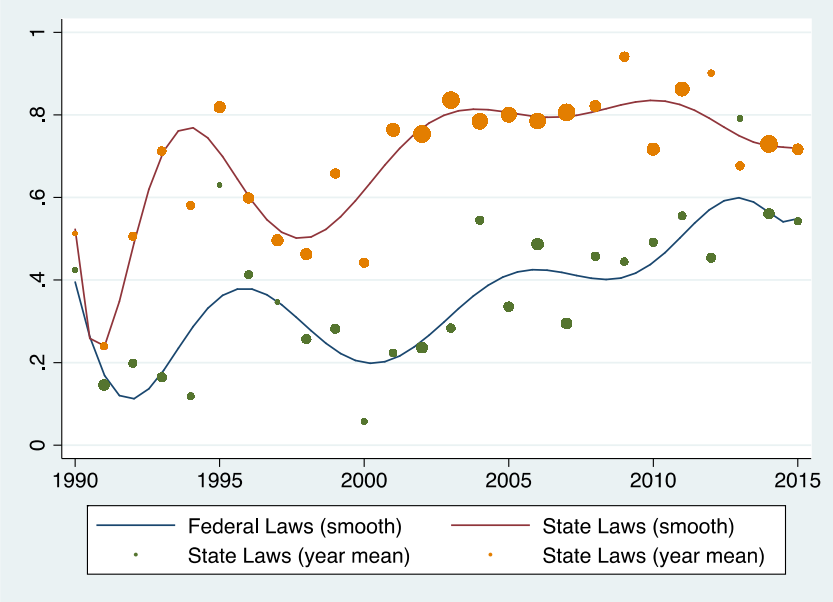
Notes: *Justice Rezek resigned in 1990 to be President Collor's Foreign Minister. In May 1992, Collor reappointed Rezek to the court, where he stayed until 1997, resigning again to become a judge of the International Court of Justice in The Hague. [#]Justices Direito and Zavaski died while serving in the Court.

Appendix B – Further descriptive statistics

B.1 The traditional measure of activism

Figure 2.2 shows the proportion of votes to strike laws over time. Importantly, the two groups display a distinct behavior. While the probability of striking state laws, after oscillating in the 1990s, has been mostly stable around 80% since the early 2000s, the probability of voting to strike federal laws has gradually but steadily increased over time, from around 20% in the early 1990s to close to 60% in 2015.

Figure 2.2 – Votes for Unconstitutionality over time

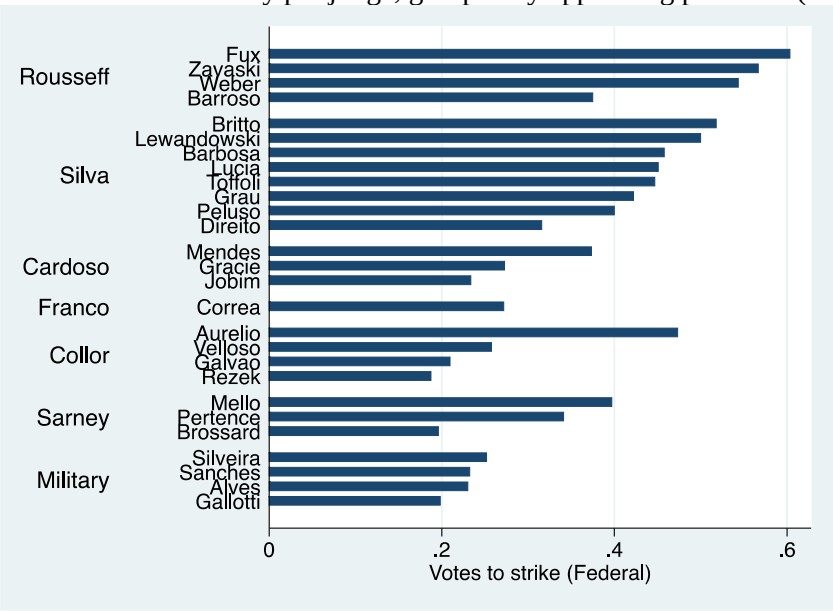


Note: Yearly averages weighed by data frequency.

Thus, if we interpret votes for unconstitutionality as activist, then the STF is, generally, more activist in relation to state laws than to federal laws. Further, the Court displays an increasing activism with regard to federal laws. Following, figures 2.3 and 2.4, respectively, display the individual justices' proportion of votes to strike down federal and state laws grouped by appointing president.

Figure 2.3 shows that there is broad variation among justices in their willingness to overturn federal statutes. While some justices, such as Rezek, Gallotti, and Brossard vote to strike just round 20% of federal laws, others are much more activist, voting to strike in nearly 60% of cases, like Justice Fux. Further, this figure shows that, at least when it comes to federal laws, the appointing president seems to be an important factor in determining activism.

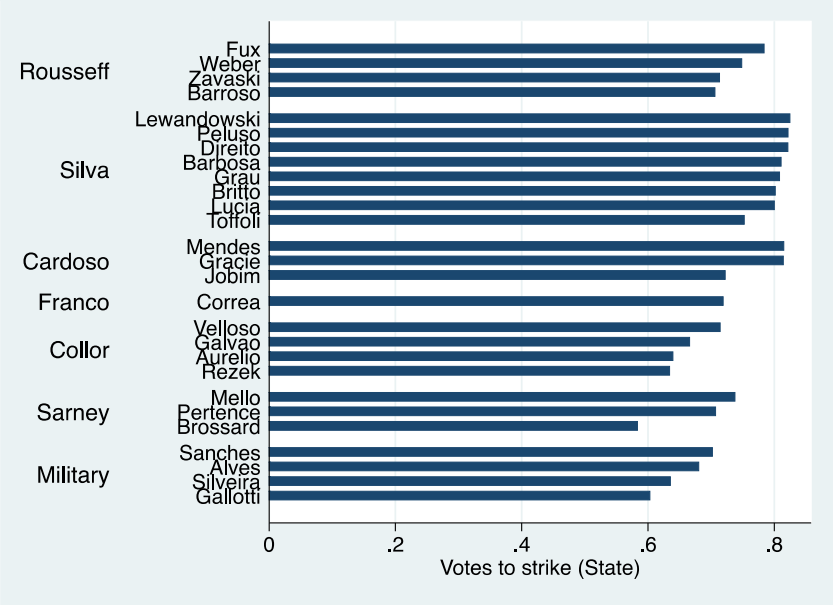
Figure 2.3 – Votes for unconstitutionality per judge, grouped by appointing president (federal laws)



Note: Justices Aldir Passarinho, Carlos Madeira, Celio Borja and Edson Fachin are excluded (too few data points).

Figure 2.4 displays the propensity of each STF justice to vote to invalidate state laws. The picture is strikingly different from that of federal laws. There is much less variation between judges and appointing presidents. Further, the overall probability of voting to strike a state law is larger, regardless of judge and appointer.

Figure 2.4 – Votes for unconstitutionality per judge, grouped by appointing president (state laws)



Note: Justices Aldir Passarinho, Carlos Madeira, Celio Borja and Edson Fachin are excluded (too few data points).

B.2 The new measure of activism

The new measure of activism I propose here entails the conditioning of the justice's votes on the brief filed by the PGR. Hence, Table 2.13 shows distribution of justices' votes in relation with the position of the brief presented by the PGR. Note that STF justices and the PGR are mostly in agreement. Over 85% of votes are in the same direction of the PGR brief. Further, justices agree with the PGR more often when the brief is to uphold than when it is to strike down the law under review.

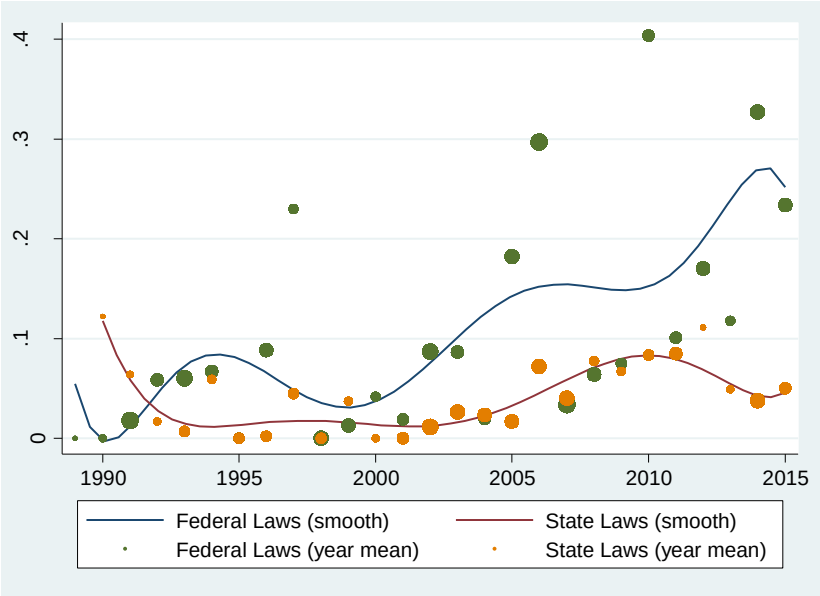
Table 2.13 – Distribution of votes

		STF		
		Strike	Uphold	Total
PGR	Strike	59.5%	9.5%	69.0%
	Uphold	5.4%	25.6%	31.0%
	Total	64.9%	35.1%	100.0%

In the measure of judicial activism I propose here, just 839 votes out of 15,883 are considered activist. While this represents just 5.4% of total votes, it accounts for 17.4% of votes in cases where the PGR brief is to uphold the law. As discussed, the argument that these votes are activist is much stronger than to simply consider any vote to strike down a law activist.

Following, Figure 2.5 illustrates the behavior of judicial activism over time. It displays the proportion of votes for unconstitutionality in cases where the PGR brief was to uphold the law per year. Again, cases are divided according to the type of law they question, namely, state or federal. The most striking aspect is that, unlike in the traditional measure, here activism is generally more common in cases that question federal laws. Also, while activism in state law cases is mostly stable over time, there is more variability when it comes to federal cases, where there seems to be a positive trend in activism starting in the late 1990s.

Figure 2.5 – Activism over time



Note: Yearly averages weighed by data frequency.

In the individual justice level, different patterns emerge. In cases that challenge federal laws, in Figure 2.6, activism seems more correlated with political appointment. As expected, judges appointed by military presidents are the least activist and very alike. Justice Marco Aurelio stands out as the most activist of the Collor appointees. Further, while all Silva appointees are close to each other (except from Justice Direito), the Rousseff appointees are more spread out, with Justice Zavaski standing out as the most activist of them. When it comes to state laws, in Figure 2.7, however, the picture is very different. There is less variability among the Rousseff appointees and, as a group, they are distinctly less activist than the Silva appointees.

Figure 2.6 – Activism in federal law cases, by judge.

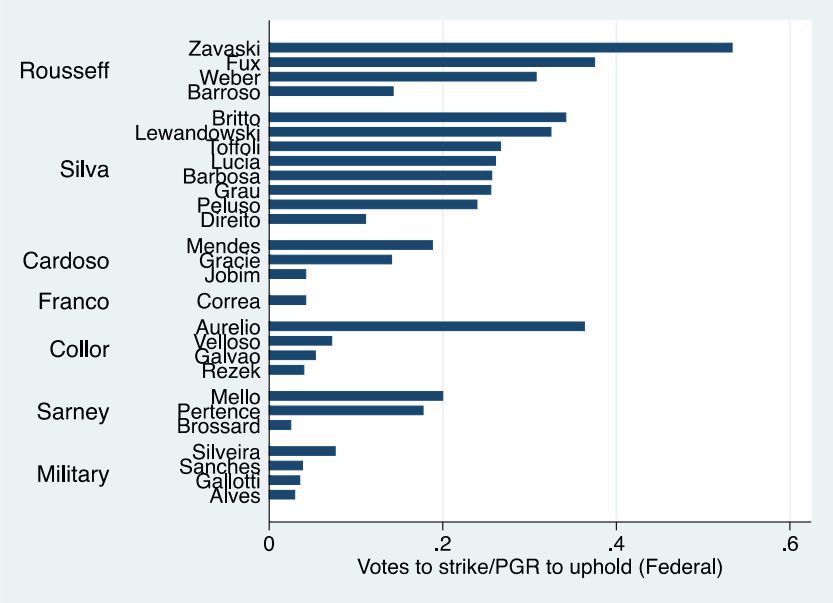
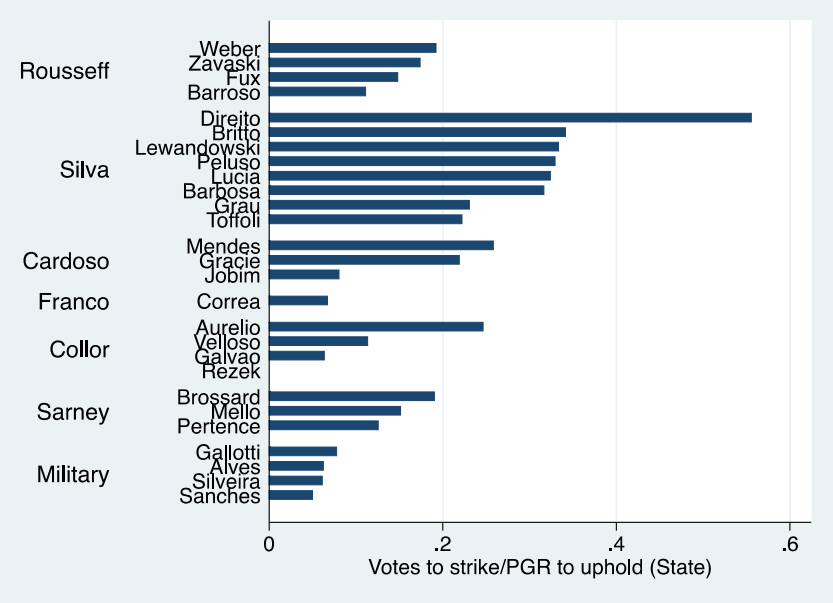


Figure 2.7 – Activism in state law cases, by judge.



Appendix C – Logistic regression output

In this Appendix, I display the logistic regression output. Tables 2.14 to 2.19 show are the regression output associated with the estimated marginal effects on tables 2.6 to 2.11, respectively, in Section 7.

Table 2.14 – The traditional measure (federal laws)

Y = Vote to Strike	(1)	(2)	(3)	(4)	(5)	(6)	(7)
Left	1.328***	1.164***	0.965*	0.813	0.741	0.045	0.149
	(0.281)	(0.299)	(0.535)	(0.602)	(0.620)	(0.674)	(0.998)
Right	-0.429***	-0.509***	-0.499***	-0.575***	-0.605***	-0.414**	-0.693**
	(0.125)	(0.161)	(0.176)	(0.195)	(0.197)	(0.186)	(0.310)
Party in Gov.	-0.892***	-0.561**	-0.585*	-0.410	-0.385	-0.507	-0.365
	(0.242)	(0.265)	(0.323)	(0.327)	(0.330)	(0.315)	(0.499)
Prosecutor		0.107	-0.480	-0.496	-0.513	-1.165**	-1.436**
		(0.076)	(0.422)	(0.491)	(0.505)	(0.459)	(0.718)
Judge		0.043	-0.595	-0.192	-0.171	0.221	0.585
		(0.090)	(0.632)	(0.700)	(0.713)	(0.683)	(0.976)
STJ		0.175	0.116	-0.112	-0.130	-0.972***	-1.231***
		(0.115)	(0.379)	(0.478)	(0.477)	(0.345)	(0.419)
Politician		0.026	-0.507	-0.721	-0.758	-1.616***	-2.188***
		(0.145)	(0.459)	(0.524)	(0.539)	(0.494)	(0.771)
S.J.D.		0.030	0.129	-0.163	-0.184	-1.139***	-1.515***
		(0.061)	(0.446)	(0.532)	(0.535)	(0.412)	(0.523)
Gender		0.079	1.160	0.432	0.401	-1.632	-2.298
		(0.111)	(1.179)	(1.310)	(1.321)	(1.101)	(1.478)
Age on App.		-0.001	-0.031	-0.002	-0.001	0.026	0.056*
		(0.006)	(0.034)	(0.032)	(0.032)	(0.024)	(0.033)
Experience		0.173***	0.177**	0.162*	0.154*	-0.0947	-0.0441
		(0.065)	(0.083)	(0.090)	(0.089)	(0.091)	(0.118)
Unanimous				-0.067	-0.083	-0.022	
				(0.210)	(0.212)	(0.221)	
PGR to Strike				2.240***	2.115***	2.098***	1.058***
				(0.218)	(0.241)	(0.251)	(0.261)
AGU to Strike				0.128	0.265	0.309	0.753
				(0.499)	(0.485)	(0.491)	(0.494)
Judge F.E.	No	No	Yes	Yes	Yes	Yes	Yes
Petitioner F.E.	No	No	No	No	Yes	Yes	Yes
Court F.E.	No	No	No	No	No	Yes	Yes
Constant	-0.647***	-2.088***	-0.018	-2.275	-2.297	-1.207	-1.715
	(0.107)	(0.702)	(2.084)	(2.200)	(2.192)	(1.802)	(2.539)
Observations	3,598	3,598	3,597	3,597	3,597	3,575	1,917
Clusters	373	373	373	373	373	371	193
Pseudo-R^2	0.029	0.034	0.039	0.218	0.223	0.234	0.142

Note: Clustered standard errors in parentheses (cluster on case); *** p<0.01, ** p<0.05, * p<0.1

Table 2.15 – The traditional measure (state laws)

Y = Vote to Strike	(1)	(2)	(3)	(4)	(5)	(6)	(7)
Left	0.178**	0.082	0.277	0.345	0.298	0.453	0.601
	(0.0773)	(0.101)	(0.236)	(0.340)	(0.340)	(0.285)	(0.543)
Right	-0.272***	-0.351***	-0.256**	-0.085	-0.069	0.118	0.135
	(0.072)	(0.092)	(0.101)	(0.143)	(0.143)	(0.128)	(0.216)
Party in Gov.	-0.028	-0.016	-0.004	-0.145	-0.136	-0.116	-0.037
	(0.077)	(0.077)	(0.078)	(0.113)	(0.112)	(0.114)	(0.128)
Prosecutor		-0.120***	-0.518***	-1.074***	-1.087***	-0.371**	-0.587
		(0.039)	(0.187)	(0.266)	(0.268)	(0.179)	(0.377)
Judge		0.028	0.389	0.073	0.056	0.045	0.039
		(0.042)	(0.285)	(0.395)	(0.399)	(0.320)	(0.558)
STJ		-0.074	-0.216	-1.013***	-1.030***	-0.373*	-0.506
		(0.067)	(0.206)	(0.304)	(0.307)	(0.224)	(0.494)
Politician		-0.086	-0.376*	-1.079***	-1.106***	-0.292	-0.241
		(0.074)	(0.222)	(0.314)	(0.319)	(0.236)	(0.450)
S.J.D		0.164***	0.094	-0.822**	-0.852**	-0.324	-0.393
		(0.037)	(0.251)	(0.354)	(0.359)	(0.271)	(0.546)
Gender		0.172***	0.349	-1.473	-1.527*	-0.450	-0.324
		(0.059)	(0.638)	(0.910)	(0.920)	(0.694)	(1.228)
Age on App.		0.004	-0.029	0.004	0.005	0.008	0.012
		(0.003)	(0.019)	(0.027)	(0.028)	(0.021)	(0.027)
Experience		0.066**	0.122***	0.049	0.038	0.051	0.019
		(0.031)	(0.042)	(0.060)	(0.062)	(0.057)	(0.087)
Unanimous				0.933***	0.927***	0.930***	
				(0.154)	(0.157)	(0.162)	
PGR to Strike				3.664***	3.716***	3.756***	1.940***
				(0.192)	(0.201)	(0.208)	(0.222)
AGU to Strike				0.287	0.316	0.369	0.357
				(0.207)	(0.207)	(0.245)	(0.250)
Judge F.E.	No	No	Yes	Yes	Yes	Yes	Yes
Petitioner F.E.	No	No	No	No	Yes	Yes	Yes
Court F.E.	No	No	No	No	No	Yes	Yes
Constant	1.138***	0.458	1.956*	-1.806	-1.679	-3.141**	-2.435
	(0.071)	(0.316)	(1.064)	(1.561)	(1.611)	(1.289)	(1.714)
Observations	11,985	11,985	11,983	11,983	11,983	11,983	3,496
Clusters	1305	1305	1305	1305	1305	1305	372
Pseudo-R^2	0.010	0.012	0.017	0.380	0.382	0.396	0.239

Note: Clustered standard errors in parentheses (cluster on case); *** p<0.01, ** p<0.05, * p<0.1

Table 2.16 – The new measure of activism (federal laws)

Y = Vote to Strike	(1)	(2)	(3)	(4)	(5)	(6)	(7)	(8)
Left	2.383***	2.075***	2.426***	2.168**	2.135**	2.002**	2.027**	1.251
	(0.658)	(0.623)	(0.894)	(0.937)	(0.931)	(0.860)	(0.803)	(1.080)
Right	-0.787***	-0.885**	-1.529**	-1.710***	-1.784***	-1.903***	-2.416***	-2.705***
	(0.270)	(0.345)	(0.600)	(0.593)	(0.613)	(0.611)	(0.651)	(0.844)
Party in Gov.	-2.049***	-1.520**	-1.519**	-1.446**	-1.412**	-1.319**	-1.317**	-1.703**
	(0.632)	(0.609)	(0.661)	(0.661)	(0.679)	(0.607)	(0.542)	(0.738)
Prosecutor		0.0499	-0.834	-0.971	-1.047	-1.484*	-1.837**	-1.345
		(0.106)	(0.713)	(0.724)	(0.786)	(0.759)	(0.856)	(0.937)
Judge		-0.272	-1.122	-0.955	-0.981	-0.446	-0.525	0.539
		(0.172)	(1.345)	(1.389)	(1.421)	(1.272)	(1.294)	(1.565)
STJ		0.482*	0.690	0.463	0.419	-0.267	-0.393	-0.536
		(0.256)	(0.618)	(0.634)	(0.638)	(0.593)	(0.480)	(0.598)
Politician		-0.733**	-1.615**	-2.136***	-2.189**	-2.722***	-3.098***	-3.663***
		(0.335)	(0.808)	(0.822)	(0.873)	(0.877)	(0.946)	(1.115)
S.J.D.		-0.164	-0.0792	-0.306	-0.320	-1.244	-1.256	-1.503
		(0.104)	(0.869)	(0.889)	(0.895)	(0.812)	(0.822)	(1.052)
Gender		0.0805	1.414	0.781	0.783	-1.362	-1.122	-2.383
		(0.167)	(2.475)	(2.546)	(2.574)	(2.280)	(2.203)	(2.745)
Age on App.		0.0122	-0.0325	-0.0101	-0.0117	0.0300	0.0120	0.0822
		(0.00993)	(0.0741)	(0.0768)	(0.0780)	(0.0636)	(0.0576)	(0.0724)
Experience		0.257**	0.254**	0.171	0.165	0.162	0.174	0.0691
		(0.101)	(0.129)	(0.124)	(0.125)	(0.169)	(0.135)	(0.171)
Unanimous				-1.334***	-1.346***	-1.217***	-1.202***	
				(0.379)	(0.377)	(0.387)	(0.432)	
PGR-Judge Align.						-0.447*	-0.315	-0.106
						(0.248)	(0.241)	(0.316)
Judge F.E.	No	No	Yes	Yes	Yes	Yes	Yes	Yes
Petitioner F.E.	No	No	No	No	Yes	Yes	Yes	Yes
PGR F.E.	No	No	No	No	No	Yes	Yes	Yes
Court F.E.	No	No	No	No	No	No	No	No
Constant	-1.165***	-3.765***	-10.40*	-11.74*	-12.42*	-16.31**	-35.61***	-21.81**
	(0.171)	(1.000)	(6.265)	(6.195)	(6.964)	(6.948)	(7.850)	(8.858)
Observations	1,660	1,660	1,651	1,651	1,651	1,642	1,642	901
Clusters	173	173	173	173	173	172	172	92
Pseudo-R^2	0.065	0.077	0.082	0.138	0.142	0.157	0.208	0.206

Note: Clustered standard errors in parentheses (cluster on case); *** p<0.01, ** p<0.05, * p<0.1

Table 2.17 – The new measure of activism (state laws)

Y = Vote to Strike	(1)	(2)	(3)	(4)	(5)	(6)	(7)	(8)
Left	0.452***	0.465**	1.789**	1.423*	1.416*	1.205	0.109	1.457
	(0.161)	(0.225)	(0.730)	(0.775)	(0.762)	(0.811)	(0.751)	(1.603)
Right	-0.821***	-0.865***	-0.543	-0.473	-0.543	-0.481	-0.185	-0.187
	(0.252)	(0.300)	(0.393)	(0.399)	(0.409)	(0.427)	(0.368)	(0.595)
Party in Gov.	-0.215	-0.214	-0.174	-0.035	-0.025	-0.066	-0.064	-0.484*
	(0.219)	(0.217)	(0.220)	(0.232)	(0.225)	(0.232)	(0.241)	(0.270)
Prosecutor		0.018	-0.135	0.001	-0.028	0.026	-0.028	-1.490
		(0.102)	(0.527)	(0.583)	(0.573)	(0.557)	(0.400)	(1.926)
Judge		-0.195	0.708	0.449	0.209	0.249	0.054	-1.789**
		(0.145)	(0.767)	(0.769)	(0.752)	(0.690)	(0.625)	(0.907)
STJ		0.167	-0.781	-0.422	-0.319	-0.244	-0.125	0.291
		(0.192)	(0.549)	(0.544)	(0.529)	(0.526)	(0.436)	(1.419)
Politician		-0.202	-0.305	-0.168	-0.214	0.019	-0.127	-1.586
		(0.237)	(0.680)	(0.750)	(0.733)	(0.741)	(0.530)	(2.094)
S.J.D.		0.107	-1.354**	-0.878	-0.704	-0.663	-0.424	-0.408
		(0.094)	(0.686)	(0.677)	(0.675)	(0.719)	(0.620)	(1.590)
Gender		0.171	-2.808*	-1.887	-1.423	-1.339	-0.809	0.692
		(0.121)	(1.668)	(1.641)	(1.605)	(1.602)	(1.347)	(1.886)
Age on App.		0.013	0.088	0.066	0.048	0.056	0.039	0.048
		(0.010)	(0.054)	(0.051)	(0.049)	(0.044)	(0.041)	(0.062)
Experience		0.179*	0.245*	0.197	0.202	0.113	0.006	0.017
		(0.0959)	(0.126)	(0.129)	(0.126)	(0.147)	(0.118)	(0.187)
Unanimous				-1.079***	-0.967***	-0.971***	-0.695*	
				(0.317)	(0.343)	(0.346)	(0.392)	
AGU to Strike				2.059	2.641*	2.484*	2.728*	4.409***
				(1.469)	(1.390)	(1.482)	(1.476)	(1.169)
PGR-Judge Align.						-0.276	-0.0744	-0.0171
						(0.186)	(0.182)	(0.277)
Judge F.E.	No	No	Yes	Yes	Yes	Yes	Yes	Yes
Petitioner F.E.	No	No	No	No	Yes	Yes	Yes	Yes
PGR F.E.	No	No	No	No	No	Yes	Yes	Yes
Court F.E.	No	No	No	No	No	No	Yes	Yes
Constant	-1.166***	-3.261***	-7.787**	-5.837*	-4.821	-4.608*	-2.693	-1.810
	(0.184)	(0.884)	(3.233)	(3.227)	(3.072)	(2.710)	(2.561)	(3.090)
Observations	1,797	1,797	1,784	1,784	1,784	1,784	1,759	651
Clusters	198	198	198	198	198	198	195	72
Pseudo-R^2	0.037	0.043	0.049	0.101	0.142	0.160	0.200	0.190

Note: Clustered standard errors in parentheses (cluster on case); *** p<0.01, ** p<0.05, * p<0.1

Table 2.18 – Robustness checks

Y = Vote to Strike	(1)	(2)	(3)	(4)
Left	1.914**	0.876	2.357***	2.293*
	(0.787)	(1.110)	(0.852)	(1.202)
Right			-2.556***	-3.048***
			(0.706)	(0.836)
Right*	-1.259**	-1.811**		
	(0.523)	(0.739)		
Party in Gov.	-1.317**	-1.703**	-1.520**	-1.563**
	(0.542)	(0.738)	(0.609)	(0.689)
Prosecutor	-1.837**	-1.345	-1.824**	-1.866**
	(0.856)	(0.937)	(0.795)	(0.902)
Judge	-0.525	0.539	-0.604	0.135
	(1.294)	(1.565)	(1.273)	(1.604)
STJ	-0.393	-0.536	-0.284	-0.648
	(0.480)	(0.598)	(0.461)	(0.625)
Politician	-3.098***	-3.663***	-2.924***	-3.957***
	(0.946)	(1.115)	(0.893)	(1.107)
S.J.D.	-1.256	-1.503	-1.054	-1.622
	(0.822)	(1.052)	(0.845)	(1.121)
Gender	-1.122	-2.383	-0.645	-2.208
	(2.203)	(2.745)	(2.197)	(2.873)
Age on App.	0.012	0.082	0.001	0.062
	(0.057)	(0.072)	(0.056)	(0.077)
Experience	-0.174	0.069	-0.062	-0.011
	(0.135)	(0.171)	(0.116)	(0.168)
Unanimous	-1.202***		-1.490***	
	(0.432)		(0.481)	
PGR-Judge Align.	-0.315	-0.106	-0.320	-0.0727
	(0.241)	(0.316)	(0.258)	(0.338)
Judge F.E.	Yes	Yes	Yes	Yes
Petitioner F.E.	Yes	Yes	Yes	Yes
PGR F.E.	Yes	Yes	Yes	Yes
Court F.E.	Yes	Yes	No	No
Year F.E.	No	No	Yes	Yes
Constant	2.086	-22.22**	-20.91***	-42.19***
	(3.606)	(8.714)	(7.035)	(8.521)
Observations	1,642	901	1,609	901
Clusters	172	92	168	92
Pseudo-R^2	0.208	0.206	0.274	0.257

Note: Clustered standard errors in parentheses (cluster on case); *** p<0.01, ** p<0.05, * p<0.1

Table 2.19 – Voting to uphold against the PGR brief

	Federal Laws		State Laws	
Y = Vote to Uphold	(1)	(2)	(3)	(4)
Left	-1.999	-3.375	-0.312	-0.978
	(1.267)	(1.936)	(0.318)	(0.622)
Right	0.534	1.173	-0.399	-0.829
	(0.440)	(0.805)	(0.291)	(0.473)
Party in Gov	0.525	1.133	0.036	-0.072
	(0.761)	(0.863)	(0.135)	(0.155)
Prosecutor	-0.111	0.211	0.571***	1.065***
	(0.322)	(0.689)	(0.149)	(0.345)
Judge	-3.337	-7.150***	0.405	1.255
	(2.590)	(2.762)	(0.660)	(1.356)
STJ	2.214**	4.992**	0.209	0.048
	(1.100)	(1.962)	(0.440)	(1.022)
Politician	0.873	4.004	-0.007	-0.978
	(1.949)	(4.069)	(0.763)	(1.597)
S.J.D.	2.087	5.031**	0.0835	-0.259
	(1.360)	(2.454)	(0.578)	(1.257)
Gender	5.750	13.09**	-0.397	-2.355
	(3.689)	(6.669)	(1.553)	(3.395)
Age on App.	-0.126	-0.361	0.0388	0.135
	(0.120)	(0.254)	(0.0480)	(0.105)
Experience	0.050	0.134	-0.005	-0.030
	(0.161)	(0.216)	(0.069)	(0.109)
Unanimous	-1.498***		-1.631***	
	(0.479)		(0.195)	
PGR-Judge Align.	-0.148	-0.327	0.038	-0.019
	(0.202)	(0.296)	(0.115)	(0.182)
Judge F.E.	Yes	Yes	Yes	Yes
Petitioner F.E.	Yes	Yes	Yes	Yes
PGR F.E.	Yes	Yes	Yes	Yes
Court F.E.	Yes	Yes	Yes	Yes
Constant	7.434	19.07*	-3.510	-7.395
	(5.278)	(11.31)	(2.176)	(4.905)
Observations	1,183	725	9,453	2,599
Clusters	122	72	1030	275
Pseudo-R^2	0.163	0.151	0.167	0.166

Note: Clustered standard errors in parentheses (cluster on case); *** p<0.01, ** p<0.05, * p<0.1

3. Dissent Aversion and Sequential Voting in the Brazilian Supreme Court

3.1 Introduction

In September 2013, an unlikely character became the focus of national attention, capturing the attention of the media and featuring on the cover of the most widely distributed weekly magazine in Brazil, *Veja*. This figure was Justice Celso de Mello, the most senior, relatively low-profile, Brazilian Supreme Court judge. One of the most media-averse justices, who very rarely talks to reporters or gives interviews, he found himself in the middle of a media frenzy because of his unique position as the last judge to vote.

Although the case had broad political ramifications, its particularities are beside the point[20]. What is relevant for this study is that Justice Mello's vote would settle the question, would break the 5-5 tie. Importantly, it was the institutional setting of the Brazilian Supreme Court that put Justice Mello in the situation he was in. As the most senior justice, he usually casts the penultimate vote – before the Chief Justice – but, in that case, as the Chief Justice was the case rapporteur, it fell upon him to cast the final vote.

This case illustrates how important are institutional settings, and how they condition behavior. Had the rules regarding voting order been different, another judge would have found himself in that position – or perhaps a different voting order would have meant that a majority would have been reached before that last vote, and Justice Mello would not have become the focus of so much unwanted attention.

The purpose of this paper is to explore the peculiar order of discussion and voting in the Brazilian Supreme Court to distinguish and quantify two important components of the judges' decision to dissent: dissent aversion and ideological heterogeneity. The first aspect – dissent aversion – relates to the notion that disagreements, in collegial courts, are costly both to the dissenter and to his peers. As Posner (2008, p. 32) put it, judges dislike dissenting since "not only is it a bother and frays collegiality, and usually has no effect on the law, but it also tends to magnify the significance of the majority position". In other words, dissents are costly and often have the effect of magnifying a position contrary to the preferences of the dissenter.

The second aspect incorporates the idea that, as the attitudinal model (Segal and Spaeth 2002) posits, judges are policy seekers and dissent is a byproduct of ideological disagreement. As Epstein et al. (2013, p. 257-258) point out, divergences over technical legal issues, where judges reason from shared premises, are less likely to result in dissents than ideological disagreements, since those are rooted in values, experience, and temperament, and therefore harder to reconcile through discussion and compromise.

The empirical literature that investigates the incentives of dissenting behavior in judges mostly agrees that political preferences are key. Preferences, however, are conditioned by the institutional

[20] Some high-profile politicians and businessman, who had been convicted of wrongdoing by the Supreme Court, petitioned (through a motion called *embargos infringentes*) to have their sentences reexamined by the Court, as there had been many dissenting votes in the original trial. Justice Mello's vote decided the issue by granting them the right to appeal.

environment in which judges operate. As Garoupa et al (2012) show in the Spanish context, where judges face strong pressures towards consensus, a high unanimity rate may mask the underlying political tensions and disagreements within the court.

Conversely, in the U.S. Supreme Court, where the cost of dissent is comparatively low, as justices have a light workload, enjoy the support of several law clerks, and benefit from an environment where dissent has come to be expected, dissent is rampant[21] (in Epstein et al. 2013, 57.4% of cases have at least one dissenting vote). In this Court, however, judges have an added benefit of dissent. As precedents are more likely to be reexamined (due to low workload), justices face the prospect of influencing future decisions with their written dissents.

In this study, voting order is key to the identification of dissent aversion. Here, the idea is that, once a majority has been reached, that is, after six out of the eleven justices have voted in a particular direction (either to uphold or to strike down the law under review), the outcome of the case is settled. The judges who vote subsequently know that their votes cannot change the outcome, no matter how strongly they may disagree with it. Consequently, if they are dissent averse, they may deviate from their preferred vote and join the majority.

In the Brazilian Supreme Court, the voting sequence changes in nearly every case, hence making the identity of the judges who vote after the formation of a majority equally variable. Among the main sources of voting order variation are rapporteur assignment, which is random[22] within each class of petitions that are presented to the Court, the rotating position of Chief Justice, and changes in the Court's composition, which are relatively frequent since retirement is mandatory at 75[23].

The empirical strategy seeks to address some issues that could hamper identification. First, from the outset, only non-unanimous cases are included in the database. The inclusion of unanimous cases would distort results as, in non-controversial cases, votes are highly correlated and voting order should not be relevant. Also, as judges who vote after the formation of a majority tend to be the most senior, by controlling for their experience in court and voting slot, results should not be influenced by potential changes in the individual proclivities towards dissent related to age and experience. Lastly, in the robustness checks, by restricting the sample to include only the more disputed cases, I ensure that judges who vote after the pivotal judge have a plausible legal position to adhere to in case they disagree with the majority.

The main result is that dissent aversion is a significant component of judicial behavior in the Brazilian Supreme Court. When judges know their votes will not alter the Court's ruling, they defer to the

[21] This was not always the case. See, for instance, Hendershot et al. (2012) on the demise of the U.S. Supreme Court's "norm of consensus".
[22] There is an automated system that allocates cases to judges. The draw is random within each class of petitions, ensuring that there is an even workload among justices.
[23] Mandatory retirement used to be at 70 until 2015.

majority, hence avoiding the costs of a dissent. This effect is significant in all econometric specifications and survives all robustness checks. Ideological heterogeneity, however, does not fare so well. Even though the effect is, at first, significant, when the sample is restricted to include only highly disputed cases, that is, cases with two or more dissents, significance vanishes. I interpret this result to mean that ideological heterogeneity matters to the isolated judge, that is, when a judge is his party's sole appointee to the court, his likelihood of dissenting is larger.

This paper is organized as follows. Section 2 briefly discusses the literature on dissenting behavior, emphasizing the differences of judiciaries from the common-law and civil-law traditions. Section 3 presents in detail the voting sequence in the Brazilian Supreme Court, illustrating how it changes according to the justice rapporteur and Chief-Justice. Section 4 discusses the empirical strategy and Section 5 presents the database I use and provides some descriptive statistics. Section 6 presents and discusses the results and, lastly, Section 7 concludes this paper.

3.2 Literature review

3.2.1 Why judges dissent

Significant research in judicial behavior has focused on understanding the underlying motives that lead judges to dissent. A substantial part of the literature, drawing from the omnipresent attitudinal model (Segal and Spaeth, 2002), emphasizes the ideological and partisan nature of dissent. Here, put simply, dissent arises from political disagreement between judges. This approach has found empirical confirmation in a multitude of contexts, from the U.S. Supreme Court (i.e., Wahlbeck et al., 1999) to the various constitutional courts of Europe (Hanretty (2012) on Portugal and Spain; Hanretty (2015) on Estonia; Bricker (2017) on Eastern-European courts) and Latin America (i.e., Tiede (2016) on Chile).

Other models of judicial behavior, while acknowledging the important role ideology and policy preferences play on the decision to dissent, have sought to incorporate further elements, either behavioral and/or institutional, to better account for the broad variability of dissent rates found in courts within the U.S. judicial system and around the world. The neo-institutional approach of Brace and Hall (1993), for instance, highlights the importance of certain court procedures, such as the voting order, and how they condition the judge's decision to dissent.

In a rational-choice approach, Epstein et al. (2011) compares the costs and benefits of dissent, focusing on U.S. federal court of appeals judges. The main benefit of dissent derives from the enhanced reputation of the judge who writes it. Although a dissent may undermine the influence of the majority opinion, it has the drawback, as Posner (2008) points out, of drawing attention to the majority, enhancing its significance. Among the costs of dissent, the most evident is the effort cost of writing a separate opinion. A dissent can also lead to an effort cost on the author of the majority, who may have to rewrite parts of the

majority opinion to address criticisms from the dissenter. There are also collegiality costs, as judges resent criticism – a judge who frequently dissents might become less well-liked, which means that he may find it harder to convince his fellow judges to join his positions.

The costs of dissenting have the potential of disguising ideological disagreement. As Fischman (2008) show, in the context of U.S. courts of appeals, dissents entail a positive cost both for the majority and the minority. Consequently, the overall dissent rate may underestimate the real level of disagreement within the court, disguising the effect of ideology on case outcomes, as a positive cost of dissent means a majority may compromise to prevent a dissent by a fellow judge.

However, incentives are, to some extent, different at the Supreme Court. As justices have a lighter workload and multiple law clerks, their opportunity cost of writing a dissent is lower. Also, justices are more in the public eye (concern about displaying a coherent judicial philosophy) and are more likely to influence law when dissenting, as the lower workload means a higher willingness to reexamine precedents (Epstein et al. 2013, p. 263).

Dissent can also serve strategic purposes. For instance, Blackstone and Collins (2014) show that dissents can be used (in lower courts) to invite further judicial review. They show that a judge in a U.S. courts of appeals is more likely to dissent when review by the full court (*en banc*) or by the Supreme Court will likely promote the judge's policy preferences.

Further, while in the attitudinal model judges disagree about outcome, and legal arguments are held to be mere frames to ideological disagreement, Niblett and Yoon (2015) investigate exactly how judges justify their positions. Using data on the U.S. federal courts of appeals, they find that, when judges disagree, the divergence is not over the interpretation of precedent, but rather on which set of precedents apply. Also, the selection of precedents is skewed according to ideological predisposition. Precedents cited both in the majority opinion and in the dissent, however, show no clear ideological leaning.

3.2.2 Dissent in the civil-law tradition

An important issue is whether judges from courts in the civil-law tradition can be expected to behave in the same way and face the same incentives as judges from the common-law tradition, which are the subject of all the formal models of judicial behavior discussed above. This question is especially relevant when we consider that judges from the common-law tradition typically come from a very different background from those in the civil-law.

While in civil-law countries judges are mostly recruited straight out of the university, are considered part of civil service and advance their careers through a mixture of merit and seniority, in common-law countries judges are appointed much later in life, after having enjoyed long careers as lawyers or law professors. Hence, in common-law countries, a judgeship is usually the culmination of someone's career,

rather than the beginning as in the civil-law tradition. These two systems for selecting judges are known in the literature as career and recognition judiciaries and are believed to entail several important differences in incentives for judges (for more details see, for instance, Georgakopoulos 2000).

Among those differences, one that is particularly relevant for this paper is that judges from the civil-law tradition tend to have a strong *esprit de corps*, that is, they tend to place very high value on the reputation of the body to which they belong. Consequently, dissent is highly discouraged in those courts, even where theoretically allowed. Furthermore, as Merryman and Perez-Perdomo (2007) point out, the idea of legal certainty is the "supreme value" of the civil-law system and, in this logic, court decisions must be presented as inevitable consequences of law and fact, not the product of policy-oriented judging. Hence, the mere possibility of dissents would show that the application of law to fact is not mechanic and therefore susceptible to the idiosyncrasies of individual judges.

Consequently, in Europe up until the end of the Second World War and the establishment of constitutional courts throughout the continent, dissent was mostly inexistent. Decisions rendered by collegial courts were signed by all judges, regardless of their agreement with the decision. As Kelemen (2013) show, the introduction of the possibility of dissent is closely tied to the creation of Kelsenian constitutional courts, which were designed as external to the existing judicial systems. It is revealing that, over sixty years on, the existence of dissents has not spread beyond the constitutional courts in most European countries: according to Kelemen (2013, p. 1349), the Spanish legal system is the only one in western Europe that allows dissent in the whole judiciary.

However, even in Spain dissents remain rare outside the constitutional court. In Garoupa et al. (2012), which investigates the political determinants of voting in a court dominated by career judiciary (the Spanish Supreme Court), their database of decisions in administrative review contains over 95 percent of unanimous decisions. The authors argue that the high level of unanimity does not necessarily indicate that a career judiciary is politically insulated, as the strong norm of consensus can mask judicial politicization.

In Brazil, as in other Latin American countries, dissent has a longer history. Even though most of Brazilian judicial institutions were strongly influenced by the Portuguese due to over three centuries of colonization, some of the new institutions designed in the first republican constitution (1891) were modeled after those of the greatest republic of the day, the United States. Among those is the Brazilian Supreme Court (*Supremo Tribunal Federal* in Portuguese, henceforth STF), which shares many characteristics with its U.S. counterpart, most notable of all the selection rule of its members (Oliveira and Garoupa 2011). Hence, dissents have been part of the STF's decision-making process from the outset. Judges' votes are always signed and have always been integral part of the Court's ruling – the *Acórdão* – regardless of their status in relation with the majority.

It is important to point out that, as STF justices are political appointees who had long careers ahead of their appointment to the Court, it could make sense to classify the Brazilian Supreme Court as a recognition judiciary institution. However, a significant proportion of the pool of potential justices are federal and state judges, typical members of a career judiciary. Accordingly, a fair share of STF justices are former judges (around 30% in the last 30 years). Therefore, it is reasonable to assume that the STF will display a mixture of traits from both systems. Dissent aversion will likely be lower than that of comparable European institutions, but higher than in the U.S. Supreme Court.

3.3 Sequential voting at the Brazilian Supreme Court

Courts that operate in collegiate form, either with multiple chambers or as a single decision-making body, must have a pre-established sequence for discussion and voting, otherwise chaos would ensue. Naturally, this sequence does not need to be written in statutes. Informal self-enforced mechanisms might work equally well. In the Brazilian Supreme Court, however, the voting sequence is clearly stated in the Court's Internal Rules of Procedure and, in the Brazilian context, is unique.

In U.S. state supreme courts, for instance, there is broad variability on the rules regarding the order of discussion and voting (i.e., Hall 1990; Hughes et al. 2014). Nevertheless, collegial courts generally operate either in seniority or reverse seniority order, which entail different intra-court dynamics. A seniority voting sequence may favor consensus-building. With the most senior judges voting first, the junior judges are able to gather high-quality information before they are required to vote, leading to less disagreement (Brace and Hall 1993). However, reverse seniority voting might be better suited to highly polarized courts. If the case outcome is to be decided by the last votes, having a senior justice break the tie could bring more legitimacy to the court's ruling.

At the STF, the first vote is always of the Justice Rapporteur, regardless of his seniority. In this Court, as in other constitutional courts, the Rapporteur plays a key role in decision-making process. His duties range from analyzing *amici curiae* requests and ensuring all relevant parties have had their say, to ruling on his own in *in limine* motions. Also, it is the Rapporteur who decides when the case is ready to be presented to the Court. However, as the power to set the Court's agenda lies with the Chief Justice, the Rapporteur has no control over the timing of his cases after he has handed them over to the Chief.

Following, the other justices vote in reverse seniority order, meaning that the most junior justice is the first to vote after the Rapporteur. The Chief Justice typically votes last, unless when he is the Rapporteur himself. It is important to point out that, at the STF, the position of Chief Justice rotates deterministically. Even though the Court holds an election every two years to select the Chief Justice, the result is always known beforehand, as the Court traditionally elects the most senior justice who has never been Chief Justice.

This mechanism ensures that there is no campaigning for the position and that nearly every justice gets to be Chief for a term.

To illustrate the many changes in the voting order that arise from the assignment of the Rapporteur and the rotation of the Chief Justice, Table 3.1 shows some possible scenarios considering the Court as it stood in 2016. Column (1) shows the reverse seniority order, with Edson Fachin the most junior and Celso de Mello the most senior justice. Then, column (2) shows the voting sequence with Ricardo Lewandowski as Chief Justice (2014-2016 term). Note that all justices more senior than the Chief vote earlier than they would compared to column (1). Further, in column (3), Justice Mendes is the Rapporteur, displacing the voting order of all justices less senior than him. Lastly, column (4) keeps Justice Mendes as Rapporteur but in a scenario where Lewandowsky, the Chief Justice, is absent and Cármen Lúcia, his deputy, presides over the proceedings. Justice Lewandowski's absence shifts the voting position of all judges more senior than Justice Toffoli.

Table 3.1 – Voting sequence scenarios

	Scenario			
Order	(1)	(2)	(3)	(4)
1	Fachin	Fachin	Mendes	Mendes
2	Barroso	Barroso	Fachin	Fachin
3	Zavaski	Zavaski	Barroso	Barroso
4	Weber	Weber	Zavaski	Zavaski
5	Fux	Fux	Weber	Weber
6	Toffoli	Toffoli	Fux	Fux
7	Lúcia	Lúcia	Toffoli	Toffoli
8	Lewandowski	Mendes	Lúcia	Aurélio
9	Mendes	Aurélio	Aurélio	Mello
10	Aurélio	Mello	Mello	Lúcia
11	Mello	Lewandowski	Lewandowski	

Hence, apart from changes in the court's composition, there are three main sources of variability in the voting sequence: (1) rapporteur assignment, (2) absences, and (3) the rotating position of Chief Justice. Crucially, this ensures that there is broad variability in the identity of the pivotal judge and of the justices that vote after the formation of a majority which is unrelated with case characteristics.

A final source of variability, even though probably correlated with case characteristics, as it potentially involves strategic judicial decision-making, are the "vista" requests. Any justice, at any point during the discussions that follow the vote of the Justice Rapporteur, may ask for "vista". This means, at least in theory, that the judge is uncertain about his vote and needs more time to decide whether to join

someone's vote or to suggest a different solution. If there is such request, the voting sequence is interrupted, and the judgement only resumes after the judge has indicated to the Chief Justice that he is ready to vote.

Formally, the justice who has asked for "vista" has about two weeks to deliver his vote, but this deadline is almost never met, as there is no penalty for doing so (i.e., Arguelhes and Hartman 2017). Typically, a "vista" request can delay a judgment for many months and, in some cases, years. Thus, aside from the obviously strategic nature of "vista" requests, they are relevant in the sense that they completely disrupt the ordinary voting sequence. Not only justices can (and often do) ask for "vista" before the moment they were supposed to vote, but the other justices, foreseeing the delay a "vista" request usually entails, may ask to anticipate their votes. This is especially common for judges who don't expect to be in the Court when the judgment resumes (i.e., Justice Velloso's vote in ADI 2886).

3.4 Empirical strategy

In this empirical analysis, I investigate whether dissent aversion plays a role in shaping the decisions of Brazilian Supreme Court justices. The main point is that the sequential nature of voting in the STF makes the votes of the justices who vote after the formation of a majority inconsequential to the outcome of the case. Hence, if dissent aversion is, as in other courts of civil-law tradition, part of judicial preferences, those justices will tend to deviate from their preferred vote and join the majority, making dissent less likely after the formation of a majority.

A significant part of the literature, however, indicates that, as per the attitudinal model (Segal and Spaeth 2002), dissent is the manifestation of ideological differences between justices. Hence, the objective here is to disentangle the two effects. The part of the justice's decision to dissent that arises from his genuine disagreement with the majority from the part that is due to dissent aversion, that is, the desire to avoid the cost (collegial, reputational, or otherwise) of being in the losing side.

To do so, I estimate the following equation for the justice's individual decision to dissent:

$$dissent_{i,j} = \beta_0 + \beta_1 majority_{i,j} + \beta_2 copartisans_{i,j} + X'_{i,j}\theta + \varepsilon_{i,j} \quad (1)$$

Where $majority_{i,j}$ is a binary variable that is equal to one if justice *j*'s vote in case *i* was cast after the formation of a majority, and zero otherwise. It is this variable that detects the presence of dissent aversion in the behavior of Supreme Court justices. The logic is fairly straightforward. The judges that vote following the formation of a majority know that their votes will be of no consequence to the outcome of the case and, if they are dissent-averse, they may deviate from their preferred vote to avoid the costs of dissenting. If this is so, β_1 should be negative, indicating that judges that vote after the pivotal judge are more likely to avoid further disagreement by joining the majority rather than dissenting.

Note that the frequent variation in voting order, as described in section 3, ensures that there is broad variability in the identity of the justices that vote following the formation of a majority. If the court followed a strict reverse seniority order, only the most senior justices would vote after the pivotal judge. Here, however, the varying identity of the Rapporteur, the rotating position of Chief Justice, and the not-so-rare "vista" requests (along with changes in the Court's composition) guarantee that multiple justices vote in these positions.

In equation (1), $copartisans_{i,j}$ is a continuous variable that ranges from zero to one, and is defined as:

$$copartisans_{i,j} = \frac{Number\ of\ justices\ from\ same\ party\ as\ Justice\ j}{N_i - 1} \quad (2)$$

In which N_i is the number of justices voting in each case *i*, ranging from eight (the minimum quorum necessary to analyze constitutional issues) to eleven (the full court).

Hence, $copartisans_{i,j}$ is closer to one when most of justice *j*'s peers in the court were appointed by the same political group as justice *j* himself. Conversely, $copartisans_{i,j}$ is equal to zero when justice *j* is isolated in the court, that is, when he is the sole appointee of a political party. Therefore, if dissent is indeed related to ideological differences between judges, β_2 should be negative, indicating that greater ideological homogeneity (higher $copartisans_{i,j}$) is associated with a lower probability of dissent. As Epstein et al. (2013, p. 257) put it, "the more heterogeneous the panel […], the less likely the judges are to think alike".

Note that equation (1) is flexible in the sense that it enables the inclusion of multiple controls. Here, a major concern is that the effect β_1 captures is really dissent aversion and not simply the effect of changes in the behavior of justices as they get older and more experienced. This concern is justified in light of the fact that multiple features of judicial behavior are known to change over time. For instance, as Hurwitz and Stefko (2004) show, junior justices are more likely to follow precedent than senior justices. Policy preferences also change, in a phenomenon known as "ideological drift" (i.e., Epstein et al. 2007). Hence, it is possible that judges' attitudes towards dissent change as they become more experienced. Even though we are agnostic as to the direction of such variation, Boyea (2010) shows that, in U.S. state supreme courts, dissent is positively related with seniority. If STF justices behave the same way, the effect on judicial behavior of the establishment of a majority could be underestimated.

However, if the effect is in the opposite direction and STF judges become less likely to dissent as they become more experienced, then the effect β_1 is supposed to capture would be reinforced. In those circumstances, judges would be less likely to dissent after the formation of a majority not because their vote's lack of impact on the case outcome makes them defer to the opinion of the majority, but because more experienced judges would be less likely to dissent anyway.

Hence, it is important to include controls that allows us to rule out the possibility that effects such as these are interfering with results. The basic control which is included in the regressions are fixed effects for the identity of each judge. In some specifications, I also include the interaction of justice fixed effects with a continuous variable that measures (in days) the experience of each justice in the Court. Thus, if preferences toward dissent change in a linear way (which can he heterogeneous among judges), this control is enough to ensure β_1 is free from interference of such changes. As a robustness check, I test a more flexible specification. By including dummies for multiple levels of experience and interacting those with justice fixed effects, I allow each judge's preferences for dissent to change in a non-linear way, further ensuring β_1 is not affected by changes in the justices' preferences towards dissent over time.

A further issue, related but not identical to the one just described, is whether the judge's propensity to dissent is related to the position he occupies in the voting order. For instance, the Justice Rapporteur – always the first vote – may be less likely to be in the minority because of his authoritative position as the single judge who has most closely examined the case (i.e., Oliveira 2012). Also, the Chief Justice – always the last vote – may be less likely to dissent due to his "institutional" position, which favors consensus (i.e., Hall and Windett 2016). Hence, to account for this possibility I include as controls the interaction of voting position dummies with justice fixed effects. This approach allows the probability of dissent to vary, for each justice, in each voting position he/she has ever occupied. In doing so, it also indirectly controls for the fact that more senior justices tend to occupy higher voting positions.

Lastly, it is important to take into consideration that, in uncontroversial cases, votes are naturally correlated, as the legal debate points more clearly to one particular outcome. In such circumstances, solitary dissents may reflect a marginal (and not so plausible) alternative to the outcome of the case, a position that other justices would be unlikely to follow. Hence, to ensure that justices who vote after the establishment of a majority have a reasonable alternative position to adhere to in case they disagree with the majority, I include as robustness checks specifications that restrict the sample to include only cases that have at least two dissenting votes before the formation of a majority.

3.5 Data and descriptive statistics

The database I use in this research is comprised of all abstract review[24] cases decided by the full court from 1988 until the end of 2015. This sums up to 1.678 cases, or 15.583 individual votes. I extracted

[24] There are three types of abstract review cases in the Brazilian Supreme Court. The most common is the ADI (*Acão Direta de Inconstitucionalidade* in Portuguese), where the petitioner asks the court to overturn a federal or state law. There is also the ADC (*Ação Declaratória de Constitucionalidade* in Portuguese), where the petitioner asks the court to uphold the law – it is a defensive instrument against conflicting rulings by lower courts. Lastly, there is the ADPF (*Arguição de Descumprimento de Preceito Fundamental* in Portuguese), where the court is asked to examine the validity of a law that predates the current Constitution.

information about each case from the court's website. Some information was taken from the docket page of each case while the remaining were obtained from the official court ruling (in Portuguese, *Acórdão*). Among the data extracted from these sources are the vote of each justice in each case, along with its position in the voting order, the nature of the law under review (federal/state), the outcome of the case, and the relevant dates (petitioning, judgement).

The voting order, along with the information on the direction of each vote (strike/uphold the law under review), allows to identify the vote tally of each case, and how it evolved as justices sequentially cast their votes. With this information, it is possible to pinpoint the pivotal judge, that is, the judge that cast the sixth vote (out of eleven) in a certain direction, consequently settling the outcome of the case. Judges that vote following the pivotal judge know that their votes cannot change the court's ruling. Here, dissent aversion may kick-in, making those judges deviate from their preferred vote and join the majority.

But whose votes are those? Given the voting order, it seems natural that the more senior justices will more likely find themselves in the position to vote after the formation of a majority. Even with the variation provided by Rapporteur assignment and the rotating position of Chief Justice, more senior justices will tend to occupy higher voting slots and therefore vote more often after the formation of a majority (only "vista" requests have the potential to completely disrupt the voting sequence). Fortunately, the database covers a long interval (over 25 years), allowing us to track justices as they become more senior, and the even-more-senior justices retire[25].

As Table 3.2 shows, most justices (25 out of 31) have been at least once in the position to vote after the formation of a majority. However, there is broad variation as to how frequently justices have occupied this position. Some, such as Justice Moreira Alves, who was the most senior justice in the Court from 1990 until his retirement in 2002, have done so very often. Others, such as Justices Grau and Direito, have seldom voted after the pivotal judge. This is because they were part of the Court for short periods (Justice Grau under six years and Justice Direito barely two years) and did not have the opportunity to evolve much in the Court's seniority.

On Table 3.3, I display the probability of dissent by voting position, according to the number of justices that participated in each judgement. Note that there seems to be no pattern relative to the voting order, that is, dissents do not become more (or less) likely according to the judge's position in the voting sequence. Further, the rapporteur (always the first vote) does not seem to carry any superior authority – the likelihood of dissent of the first vote is not consistently smaller than the others, sometimes quite the opposite. However, results on Table 3.3 do confirm a very intuitive idea, that the more people discussing a subject

[25] Retirement is compulsory at the age of 75 (used to be 70 up until 2015).

the more likely someone is to disagree. Note that the probability of dissent increases with the number of justices that participate in the judgement.

Table 3.2 – Proportion of votes, by justice, after the formation of a majority

Justice	Votes after pivotal judge
Ayres Britto	4,03%
Aldir Passarinho	11,11%
Carlos Madeira	0,00%
Célio Borja	0,00%
Cármen Lúcia	4,76%
Celso de Mello	38,43%
Cezar Peluso	23,62%
Carlos Velloso	15,12%
Dias Toffoli	0,00%
Edson Fachin	0,00%
Ellen Gracie	31,76%
Eros Grau	0,61%
Francisco Rezek	0,00%
Gilmar Mendes	23,13%
Ilmar Galvão	2,44%
Joaquim Barbosa	8,68%
Luiz Fux	1,18%
Moreira Alves	48,60%
Maurício Corrêa	2,66%
Menezes Direito	2,50%
Marco Aurélio	21,25%
Nelson Jobim	26,44%
Néri da Silveira	35,75%
Octávio Gallotti	19,27%
Paulo Brossard	3,17%
Roberto Barroso	0,00%
Ricardo Lewandowski	11,21%
Rosa Weber	6,67%
Sepúlveda Pertence	34,05%
Sydney Sanches	28,70%
Teori Zavaski	1,85%

Note: Only includes votes in non-unanimous cases.

As discussed on section 4, in order to determine whether the judge's individual decision to dissent is related to ideological disagreement (as the attitudinal model predicts), I construct a variable called $copartisans$ (see equation (2) in section 4). This variable, which ranges from zero to one, represents, for each judge in each case, how many of his peers were appointed by the same political group as his. Hence, an isolated judge will have $copartisans = 0$ and judges in a court filled by appointees of a single party will have $copartisans = 1$.

Table 3.3 – Probability of dissent, by voting order, by number of voting justices

	Number of voting justices			
Order	11	10	9	8
1	29,25%	18,34%	15,63%	30,00%
2	24,49%	15,38%	10,16%	6,67%
3	22,45%	21,30%	20,31%	8,33%
4	31,97%	13,02%	20,31%	16,67%
5	34,01%	24,26%	21,09%	14,17%
6	25,85%	18,93%	9,38%	24,17%
7	29,25%	21,89%	32,81%	20,83%
8	31,97%	25,44%	15,63%	11,67%
9	29,25%	17,16%	16,41%	
10	14,29%	20,12%		
11	17,69%			
Total	26,41%	19,59%	17,97%	16,56%

Note: Only includes votes in non-unanimous cases.

Figure 3.1 – Histogram of $copartisans$

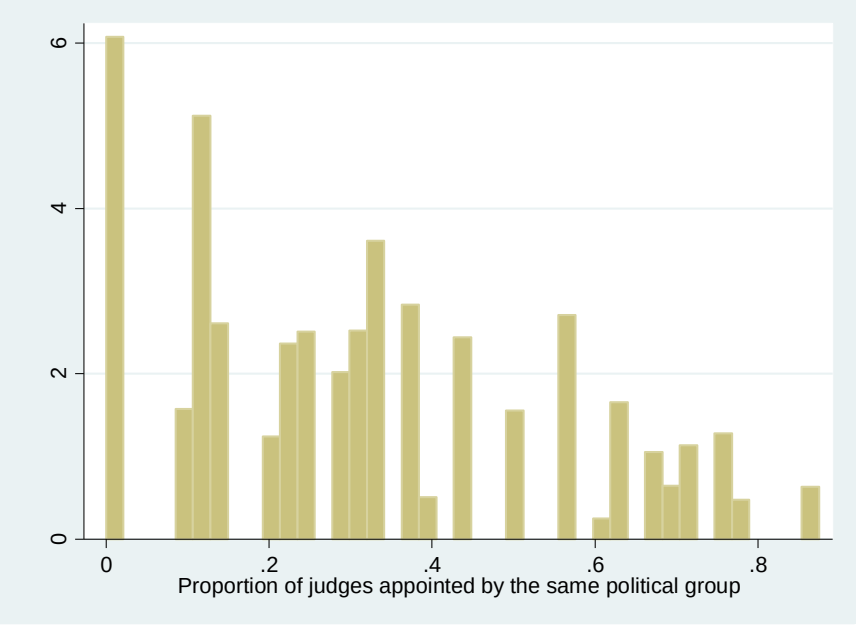


Figure 3.1 shows the histogram of the distribution of $copartisans$. Note that of all scenarios, the most common is that of political isolation – nearly 13% of votes are of judges who are the single appointees of their party. This occurs on two different scenarios. First, when a party has just taken office and has only managed to appoint a single judge to the Supreme Court. Second, when a party has left power so long ago that only one of its appointees remain in the Court. Considering the recent history of the Brazilian Supreme Court, the second scenario predominates. From 2003 on, the Worker's Party (*Partido dos Trabalhadores* in Portuguese) has consistently increased its dominance of the Court, with judges from other parties becoming

increasingly marginal. However, also note that no single party has achieved complete dominance of the Court. The maximum value $copartisans$ assumes is 0.875, which is high, but smaller than one.

3.6 Results

The main question I propose to answer in this study is whether dissent aversion is part of the preferences of judges of the Brazilian Supreme Court. Do judges, when they know that their votes will not alter the court's ruling, defer to the majority to avoid the costs of dissenting? Additionally, I seek to establish whether dissent in the Brazilian Supreme Court is associated with ideological differences between justices, as the attitudinal model proposes, and the literature shows to be the case in other courts around the globe (see discussion in section 2).

Hence, with the objective of answering these two questions, I use the empirical strategy described in section 4 to estimate equation (1). It is important to point out, from the outset, that only non-unanimous cases are included in the regressions. Also, standard errors are clustered by case.

I group regressions in two sets, according to which type of controls are added to the specification. The first set include controls mainly related with the justices' experience. The idea, as pointed out in section 4, is that justices' preferences regarding dissent aversion may change over time. And, as more experienced justices tend to vote more often after the formation of a majority, this could have an impact on the estimation of the effect I seek to identify, namely, that judges may defer to the majority after they know their votes will have no impact on the outcome of the case.

Hence, in this first set of regressions, there are five different specifications. The first one is the simplest, it includes the two main explanatory variables and controls for experience, identity of the Chief Justice, federal laws (as opposed to state laws), political appointment (dummies by party) and type of case (ADI, ADC or ADPF). Following, regression (2) also includes year fixed effects, and regression (3) adds justice fixed effects. Further, regression (4) includes the interaction of justice fixed effects with *Experience*, hence allowing each judge's preferences towards dissent to evolve independently. Lastly, regression (5) is identical to (4) except for the fact that the sample is restricted to include only cases which had at least two dissenting votes before the formation of a majority.

The idea behind regression (5) is to ensure that justices who vote after the establishment of a majority have a reasonable alternative position to adhere to in case they disagree with the majority. Solitary dissents may reflect a marginal (and not so plausible) alternative to the outcome of the case, a position that other justices would be unlikely to follow. In this case, the effect I seek to identify could be distorted, as the justices who vote after the pivotal justice would join the majority not because they disfavor disagreement but because there is no credible alternative to the majority ruling.

Following, the second set of regressions includes controls related with voting order. Again, as pointed out in section 4, the judge's propensity toward dissent may be related to the position they occupy in the voting order. Two "special" positions – that of the Justice Rapporteur and of the Chief Justice – have peculiar characteristics that may lead to systematic differences in the likelihood of dissent. Therefore, it is appropriate to allow the probability of dissent to vary, for each justice, according to the position they occupy in the voting order.

The second set of regressions, as the first, contains five different specifications. The first specification includes, besides the main explanatory variables, controls for experience, presiding justice, federal laws, political appointment, type of case and voting order (dummies for each voting slot). Regression (2) further includes year fixed effects, and regression (3) adds justice fixed effects. Significantly, regression (4) includes the interaction of justice fixed effects with voting order dummies, thus letting the probability of dissent to change, for each justice, according to the position they occupy in the voting order. Lastly, identical to the first set of regressions, specification (5) is identical to (4), but the sample is restricted to include only cases with two or more dissenting votes.

Table 3.4 – First set of regressions

Y = Dissent	(1)	(2)	(3)	(4)	(5)
Majority	-0.140***	-0.146***	-0.138***	-0.140***	-0.144***
	(0.0131)	(0.0134)	(0.0142)	(0.0145)	(0.0251)
Co-partisans	-0.463***	-0.499***	-0.325***	-0.390***	-0.154
	(0.0477)	(0.0528)	(0.0593)	(0.0726)	(0.117)
Experience	0.0355***	0.0312***	0.0341***	0.00834	-0.130**
	(0.00571)	(0.00722)	(0.00918)	(0.0407)	(0.0659)
Chief Justice	0.0628***	0.0672***	0.0566***	0.0404**	0.0286
	(0.0177)	(0.0180)	(0.0183)	(0.0192)	(0.0331)
Federal Laws	0.0497***	0.0449***	0.0468***	0.0460***	0.0173
	(0.00964)	(0.00952)	(0.00971)	(0.00974)	(0.0114)
Political Appointment	Yes	Yes	Yes	Yes	Yes
Type of Case	Yes	Yes	Yes	Yes	Yes
Year	No	Yes	Yes	Yes	Yes
Justice	No	No	Yes	Yes	Yes
Justice*Experience	No	No	No	Yes	Yes
Constant	0.0119	0.234***	0.0661	2.253*	2.758
	(0.0482)	(0.0777)	(0.0903)	(1.223)	(1.770)
Observations	5,417	5,417	5,417	5,417	2,867
R-squared	0.163	0.171	0.237	0.246	0.176

Note: Robust standard errors (cluster on case) in parentheses. Significance: *** p<0.01, ** p<0.05, * p<0.1

Results on the first set of regressions, available on Table 3.4, confirm the two main hypotheses I set out to test in this study. First, the formation of a majority, by settling the outcome of the case, makes the judges who vote in sequence less likely to dissent. The effect is significant in all five specifications and the coefficient is very stable across regressions – note that the it barely changes between specification (2) and (3), when justice fixed effects are added. Judges that vote after the pivotal judge are around 14 percentage points less likely to dissent than judges who vote before, everything else remaining constant.

Second, dissent is indeed associated with ideological differences. More ideological homogeneity is associated with a decreased probability of dissent. Note, however, that the effect loses significance in the last regression, when cases with just one dissenting vote are removed from the sample. This may be an indication that ideological differences matter the most to the isolated judge – dissents are more likely when the justice is ideologically isolated – and, by excluding cases with only one dissent, the significance vanishes.

Also, surprisingly, the Chief Justice is more likely to dissent than other justices. This result is counterintuitive and in conflict with the literature that highlights the Chief Justice's role in promoting consensus to enhance the public's confidence in the court and in maintaining collegiality (i.e. Hall and Windett, 2016).

Further, experience seems positively related with the likelihood of dissent, even though results are somewhat inconsistent. In the first three specifications, the coefficient is positive and significant. In the fourth specification, where experience is allowed to vary differently for each justice, the overall effect loses significance. When the sample is restricted to cases with two or more dissenting votes, *Experience* regains significance, but the sign is reversed, the overall effect becomes negative. However, it is important to note that, in these specifications, the inclusion of the interaction terms makes the interpretation of the overall coefficient troublesome.

Lastly, dissents are more likely in cases that question federal than in those that question state laws (significant in all specifications but the last). As examined in previous research (Lopes, 2017), federal law cases tend to be high-stakes cases and hence draw more attention from the press and the general public. Consequently, decisions in those cases tend to be longer and to have more dissenting votes.

Results on the second set of regressions, where I control for vote order and allow the probability of dissent to vary, for each justice, in each voting position, are available on Table 3.5. Note that these results are similar but not identical to those on Table 3.4. Here, as in the first set of results, the coefficient of *Majority* is always negative and significant, according to expectations. Judges defer to the majority when they know that their votes will not change the outcome of the case. Additionally, dissents are associated with ideological disagreement and, unlike in the first set, here the effect does not disappear in specification (5) – it remains negative and significant at 5%.

Also, in this second set of regressions, the Chief Justice variable coefficient is not significant in any specification and the coefficient of *Experience* is always positive, but not always significant. For Federal Laws, results are nearly identical to the first set.

Table 3.5 – Second set of regressions

Y = Dissent	(1)	(2)	(3)	(4)	(5)
Majority	-0.199***	-0.194***	-0.198***	-0.202***	-0.171***
	(0.0195)	(0.0200)	(0.0201)	(0.0205)	(0.0308)
Co-partisans	-0.405***	-0.461***	-0.263***	-0.214***	-0.265**
	(0.0493)	(0.0550)	(0.0616)	(0.0709)	(0.118)
Experience	0.0158**	0.0129	0.0265**	0.0301**	0.0347*
	(0.00726)	(0.00880)	(0.0108)	(0.0118)	(0.0195)
Chief Justice	0.00953	0.0194	-0.0125	-0.0166	0.0283
	(0.0185)	(0.0189)	(0.0200)	(0.0240)	(0.0445)
Federal Laws	0.0454***	0.0424***	0.0420***	0.0452***	0.0115
	(0.00910)	(0.00909)	(0.00908)	(0.00942)	(0.0121)
Political Appointment	Yes	Yes	Yes	Yes	Yes
Type of Case	Yes	Yes	Yes	Yes	Yes
Order	Yes	Yes	Yes	Yes	Yes
Year	No	Yes	Yes	Yes	Yes
Justice	No	No	Yes	Yes	Yes
Justice*Order	No	No	No	Yes	Yes
Constant	0.0971	0.286***	0.0656	0.0561	0.187
	(0.0614)	(0.0854)	(0.0975)	(0.135)	(0.204)
Observations	5,419	5,419	5,419	5,419	2,869
R-squared	0.169	0.175	0.243	0.287	0.233

Note: Robust standard errors (cluster on case) in parentheses. Significance: *** p<0.01, ** p<0.05, * p<0.1

3.6.1 Robustness Checks

There are two main robustness checks I conduct in this study. The first is to allow judges' preferences toward dissent to vary non-linearly as they get more experienced. To do so, I create four dummy variables that indicate their level of experience (the four quartiles, which can be interpreted as low, mid-low, mid-high and high experience) and interact those dummies with judge fixed effects. In this way, each judge's propensity to dissent may vary differently as their experience in court increases.

Results on this first robustness check are available on Table 3.6. Importantly, the result for *Majority* remains unchanged. The effect is negative, as expected, and significant. Results for *Co-partisans* also remain unaltered although, as in Table 3.4, significance is lost when the sample is restricted to include only

cases with two or more dissenting votes. Interestingly, here the coefficient of *Chief Justice* is negative and significant in the first two specifications, the opposite of results on Table 3.4.

The second robustness check consists of further restricting the sample to include only the most disputed cases. Hence, here I include only cases with three or more dissents. It is important to note that this is an extreme test, as it entails a radical reduction of sample size. Results available on Table 3.7 show that, while the coefficient of *Majority* remains negative and significant, that of *Co-partisans* loses significance when controls for experience are added. Even more radical restrictions to the sample, however, are not possible. Cases with four dissenting votes are not frequent enough (only 53 out of 1678 cases) to enable a reliable estimate. Also, as cases with five dissents are usually decided on the last vote, there are no justices who vote after a majority is reached.

Table 3.6 – First robustness check

Y = Dissent	(1)	(2)	(3)
Majority	-0.203***	-0.205***	-0.177***
	(0.020)	(0.020)	(0.031)
Co-partisans	-0.297***	-0.236***	-0.039
	(0.075)	(0.082)	(0.137)
Experience	-0.005	-0.005	-0.133
	(0.041)	(0.061)	(0.102)
Chief Justice	-0.035*	-0.054**	-0.027
	(0.021)	(0.023)	(0.039)
Federal Laws	0.040***	0.041***	0.0168
	(0.009)	(0.009)	(0.011)
Political Appointment	Yes	Yes	Yes
Type of Case	Yes	Yes	Yes
Order	Yes	Yes	Yes
Year	Yes	Yes	Yes
Justice	Yes	Yes	Yes
Justice*Experience	Yes	Yes	Yes
Experience Level	No	Yes	Yes
Justice*Experience Level	No	Yes	Yes
Constant	1.590	0.793	0.251
	(1.247)	(1.801)	(2.740)
Observations	5,419	5,419	2,869
R-squared	0.252	0.272	0.207

Note: Robust standard errors (cluster on case) in parentheses. Significance: *** p<0.01, ** p<0.05, * p<0.1

Table 3.7 – Second robustness check

Y = Dissent	(1)	(2)
Majority	-0.111**	-0.139**
	(0.0560)	(0.0618)
Co-partisans	-0.299*	-0.0292
	(0.170)	(0.172)
Experience	0.0556*	0.0351
	(0.0300)	(0.0294)
Chief Justice	0.0240	0.0111
	(0.0714)	(0.0616)
Federal Laws	-0.0119	-0.00856
	(0.0165)	(0.0128)
Political Appointment	Yes	Yes
Type of Case	Yes	Yes
Order	Yes	Yes
Year	Yes	Yes
Justice	Yes	Yes
Justice*Order	Yes	No
Justice*Experience	No	Yes
Constant	0.0984	-0.104
	(0.272)	(0.359)
Observations	1,645	1,645
R-squared	0.260	0.196

Note: Robust standard errors (cluster on case) in parentheses. Significance: *** p<0.01, ** p<0.05, * p<0.1

3.7 Conclusion

One of the fundamental hypotheses underlying most of the judicial politics literature is that judges are sincere in their votes. In other words, votes are held to be an accurate representation of judges' political and ideological preferences. This approach, however, falls short when we consider that judges have strategic considerations and have to balance the costs and benefits of their decisions. They do not simplistically vote their heart. They take into account the behavior and reactions of other agents, as well as the long-term implications of their actions.

In this study, by exploring the sequential nature of voting in the Brazilian Supreme Court, I show that dissent aversion is a relevant component of judges' preferences. When justices know that their votes cannot change the outcome of the case, they avoid the cost of dissenting and join the majority opinion, hence departing from their "sincere" votes. This is an indication that the overall dissent rate underestimates the internal disagreements within this Court, as is the case in other constitutional courts (Garoupa et al. 2012).

The effect of ideological heterogeneity, on the other hand, is not sufficiently robust. Even though there is some indication that more (politically) diverse courts lead to a higher likelihood of dissents, the effect mostly disappears when the sample is restricted to include only cases with at least two dissenting votes. Here, there may me a measurement issue. As I use political appointment as an indicative of ideology, it is possible that ideological heterogeneity is underestimated as, by definition, in the variable I use all appointees by the same party are held to share the same ideological standpoint.

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