

‘The Court, it is I’? Individual judicial powers in the Brazilian Supreme Court and their implications for constitutional theory

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Abstract: Collective decision-making is often taken as an ‘institutional fact’ when it comes to supreme and constitutional courts. In this article, we focus on the example of the Brazilian Supreme Court (Supremo Tribunal Federal, or STF) to argue that this feature should not be assumed from the outset, as it does not necessarily hold, across countries, for all relevant powers that courts may have. As this example illustrates, the assignment to individual Justices of three distinct powers, namely agenda setting, position taking, and decision making, can have profound effects on the legislative status quo outside the court, amounting in some circumstances to a form of individual judicial review. This expanded typology of court powers both points to an underexplored spectrum for comparing different courts and makes it necessary to discuss if and how particular distributions of such powers within multi-member courts are normatively justified. In the specific case of the STF, we argue that the specific combination of individual allocations of agenda setting and decision-making powers, which gives rise in practice to the possibility of individual judicial review, cannot be reconciled with basic tenets of constitutional theory.

Keywords: constitutional courts; Brazilian Supreme Court; voting rules; judicial review; collegiality

I. Introduction

Last December, the Brazilian Senate prepared to vote on the ‘10 Measures Against Corruption’, a legislative package that had just been approved by

the House of Representatives. The original package had resulted from a proposal drafted by a group of federal prosecutors and presented to Congress after obtaining 2.2 million signatures from Brazilian citizens, in accordance with constitutional provisions allowing for ‘popular initiative’ in federal law-making.¹ The prosecutors’ original proposal was controversial, and the Chamber added its own controversial elements to the bill.² Amidst major corruption charges being brought against key politicians and business in the *Lava Jato* (‘Car Wash’) police investigation, the imminent vote on the ‘10 Measures’ by the Senate was at the centre of the national stage.³

On 14 December 2016, however, just before both the judicial and legislative recesses, the Brazilian Supreme Court (*Supremo Tribunal Federal*, or ‘STF’) issued a preliminary injunction ordering Congress to reset the legislative process. The plaintiffs, a group of right-wing representatives, had argued that two serious constitutional problems had arisen in the procedure that had been followed until that point. First, the additions by the House had in their view ‘de-characterised’ the ‘essence’ of ‘the people’s proposal’, which should have been respected by the politicians as they voted on it. Second, instead of following the applicable congressional rules of order on bills initiated by the people, the plaintiffs claimed that the president of the Chamber had simply chosen one of the deputies as the formal author of the proposal. The STF agreed, and decided that the only way to respect the constitution was to begin legislative procedures anew. Following a legislative recess, a perplexed president of the Senate sent the bill back to the Chamber on 16 February 2017. The STF then put an end to the injunction, on the basis that this action was sufficient to wholly remedy the constitutional problems raised by the petition.

All of this was actually the work of a single Justice. Without any prior or ex post participation of another member of the Court, Justice Luiz Fux made Congress backtrack on one of the most politically charged issues of

¹ Brazilian Constitution, art 61, para 2: ‘The initiative of the people may be exercised by means of the presentation to the Chamber of Deputies of a bill of law subscribed by at least one percent of the national electorate, distributed throughout at least five states, with not less than three-tenths of one percent of the voters in each of them.’

² See e.g. Fernanda Castro, ‘Câmara retira seis propostas do MPF e desfigura pacote anticorrupção’ *G1/Globo* (30 November 2016) available at <<http://g1.globo.com/politica/noticia/2016/11/camara-dos-deputados-conclui-votacao-de-medidas-contracorrupcao.html>>.

³ The *Lava Jato* (‘Car Wash’) operation started in 2014 as a money laundering investigation by the federal police. Since then, it has grown in size and scope, as it uncovered a cartel of construction firms that were granted public contracts, from the state-run oil company Petrobras, in exchange for bribes and campaign contributions to parties from the governing coalition.

current Brazilian politics. The fate of the ‘10 Measures’, with vast implications for national politics in Brazil, was determined not simply by judicial review, but by *individual* judicial review.

Constitutional theorists have debated extensively how constitutional courts should decide, and under which conditions democracy and judicial review can be reconciled. Such debates have been largely based on the implicit assumption that constitutional courts are multi-member bodies, and, consequently, that judicial intervention in legislative or executive politics will be the outcome of some kind of collective decision-making process. And when it does address the procedures for forming a decision ‘by the Court’, constitutional theory typically assumes that, *internally*, courts are majoritarian institutions, and minority positions will ultimately be silenced or forced into becoming dissenting opinions.

As the case of the STF shows, however, high court judges can make use of many resources to affect the legal status quo and influence the behaviour of actors and institutions outside the court. Such may be the case even when they are in the minority in a given ruling, and, sometimes, individual judges might even completely bypass the court as a collective instance of decision making. Institutional deviations from majority rule-making, including judicial review, are pervasive in contemporary constitutional democracies, including in the design of parliamentary procedures.⁴ But how do the arguments advanced to defend these deviations hold once we grant powers to a minority of judges within a given court – or, more drastically, to a single member of that court? If judicial review in itself has been a delicate issue for democratic and constitutional theory, individual judicial review would seem to present insurmountable challenges.⁵

In section II, we analyse how individual powers are allocated within the STF, and the institutional conditions under which individual judicial review arises. We discuss three such powers, which can also be assigned to individual Justices within other collegiate judicial bodies: (i) *agenda setting*; (ii) *position taking*; (iii) *decision making*. We map these powers by reference to the highly individualistic organisation of the STF, which actually allows in practice for individual Justices to perform judicial review.

⁴ See e.g. G Tsebelis, *Veto Players: How Political Institutions Work* (Princeton University Press, Princeton, NJ, 2002).

⁵ Our argument focuses on individual powers within constitutional courts or supreme courts. In ‘decentralised’ systems of judicial review, like in the US, Argentina and Brazil, a single lower court judge is empowered to perform judicial review. In these scenarios, however, it is still assumed that all such individual decisions will be eventually (and often immediately) subjected to oversight by higher, *collective* judicial bodies. In this sense, lower judges performing judicial review present fewer problems than the form of individual judicial review discussed in this piece.

In section III, we consider the normative implications of some of these individual allocations of power. We focus largely on the power to perform judicial review – or the combination of different powers that, in practice, amounts to giving an individual judge the power to perform judicial review, as we observe in the Brazilian case. However, we expect that these discussions will help us develop a framework for assessing other non-majoritarian allocations of relevant judicial powers in multi-member judicial bodies.

This article is the first step in a broader project to challenge and discuss the ‘majoritarian assumption’ both descriptively and normatively. Although we focus on the Brazilian case, we see individual judicial review as the extreme point on a spectrum of possible allocations, within a multi-member court, of different kinds of powers to affect the political process. The Brazilian case is one extreme point on this spectrum, but constitutional theory and institutional design should face the problems created by different combinations of allocations of judicial powers, looking beyond the paradigm of a multi-member court in which a majority vote is a necessary condition for judicial intervention in the political process.

II. Individual powers in multi-member courts

Beyond decision making: What kinds of powers do courts have?

Judicial decisions tend to monopolise scholarly attention as the main, prototypical expression of judicial power. The power to decide a controversy is indeed the most visible manifestation of power by judges. However, decision making provides us with an incomplete account of judicial power, in two ways. First, judges can influence the behaviour of other institutions and private parties without making an actual decision. The threat of a judicial decision in the near future can already shape the strategies of actors outside the court.⁶ Any indication that the threat of

⁶ This idea is present in many varieties of social science studies on courts. See e.g. A Stone Sweet, *Governing with Judges: Constitutional Politics in Europe* (Oxford University Press, Oxford, 2000); KE Whittington, “‘Interpose Your Friendly Hand’: Political Supports for the Exercise of Judicial Review by the United States Supreme Court” (2005) 99(4) *American Political Science Review* 583; L Epstein and J Knight, *The Choices Justices Make* (CQ Press, Washington DC, 1998); M Taylor, *Judging Policy: Courts and Policy Reform in Democratic Brazil* (Stanford University Press, Stanford, CA, 2008). In these approaches, the threat of future judicial intervention can be very specific in terms of the expected outcomes; see, in contrast, the broader idea of ‘bargaining under the shadow of the law’ as developed in R Mnookin and L Kornhauser, ‘Bargaining under the Shadow of the Law: The Case of Divorce’ (1979) 88(5) *Yale Law Journal* 950.

interference is more or less likely can therefore, in principle, affect their behaviour. Second, within a given court, there are institutional steps that need to be taken so as to prime the case for a decision. The power to decide must therefore be enabled by other internal mechanisms before it can be used. If these mechanisms are instead employed to disable the possibility of a decision, the court's power is not to be feared.

A full picture of the configuration of judicial power thus requires us to account for all mechanisms that can *emulate* the power to decide cases in terms of its effects on the world outside the court, or that can *modulate* the effects of a decision if and when this decision-making power is used. In this section, we discuss three such powers, by means of which Justices within collegiate judicial bodies can influence the legal status quo and the behaviour of actors outside the court, either directly or indirectly: (i) *agenda setting* (deciding what the court will decide); (ii) *position taking* (speaking on behalf of the court, thus signalling a potential judicial decision in specific directions); and (iii) *decision making* (resolving cases, controversies, and matters of dispute brought to the court).

Agenda setting involves enabling the court (or a fraction of its members) to decide a case or issue – or, conversely, preventing the occasion for such a decision. Selecting the agenda is a consequential aspect of judicial power. Courts trying to establish a politically relevant role for themselves need to decide the right cases at the right time.⁷ Even for well-established courts, timing can shape the very substance of the decision. Timing may affect the likelihood that losing parties will retaliate against the court or its specific decision (for example, by passing a constitutional amendment).⁸ Moreover, depending on the appointment mechanisms in place, the passage of time itself can change the composition of the court, allowing a different set of judges to make the decision and therefore changing the potential outcome of the case.⁹

⁷ See L Epstein, J Knight and O Shvetsova, 'The Role of Constitutional Courts in the Establishment and Maintenance of Democratic Systems of Government' (2001) *Law and Society Review* 117; D Fontana, 'Docket Control and the Success of Constitutional Courts' in T Ginsburg and R Dixon (eds), *Comparative Constitutional Law* (Edward Elgar, London, 2011).

⁸ We are assuming here that judges are strategic decision-makers – that is, their preferred position on a given case will be modulated (and therefore not sincerely expressed) – given the possibility of undesired reactions by other institutions against the court or the decision itself. In this sense, decision timing might determine what judges perceive as a feasible or prudent exercise of the powers at their disposal.

⁹ On agenda setting in the US Supreme Court, see e.g. L Epstein, W Landes and RA Posner, 'The Best for Last: The Timing of U.S. Supreme Court Decisions' (2015) 64 *Duke Law Journal* 101; SC Benesh, S Brenner and HJ Spaeth, 'Aggressive Grants by Affirm-Minded Justices' (2002) 30(3) *American Politics* 219. For one analysis of the Brazilian case, see D Werneck Arguelhes and IA Hartmann, 'Timing Control without Docket Control: How Individual Justices Shape the Brazilian Supreme Court's Agenda' (2017) 5(1) *Journal of Law and Courts* 105.

But how can courts actually control the timing of their decisions? Many different mechanisms and design features influence agenda setting for this purpose. Comella, for example, distinguishes between two broadly considered ‘models’ of apex courts, each with its own clusters of agenda-setting mechanisms and implications for overall timing control. On the one hand, there are ‘Supreme Courts’, which typically have very limited mandatory jurisdiction, expansive docket control mechanisms, strict standing rules, and limited access to the court by litigants. In contrast, ‘Constitutional Courts’ lack formal docket control mechanisms, have expansive mandatory jurisdiction and tend to be very open to potential litigants and inconvenient or untimely cases.¹⁰ Fontana, however, sees in discretionary docket control the ultimate mechanism for timing control. When a court simply refuses to hear a case, this decision will draw less public attention and make criticism by the losing party less likely, as losers in the status quo will have a harder time blaming their defeat on the Court.¹¹

However, judges can reap these same institutional benefits in the absence of formal discretionary docket control, even with expansive standing rules and mandatory jurisdiction, and without resorting to any indirect strategies of avoidance. The STF, for example, has developed mechanisms for remaining completely silent on any given case or controversy, independent from any formal power to decide what to decide.¹² It does so by *not* including a case in the agenda in the first place, and, when it has already started to decide a case that suddenly becomes ‘inconvenient’, it can remove it from the agenda (even if not from the docket) and keep it on hold indefinitely. These lasting silences are achieved by a combination of positive (the power to include something on the agenda) and negative (the power to veto the inclusion of a case or issue in the agenda) agenda-setting powers within the court. Although the use of such powers in itself is not a judicial decision, it can have lasting effects on the status quo, in the same fashion as a decision would, but with much less exposure for the Court.

Prolonged judicial silence can be used to create social and political *faits accomplis*, enabling certain strategies by actors outside the court, in the

¹⁰ V Ferreres Comella, ‘The Consequences of Centralizing Constitutional Review in a Special Court: Some Thoughts on Judicial Activism’ (2004) 82 *Texas Law Review* 1705.

¹¹ See Fontana (n 7).

¹² See Arguelles and Hartmann (n 9). The STF was granted limited means of formal docket control with the judicial reform amendment of 2004. In a specific kind of appeal (*Recurso Extraordinário*) that accounts for a large share of the court’s annual workload, two-thirds of the Justices can now decide that a given case lacks ‘general repercussion’ and should not, therefore, be decided by the Supreme Court. There was *de facto* docket control in the STF, however, before such a formal mechanism was created, and informal control is still applied through various other means.

short run, and making it less likely, in the long run, that a judicial decision would force a reversion of the status quo. Consider, in the Brazilian case, the several lawsuits filed by President Dilma Rousseff before, during, and in the wake of her impeachment trial by the Senate. In these cases, Rousseff challenged the constitutionality of the conviction on many grounds.¹³ President Rousseff was officially removed from office on 31 August 2016 but, as we write, the STF is still silent on these lawsuits. In the meantime, we have had municipal elections all over the country, a couple of watershed constitutional amendments have been approved by the Temer government, and a new STF Court justice has been appointed – yet, the STF itself has not said anything about Rousseff's claims. A judicial overruling of the Senate conviction was unlikely from the outset; after all this time, it has become a practical impossibility.

Regardless of the merits of Rousseff's claims, as time passes and the political environment settles around her impeachment, it becomes more and more costly for political actors to obey a judicial decision reinstating her in office.¹⁴ Over time, therefore, judicial silence has skewed the outcome of a future ruling; if the case is decided at all, the STF will most likely dismiss it on a technicality (e.g., the new elections in 2018 will have made the case moot). This is a similar strategy employed by the court when dealing with other politically sensitive cases that could have been a political lose-lose situation for the court. If it decides against the current government, there is a high likelihood that its decision will invite retaliation; otherwise, however, it will legitimise a politically controversial measure it might actually consider unconstitutional. Why decide, then? Regardless of a Justice's position on the merits, it is tempting to simply act as if the court's trigger was never triggered at all. Examples of agenda setting and judicial silence being used to deflect inconvenient cases like this abound in Brazil.¹⁵

¹³ MS 34193-16, MS 34371-16 and MS 34441-16. In addition to several alleged due process violations, Rousseff argued that the specific provisions of the 'Impeachable Crimes' law the Senate and the Chamber used to convict her were actually unconstitutional, and that the impeachment decision was wrong on the merits because her conduct did not amount to an impeachable offence according to the constitution.

¹⁴ On the relevance of case selection for compliance with judicial decisions and building judicial power in recent democracies, see T Ginsburg, *Judicial Review in New Democracies: Constitutional Courts in Asian Cases* (Cambridge University Press, Cambridge, 2003) ch 3.

¹⁵ See, for example, the Court's silences on the privatisation of the telecommunications sector in the 1990s (MS 34562-16, still undecided), or on the Arbitration Act of 1996, which was only decided in 2001; or on several aspects of the '*Plano Real*' stabilisation measures from 1995, which were decided only two decades after the country had made the change to a new currency. For more examples and general trends, see J Falcão, I Hartmann and VP Chaves, III *Relatório Supremo em números: o Supremo e o tempo* (FGV, Rio de Janeiro, 2014); VE Vieira and R Glezer (eds), *A Razão e o Voto: Diálogos constitucionais com Luis Roberto Barroso* (FGV, Rio de Janeiro, 2017).

When judges are not under an obligation to provide *some* answer to a given case within a certain period of time, the distinction between different timing control mechanisms, including docket control, becomes less important.¹⁶ Their time is theirs to control, and, while the refusal to rule on a case is still a decision that might draw attention and therefore leave the court exposed, it is comparably harder to keep track of the judicial power to simply remain silent. But, whatever the precise mechanisms by which the court's agenda is set, they can all be used in ways that modulate the final decision of the court, or prevent it from taking place and thus keeping the status quo undisturbed. These agenda-setting powers can work, in the world outside the court, as functional equivalents to the actual power to decide the case.

We turn now to *position taking*. Courts can influence the outside world by taking a public stance that signals, to different actors, a potential favourable or unfavourable decision in the future. If we assume that courts operate in a strategic environment, then the behaviour of different institutional actors is influenced by what they anticipate as the future behaviour of the other actors (judicial or otherwise) with whom they now engage. Studies of the judicialisation of politics show political actors adjusting their behaviour to the fact that their decisions today might be challenged before the constitutional court tomorrow.¹⁷ Future threats, actual or imagined, can therefore affect behaviour today. It follows from this assumption, in principle, that any mechanism by which a court can signal what its decision would be on a given issue can influence behaviour by other actors around it. In particular, by taking a public stance on an issue before it is challenged in a lawsuit, the court provides information for actors outside it of the possible legal consequences attached to their planned lines of action.

In its clearest manifestation, such a position-taking power could take the form of an advisory opinion issued by the court on an issue being debated in Congress at that very moment, or a contemporary political event – like the *Suprema Corte de Justicia de la Nación* did in Argentina in 1930, in the infamous '*acordada*' by which, in the absence of any actual case or controversy triggering its jurisdiction, the Justices issued a formal document acknowledging and normalising the rupture of the constitutional order.¹⁸ But similar effects can be achieved in more subtle ways. A comment

¹⁶ Arguelles and Hartmann (n 9).

¹⁷ Stone Sweet (n 6).

¹⁸ See SG Cayuso and MA Gelli, *Ruptura de la Legitimidad Constitucional – La Acordada de la Corte Suprema de Justicia de la Nación de 1930* (Instituto de Investigaciones Jurídicas y Sociales Ambrosio L Gioja, Buenos Aires, 1988).

by a Justice in a lecture or interview might be read as signalling sympathy for a given cause or interpretation of the constitution, thus encouraging or discouraging new lawsuits; an official speech by the Chief Justice in the opening of the judicial year, or a side remark made to journalists after a court session, might signal to politicians that a certain bill will face at least some judicial resistance if approved.¹⁹ In all these examples of position taking, the court or its members ‘borrow’ the authority and the threat of future decisions to provide incentives, in the present, for the behaviour of other actors.

Lastly, we find *decision-making* power itself, which we most immediately associate with judicial power. In looking at how courts operate, it should be disaggregated in two smaller components: the power to issue *preliminary* decisions might be assigned in different ways, and according to different criteria, than the power to issue *final* decisions. The importance of this distinction in practice, however, must not be overstated. The decision mentioned in the Introduction of this article, for example (the suspension of congressional voting on the anti-corruption package), was formally a mere *preliminary injunction*, not a decision on merits.²⁰ The relevance of the formal distinction between preliminary injunctions and final decisions depends on how often (and for how long) preliminary injunctions can be allowed to remain in place so as to shape the status quo.²¹

In terms of design and operation, courts can greatly differ from each other regarding the scope and limits of the powers discussed above. Moreover, these powers can be limited in many ways – by law and legal

¹⁹ See R Davis, *Justices and Journalists: The Supreme Court and the Media* (Cambridge University Press, New York, NY, 2011) ch 1, which discusses other kinds of motivations that can prompt courts to reach out to the public. The importance of the press as an arena in which judicial power can be promoted or constrained has been documented in several studies, in different ways. See e.g. J Katon, *Judicial Power and Strategic Communication in Mexico* (Cambridge University Press, New York, NY, 2010); R Davis and VJ Strickler, ‘The Invisible Dance: The Supreme Court and the Press’ (2000) 29(2) *Perspectives on Political Science* 85; B Friedman, *The Will of the People* (Farrar, Straus and Giroux, New York, NY, 2009). In these studies, however, the focus is still on the court as a collective institution, and the press is usually seen primarily as an arena to strengthen the court’s legitimacy or to protect its decisions from retaliation or disobedience by other institutions.

²⁰ In the STF, for example, a decision that is provisional in theory often becomes final in practice. Between 1988 and 2013, preliminary injunctions (*‘liminares’*) stayed in place on average for more than two years before the court made a final ruling; in the main kind of abstract review procedure (*Ação Direta de Inconstitucionalidade*, ‘ADI’), the average duration was more than six years. When the researchers considered only the *liminares* that still had not been superseded by a final ruling, the overall average was more than six years – and more than 13 years for the ADIs. See Falcão, Hartmann and Chaves (n 15).

²¹ We will explore this in detail in the Brazilian case in section II: *Designing a (de)centralised court*.

doctrine, by the behaviour of other institutions, and by the social conventions and norms of professional conduct. But, whatever their limits in a given design, their possible existence should encourage us to look beyond decision making when we look at (and compare) how courts are designed to influence the outside world.

Who holds power within the Court?

How can these different powers be assigned within courts? To begin with, talking about a 'court' as single entity can be misleading. Dissents and concurrences remind us that the court is a sum of individuals with their own views on how cases should be decided, and whose opinions might not necessarily coincide with those of the court.²² Multiple, conflicting views exist within the institution, and the decision of *the court* is obtained either through persuasion, deliberation and bargaining, or, when all else fails, through counting votes. We hope that the best (not the most popular) argument will prevail, but even so, as Waldron pointed out, a divided court must resort to the same mechanism we see in majoritarian, legislative institutions: the side with the most votes wins.²³

But even these views on vote counting and dissents still assume that the final decision of *the court* – the decision that will directly affect the world outside – will be the product of some sort of collective decision-making procedure, by which the views of each individual judge will be considered, filtered, and finally subjected to a mechanism that ensures that the *majority* position will prevail. This assumption is still problematic. As a matter of institutional design, it is possible to confer powers of agenda setting, position taking, and even decision making to a sub-majority of judges, or even to individual judges within the court.

We begin by distinguishing between *collective* and *individual* allocations. In the former, some sort of collective decision-making procedure (requiring either a majority or a sub-majority of the votes in the court) must be adopted for a given power to be used; in the latter, the individual will of a single judge in the court is a sufficient condition for deploying it. Individual allocations, however, come in very different forms. *Centralised* individual arrangements allocate the power to a specific, fixed position/role within the court that is endowed with powers that are not available to regular

²² See e.g. K Stack, 'The Practice of Dissent in the Supreme Court' (1996) 105(8) *Yale Law Journal* 2235; V Afonso da Silva, 'Deciding without Deliberating' (2013) 11(3) *International Journal of Constitutional Law* 557.

²³ J Waldron, 'The Core of the Case Against Judicial Review' (2006) 115(6) *Yale Law Journal* 1346.

Justices *qua* Justices. The typical example is the office of Chief Justice (CJ) – for this position to mean something in practice, there should be at least some issues its occupant decides alone. In *decentralised* individual arrangements, in contrast, a given power is equally assigned, in principle, to each individual justice, regardless of any specific institutional position defined beforehand.

Some courts adopt the figure of a ‘case reporter’, who might have some specific powers, over a specific case, which are not shared by her fellow judges.²⁴ In our classification, this would still count as an *individual decentralised* arrangement, provided that any judge in the court can, in principle, be assigned the role of reporter (that is, that the office of reporter is not a permanent position in the court’s structure). Still, within this category, we can consider that powers granted to the reporter represent a less centralised allocation than powers granted to all justices not just in principle, but also in the sense that any judge can exercise them at a given time.

We have, therefore, a spectrum, from the more collective/centralised to the more individual/decentralised: a majority of Justices; a sub-majority of Justices; the Chief Justice; each case reporter or equivalent position in the court; each and every Justice in the court. Different combinations of powers and modes of assignment will lead to overall more or less centralised courts. The US Supreme Court, for example, is more of a centralised court. The most relevant agenda-setting power is the decision to grant certiorari, which can be made collectively, by the vote of a sub-majority of four Justices. However, when voting on which cases should be accepted, Justices use a list of relevant options that is created by the Chief Justice. Although they can add cases if they want, the large volume of cases and the scarcity of time can make them deferential to the CJ’s initiative in this ‘deciding to decide’ stage.²⁵

The Chief Justice or the most senior Justice in any given voting group chooses who will draft the opinion for that group. Their choice will not prevail, however, if the tentative drafter is unable to write an opinion that can command the support of the other members of the coalition.²⁶ Additionally, the Chief Justice is the first to speak during deliberations,

²⁴ See M Cohen, ‘Ex Ante Versus Ex Post Deliberations: Two Models of Judicial Deliberations in Courts of Last Resort’ (2014) 62(4) *American Journal of Comparative Law* 951 for a discussion of the role of the case reporter in different systems.

²⁵ See FB Cross and SA Lindquist, ‘The Scientific Study of Judicial Activism’ (2006) 91 *Minnesota Law Review* 1752.

²⁶ JF Spriggs, F Maltzman and PJ Wahlbeck, ‘Bargaining on the US Supreme Court: Justices’ Responses to Majority Opinion Drafts’ (1999) 61(2) *The Journal of Politics* 485.

an agenda-setting power that, although not comparable to actually deciding what to decide, can influence *how* cases will be decided.²⁷ Provisional injunctions (for example, for stays of execution) are exceptional. Even when possible, they require a majority of Justices. Overall, decision-making power is firmly dependent on the majority. Although skilful Chief Justices can control the debates to try and promote certain outcomes, the office carries little authority over the rest of Justices when it comes to actual voting.²⁸

Finally, position-taking powers seem to be very limited in the U.S. Supreme Court in general. Justices do not typically give interviews; even when they lecture, they typically talk about ‘bland’ topics.²⁹ The Chief Justice does have a few position-taking tools at her disposal if she wants to send such signals. The annual reports on the federal judiciary, for example, can function as position taking on issues bearing on the administration, organisation, and funding of federal courts, which are a matter of congressional decision.³⁰ But such powers are still very limited in comparative terms.³¹ Consider, for example, how the Presidents of the Russian and Hungarian Constitutional Courts frequently and directly accessed the media and the public in the 1990s to defend their respective Court’s power, sometimes even going so far as to take a stance on current

²⁷ Cross and Lindquist (n 25): ‘The authority to speak first conveys an agenda-setting power that may be quite important because it enables the Chief to “direct discussion and frame alternatives”.’

²⁸ Ibid.

²⁹ In one recent instance in which a Justice has spoken out to discuss current affairs, for example, backlash and backtracking ensued. See MD Shear, ‘Ruth Bader Ginsburg expresses regret for criticizing Donald Trump’ *The New York Times* (14 July 2016).

³⁰ Toma has argued that politicians use this power to signal their broad approval/disapproval of Supreme Court decisions in a given year; the Chief Justice’s actions and words regarding the judicial budget would be another step in this signalling game. See EF Toma, ‘A Contractual Model of the Voting Behavior of the Supreme Court: The Role of the Chief Justice’ (1996) 16(4) *International Review of Law and Economics* 433.

³¹ See G Edward White, ‘The Internal Powers of the Chief Justice: The Nineteenth Century Legacy’ (2006) 154(6) *University of Pennsylvania Law Review* 1463. Contrast TW Ruger, ‘The Chief Justice and the Institutional Judiciary: Foreword’ (2006) 154(6) *University of Pennsylvania Law Review* 1323. Ruger observes that, in recent decades, the office of the Chief Justice has acquired what he calls *extramural* powers that can be deployed independently from in-court majorities, such as ‘presiding over the important Judicial Conference, which helps set judicial policy, appoint[ing] key managerial personnel in the federal courts, and select[ing] the judges who sit on various specialized federal courts’. Ruger argues that, although administrative in character, these (individual) powers can have an impact on how federal courts decide cases and therefore should be subject to the same requirements as other judicial decisions (i.e., reason giving and collective deliberation/decision making).

political controversies.³² In any event, to the extent that position-taking powers exist and are relevant in the U.S. Supreme Court's design, the CJ seems to have a more significant share of it, especially considering that associate justices still rarely discuss current affairs in the press.³³

Designing a (de)centralised court: The case of Brazil

The case of the STF stands in stark contrast to the examples sketched above. First, agenda-setting powers are fragmented and distributed on many different levels. A case is only sent to the Court for a decision after the case reporter says it is ready and after the Chief Justice includes it in the agenda. Even after the court begins to decide the case, however, in practice each individual justice holds a veto power that can be activated at any time: she can request for the judgment to be halted, and the case files to be sent to her chamber for further study ('*pedido de vista*', or simply '*vista*'). Although the court's rules of procedure limit such '*vistas*' to a few weeks, they last more than one year on average, with some lasting for a decade or more. There is no institutional mechanism to force the case to be sent back for judgment.³⁴

Unsurprisingly, Justices have used this mechanism to indefinitely stall a final judgment in several cases, even when a majority of votes has already been formed.³⁵ For a given decision to happen, therefore, (i) the case reporter and (ii) the Chief Justice must positively select a case, and (iii) the remaining Justices must refrain from using their veto-like power. If any individual Justice objects to the Court deciding the case, she can delay a decision for years or

³² K Lane Scheppelle, 'Guardians of the Constitution: Constitutional Court Presidents and the Struggle for the Rule of Law in Post-Soviet Europe' (2006) 154(6) *University of Pennsylvania Law Review* 1757. In the case of the German Constitutional Court, since the 1990s the President has engaged with the press to represent and defend the Court much more often than what would be the case in the US. See PE Quint, 'Leading a Constitutional Court: Perspectives from the Federal Republic of Germany' 154(6) *University of Pennsylvania Law Review* 1853: 'President [Juta] Limbach (...) displayed a willingness to engage in extrajudicial discussion and explanation that went considerably beyond anything of the sort that has been seen in a Chief Justice of the United States – in recent times at least.' However, such appearances would take place *after* the relevant decisions had been made, thus limiting their relevance as signalling mechanisms.

³³ According to Davis and Strickler (n 19) 90, 'despite the lack of formal personal encounters (...) the justices shape press coverage by directing the press to their written work, by being selective in their public appearances, by providing background information, by shutting off other points of access, and by avoiding issues of contention, focusing instead on minor matters such as working conditions. (...) They usually refuse to discuss current cases, and reporters know better than to ask. But the justices do discuss their roles in past decisions and offer insight on the Court's inner machinations.' See, however, Davis (n 19) (arguing that US Supreme Court Justices are becoming less averse to appearing in the press in recent years).

³⁴ Arguelhes and Hartmann (n 9).

³⁵ See *ibid* (n 9) for a detailed analysis of this mechanism and the lack of limits in its use, including examples of the strategic use of *vistas*.

even indefinitely, since the STF and its members have shown not to be bound, in practice, by any deadlines.³⁶ Moreover, given the STF's vast backlog, it is very costly for the press, for the parties involved, and for the other Justices to monitor which cases are being delayed and for what purposes.

Second, although this would seem to be forbidden by existing rules, in practice STF Justices talk to the press or the public about cases pending for a decision by the court.³⁷ In 2013, for example, in the days after some congressional committees began to discuss a political amendment that would significantly limit the STF's powers, four Supreme Court Justices spoke to the press about the amendment. Of the three that criticised it, two actually stated that such an amendment would be unconstitutional.³⁸ Shortly afterwards, Congress stopped discussing the amendment. Position taking by the three Justices was not the only factor that led to this outcome, but such public statements undoubtedly provided congressmen with information on the likelihood, direction, and intensity of future judicial reactions, while also providing incentives (and perhaps specific legal arguments) for actors considering taking their political defeats to court.³⁹ While the actual effectiveness of this kind of signalling depends on many variables, including the standing of the speaking Justice, there seems to be no mechanism to punish or control Justices who talk to the press about pending and future cases. Just as it happens with the agenda-setting powers, then, the use of position-taking powers is entirely a matter of individual inclination and/or strategy.⁴⁰

Third, in practice if not in theory, individual justices in the STF can perform judicial review by themselves. Although formally decision-making

³⁶ Ibid. See also D Dimoulis and S Lunardi, 'Definição da pauta no Supremo Tribunal Federal e (auto)criação do processo objetivo' (Anais do XVII Congresso Nacional do CONPEDI, Brasília, 2008), 4.357–77.

³⁷ D Werneck Arguelles and L Molhano Ribeiro, 'O Supremo Individual: Mecanismos de atuação direta dos ministros sobre o processo político' (2015) 46 *Direito, Estado e Sociedade* 121.

³⁸ These two Justices were Gilmar Mendes and Marco Aurélio, both of whom have made some of the most consequential public appearances in the last few years (see *ibid*). When President Dilma Rousseff first launched the idea of political reform via an exclusive constituent, STF Ministers spoke out on the issue. In particular, Ministers Roberto Barroso and Gilmar Mendes presented different views (cautious acknowledgement and frontal rejection, respectively) on the constitutionality of reforming the constitution through this type of mechanism.

³⁹ In a few occasions, Justices have even used this power to try to influence the behaviour of their own colleagues in pending cases. See Arguelles and Ribeiro (n 37) for examples and discussion.

⁴⁰ Ibid; J Falcão and D Werneck Arguelles, 'O invisível Teori Zavascki e a fragmentação do Supremo – Uma retrospectiva de 2015' in J Falcão, D Werneck Arguelles, and F Recondo, *O Supremo em 2015* (FGV, Rio de Janeiro, 2016) 21. The STF's Chief Justice does have some exclusive, institutional opportunities to speak on behalf of the court – for example, the Chief Justice must speak at the opening of the judicial year, at the beginning of each semester. In practice, however, associate Justices access the press and the public so often that the potential value of the CJ's exclusive opportunities to speak out are diluted.

powers are allocated to the majority of the Justices, in the plenary court or in one of the chambers, there are in practice several mechanisms by which individual Justices can review and suspend the actions of the other branches without persuading a majority of their colleagues. As a formal matter, several different laws grant the case reporter – who is randomly assigned to the case as it enters the docket – the power to make individual decisions in exceptional circumstances, without necessarily giving the merits of the case a full analysis. These circumstances typically include preventing irreparable harm to rights, or irreversible consequences that would make a future decision moot. In practice, however, individual decisions are often neither exceptional, nor provisional.

The STF issues a massive amount of decisions each year, in the range of dozens of thousands.⁴¹ Historically, an average of less than 10 per cent per year of these decisions have actually been taken by a collective of judges, in the plenary court in one of its two chambers. Individual judges, then, make the vast majority of these decisions. Scholars have observed that this mass of individual rulings can operate as an informal mechanism for case selection, by which the most controversial, novel or important cases are sent for collective deliberation.⁴² This is, however, only a partial view of what individual rulings represent in the STF. While they can function as informal docket control mechanisms to filter out lesser or ‘easy’ cases, the data available suggests that this mass of individual rulings enables individual action – including judicial review – even on important cases that would deserve, by any measure, collective deliberation by the STF.

Between 2010 and 2017, the STF issued 20,830 decisions on individual provisional injunctions – an average of 2,603 (260 per Justice) per year.⁴³ In the same period, the plenary court and two chambers combined decided less than 180 provisional injunctions.⁴⁴ In such a large number of individual decisions, it is unsurprising that the plenary court and the chambers have not

⁴¹ For a comparison of data on the court’s caseload over time, contrast e.g. MP Veríssimo, ‘A Constituição de 1988, vinte anos depois: Suprema Corte et ativismo judicial “à Brasileira”’ (2008) *Revista Direito GV* 407; J Falcão, P de C Cerdeira and D Werneck Arguelhes, ‘1o Relatório Supremo em Números: O Múltiplo Supremo’ (FGV, Rio de Janeiro, 2011); and IA Hartmann and L Ferreira, ‘Ao relator, tudo: o impacto do aumento do poder do ministro relator no Supremo’ (2015) 13(17) *Revista Opinião Jurídica* 268.

⁴² See Veríssimo (n 41).

⁴³ Data obtained from the STF’s official website: see <<http://www.stf.jus.br/portal/cms/verTexto.asp?servico=estatistica&pagina=decmonocraticas>>.

⁴⁴ Ibid. According to data from the *Supremo em Números* database at FGV Direito Rio, the same proportion can be found when we look just at abstract review cases. Between 2012 and 2016, there were 883 individual decisions on provisional injunctions – an average of 80 per Justice per year. Moreover, in the last decade, individual judges made more than 90 per cent of all provisional rulings on abstract review. See also Falcão, Hartmann and Chaves (n 15).

been able to effectively monitor how individual judges use their decisional powers. Between 2007 and 2016, on average 797 days have passed between an individual ruling granting an injunction on abstract review cases and the first meeting of the plenary or the chambers for which that injunction was on the agenda.⁴⁵ Beyond abstract review, between 2012 and 2016, the average is 617 days.⁴⁶

Technically, such injunctions can only be granted in exceptional circumstances. Granting them often means suspending laws, administrative acts, or deliberations on a bill. The only mechanism to identify and neutralise a wrongly issued provisional ruling (i.e., one outside the limits and exceptional conditions prescribed by law) is a vote by the plenary court or one of its chambers. However, with so much time lapsing between the individually issued injunction and the collective opportunity for oversight, what we see in practice is an effective opportunity for individual judges to reshape the legislative status quo, with no interference or oversight by their colleagues.⁴⁷

At least in part, this scenario is created by one individual agenda-setting mechanism: namely, that the case reporter herself – the one who issues an individual ruling in the first place – gets to decide, on her own terms and under no deadlines, when the case is ready for judgment before the court. In practice, although not officially, submitting a case to the plenary court is entirely optional for the case reporter, and the passage of time can turn the provisional suspension of a law or administrative act into a social or political *fait accompli*.⁴⁸ This ‘loop’ between agenda setting and decision making is crucial in understanding how the STF works and how its members influence politics around it: *a Justice can decide individually; and that same Justice decides when to take the case to the rest of the court.*

We opened this article with the example of Justice Fux suspending, by himself, congressional voting on a key bill. This should not be read as an isolated episode. In the last decade, and especially during the political

⁴⁵ Data obtained from the *Supremo em Números* database.

⁴⁶ This is the time between the issuing of the decision and the next collegiate decision in the case. We assume that the next collegiate decision will typically either be about the previous, provisional ruling, or be in itself a decision on the merits that ends the dispute and supersedes the individual ruling. That might not be the case, however, and even longer periods of time may have passed, in the cases included in the data, before the court reviews the individual ruling or decides the case.

⁴⁷ Dimoulis and Lunardi (n 36) have observed that, on several important issues, individual justices have adopted an activist stance in the last decade while the plenary court or the chambers remain passive or even completely silent.

⁴⁸ For extended discussion and examples, see J Falcão and D Werneck Arguelhes, ‘Onze Supremos, todos contra o Plenário’ in J Falcão, D Werneck Arguelhes and F Recondo (eds), *Onze supremos: o supremo em 2016* (FGV, Rio de Janeiro, 2017) 20.

crisis of 2015–16, it would be easy to find other examples. By himself, Justice Gilmar Mendes granted an injunction suspending former president Lula's appointment to president Rousseff's cabinet. It took him a few weeks to clear the case for judgment by the plenary court, and in that period of time President Rousseff was suspended from office on a vote in the House.⁴⁹ By himself, Justice Marco Aurélio determined that the president of the Chamber of Deputies had to reconsider his summary dismissal of an impeachment petition against then-interim President Temer.⁵⁰ By himself, Justice Fux granted an injunction guaranteeing to all judges in Brazil a *de facto* salary bonus of dubious legality ('*auxílio moradia*').⁵¹

These are not minor issues. When decided, they were amongst the most heated political controversies of the day. In none of these high-profile cases, however, did the plenary court have the opportunity to review the individual, 'provisional' ruling. In the meantime, politics kept moving forward. In this fashion, supposedly provisional rulings become final in practice, even in high-stakes cases to which the press, the legal community, politicians, and the rest of the court were paying close attention. Whatever the law says about how these individual injunctions *should* be provisional, they can be placed outside the scope of the plenary sessions and have irreversible effects on the political landscape around the court. Individual rulings are included in the system as a mechanism to protect and guarantee, in an emergency, the plenary court's possibility of making a decision before irreparable harm is done.

In practice, however, they can be used for the opposite purpose: to make an individual decision and prevent the plenary court from having a say on the issue, or at least to guarantee that the plenary court will have to decide when the status quo has already been transformed in the direction desired by the individual judge.

⁴⁹ T Pereira, 'Lula Ministro e o Silêncio do Supremo' in Falcão, Werneck Arguelhes and Recondo (n 48) 77.

⁵⁰ MS 34087. Justice Marco Aurélio's injunction was issued on 5 April, and cleared for judgment by the plenary Court on 17 May. See L Scocuglia, 'Marco Aurélio libera para julgamento pedido de impeachment de Temer' *JOTA* (17 May 2017) available at <<https://jota.info/justica/marco-aurelio-libera-para-julgamento-pedido-de-impeachment-de-temer-17052016>>. At the time of writing, the Court has yet to rule on this individual injunction.

⁵¹ Since Fux made his decision within the AO n° 1.773, in 2014, each judge in Brazil has been receiving a *de facto* raise of approximately 4.300 BRL/month (1200 USD/month). According to one estimate, between the decision and November 2016, this has amounted to a total cost of 289 million BRL per year for the federal budget. See Redação JOTA, 'Barroso libera para julgamento o fim do auxílio-moradia' *JOTA* (14 November 2016) available at <<https://jota.info/justica/barroso-libera-para-julgamento-o-fim-auxilio-moradia-para-juizes-14112016>>. In December 2017, more than three years after his individual injunction, Justice Fux cleared the case for deliberation by the plenary court.

The STF, then, has a highly individualised and decentralised design, in which individual judges can make their preferences prevail against both external (political) and internal (judicial) majorities. All Justices have the power to individually prevent a case from being decided, and can use the press to try to threaten other institutions by means of signalling future decisions. Finally, and more disturbingly, each case reporter can issue provisional decisions, even if this means suspending the execution of statutes or administrative acts, and then use her agenda-setting powers to control if and when such a provisional ruling will be taken to the full court, blurring the distinction between ‘provisional’ and ‘final’ decisions. Beyond the formal allocation of the power to decide on the merits of a case, though, this decentralised blueprint is created by the combination of and interaction between agenda-setting powers, provisional injunctions and, to a smaller extent, position-taking powers.

It should be noted that this system was not *designed* to work like this. In theory, most of the individual powers we described should be part of a delegation framework, with the individual judge working as an agent of the collegiate principal, so as to make it possible for the court to deal with the massive amount of cases entering its docket every year. This logic, however, does not capture how the institution works in practice. The mechanisms by which the ‘principal’ could oversee and correct the ‘agent’ are extremely limited, and have been ineffective in even the most important of cases. While a majority of justices could, in theory, change the court’s internal rules of order so as to limit most of these powers, nothing of this sort has been observed in practice, and it still unclear whether this majority would be willing or able to enforce the new rules to discipline individual justices.

III. Constitutional theory, individual judicial powers, and individual judicial review

We have seen that courts can affect the outside world in ways that do not necessarily involve a majority of their members or even a collective decision. But how are debates on the legitimacy of constitutional review affected once we remove the assumption of collective decision-making? Constitutional theorists have recently discussed not just the allocation of power between judges and political institutions, but also how specific features of the design of judicial institutions might affect their claims to legitimacy, in particular when it comes to judicial review.⁵² In this perspective,

⁵² Silva (n 22); M Kumm, ‘Constitutional Courts and Legislatures: Institutional Terms of Engagement’ (2017) 1(1) *Católica Law Review* 55. See also C Mendes, *Constitutional Courts and Deliberative Democracy* (Oxford University Press, Oxford, 2013).

for example, Silva has analysed internal decision-making practices of the STF to assess if and how the institution's power can be justified by deliberation-centred defences of judicial review.⁵³ What we suggest here is engaging in the same sort of normative enterprise to criticise specific allocations of powers within multi-member courts.

Individual judicial review is perhaps the most challenging problem in this spectrum: can existing arguments for constitutional review be used to justify *individual* review within collegiate courts? Unsurprisingly, we answer the question in the negative. The main purpose of this final section, however, is not to argue that the power to perform judicial review should not be granted to individual judges within a high court, but rather map and to understand the possible reasons *why* this is the case. We will focus on individual judicial review to illustrate the kind of arguments and issues that can be raised once we become aware of how certain powers are allocated within multi-member courts.

Collective decision-making and normative defences of judicial review

Constitutional theorists often separate the questions of (i) how to best interpret constitutional texts and (ii) whose interpretation of the constitution should be binding. Theories that focus primarily on the first question do not deny that all institutions and their members can interpret and apply the constitution – but they do assume that, because the judiciary is insulated from politics, judges will have fewer incentives not to deviate from what the normative theory of interpretation prescribes. Dworkin's influential theory of 'law as integrity', for example, provides both normative guidance to constitutional adjudication and a justification for judicial review, but it does so by establishing how the constitution should be interpreted. Insulation from politics and the requirement to give reasons for their decisions are enough to turn courts into 'forums of principle', and thus better suited to redeeming the promise of law as integrity. Still, a Dworkinian would not necessarily reconsider her support for judicial review, at least in the US context, if the Supreme Court were staffed by a single independent judge, as long as that judge was committed to 'law as integrity'.⁵⁴ Dworkin's and similar theories can be criticised for ignoring the collective nature of

⁵³ Silva (n 22).

⁵⁴ Each judge is bound by 'law as integrity' individually, as she is 'required to test his interpretation of any part of the great network of political structures and decisions of his community'. See R Dworkin, *Law's Empire* (Harvard University Press, Cambridge, MA, 1986) 245.

the judicial review enterprise, but, for the same reason, the individual exercise of judicial power would not seem to be an independent source of criticism for this theory.⁵⁵

Such theorists could, of course, still acknowledge the existence of good, prudential reasons for collective decision-making that are not in themselves required by their normative theory of constitutional adjudication.⁵⁶ Indeed, independently from whatever ideal theory we adopt, we might still think that the power to strike laws down on the basis of constitutional interpretation can be designed in ways that make it more effective or safer – for example, because a single justice might more easily succumb to personal biases, external threats, or other extrajudicial temptations. Or, once we factor in appointment procedures, we might want to design this power in ways that will increase its legitimacy. People would be more suspicious of a single Hercules appointed by a single president or governing majority; in contrast, a multi-member body will most likely include appointees from politicians of very different persuasions.

Excessive concentrations of judicial power in a single judge, then, could still be seen as undesirable as a practical matter. But this problem is not related to the core of Dworkin's and similar arguments in favour of judicial review. Other approaches, in contrast, defend constitutional review without directly requiring that judges approach the constitution in specific ways. Instead, they ask an institutional design question. If the goal is to enforce constitutional commitments, including fundamental rights, how should we design our institutions? A first set of theories in this group argues that certain properties in the design of judicial institutions might make them particularly *good* at fulfilling this task in a democracy, in ways that go beyond the mere independence from politics. In particular, as the idea of *deliberation* entered the scene, high courts were transformed '*from a democratic anomaly into models of democratic decision-making*'.⁵⁷

From this perspective, these institutions' procedural features, coupled with their insulation from electoral politics, gave them an edge in deliberating and providing an important good in a democracy: reasoned, principled arguments about our constitutional commitments. Indeed, in many recent defences of judicial review, constitutional courts are assumed to be institutions with a high potential, at least, for deliberation.⁵⁸ Courts may differ, of course, in their resources and incentives to become actual

⁵⁵ See e.g. FI Michelman, 'Foreword: Traces of Self-Government' (1986) 100 *Harvard Law Review* 4.

⁵⁶ For a discussion of some of these prudential reasons, see Mendes (n 52).

⁵⁷ Cohen (n 24) 958–63 (emphasis added).

⁵⁸ See *ibid*, 958, fn 19 for examples.

deliberators.⁵⁹ But theorists of deliberation assume that all courts share at least one such resource: judicial power is exercised through collegiate institutions.⁶⁰ Collective decision-making is a necessary, but insufficient condition for deliberative performance.⁶¹ Still, when a single judge can decide at an apex court, the promise of judicial deliberation as a redeeming feature of constitutional review in a democracy is obviously lost.

Finally, there are arguments in favour of judicial review that, while also taking institutional design into account, do not rely on showing that courts are particularly good at ‘getting the constitution right’. Instead of focusing on the institutional expertise required by this task, they focus on what judicial review has in common with other deviations from majority rule, such as bicameralism. By requiring an increased level of political agreement between different institutions, such mechanisms promote positive outcomes like stability or the respect for minorities’ rights.⁶² Such a ‘modest case’ for judicial review would not rest ‘on the idea that courts are more likely than legislatures to make correct decisions about how to define vague rights’ because they are ‘forums of principle’, but rather on the ground ‘*that legislatures and courts should both be enlisted in protecting fundamental rights, and that both should have veto powers over legislation that might reasonably be thought to violate such rights*’.⁶³ In such a view, giving courts this kind of power is justified as a measure to bias the political process towards minimising violations of rights by simply adding one extra veto point. If this veto is exercised by an institution that could be particularly responsive to rights claims, even better, but this is not required for the argument to work.

In principle, this line of reasoning would seem to justify even individual judicial review. If creating additional pro-rights checks is important in a democracy, why not give several independent judges, within a court,

⁵⁹ Silva (n 22); Mendes (n 52); C Mendes, ‘Political Deliberation and Constitutional Review’ in K Himma and I Flores (eds), *Law, Liberty and the Rule of Law* (1st edn, Springer, Nova Iorque, 2013) vol 1 121.

⁶⁰ Mendes (n 52) 72: ‘Collegiality is a fact of constitutional courts, and constitutional theory needs to take that into account.’ The dimension in which courts really differ, in terms of their deliberative potential, is that ‘as any multi-member institution, a collegiate court needs to frame a procedure that allows for the conversion of the “many” into “one”, to define what shape “the opinion of the court” will have’ (ibid 62).

⁶¹ According to Mendes, we should not assume that, because judges are unelected, the ‘internal dynamics of this conflictive multi-member institution’ will necessarily foster deliberation. See *ibid*.

⁶² See e.g. S Freeman, ‘Constitutional Democracy and the Legitimacy of Judicial Review’ (1990) 9(4) *Law and Philosophy* 327, 364–5.

⁶³ RH Fallon Jr., ‘The Core of an Uneasy Case for Judicial Review’ (2008) 121(7) *Harvard Law Review* 1693 (original emphasis).

The second scenario is problematic for theories of deliberation as well. If IJR is actually a voting rule, it could still be the case that judges actually deliberate before using their individual powers. They could listen to each other's arguments, and perhaps even try to reach a consensus so as to protect and foster their institution's authority. But, if reaching a consensus and persuading each other is not possible, one vote would be enough to strike down a law (if decision-making power is allocated to a single judge), or to completely prevent that law from being struck by the court (if one single judge has the right agenda-setting powers). We have now moved from collegiality as an institutional feature to a finer question of the

⁶⁴ Fallon recognises this risk of proving too much with this line of reasoning. See *ibid.*: ‘If multiple vetoes are good, why stop with the legislature, the President, and the courts? Why not establish other institutions with veto powers or insist on unanimous consent before any legislation can be enacted?’

internal design of judicial decision-making procedures: why should a single vote in a multi-member court be enough (or not enough) for judicial review?

Judicial power and majority rule in multi-member courts

In this section, we will consider individual assignments of judicial power – focusing on, but not limited to, individual judicial review – as a *voting rule*, by which the vote of a single judge in a multi-member court is a sufficient condition to exercise power over the outside world. We typically assume that courts should settle their internal disagreements and reach a decision by means of majority rule (MR). But are there good reasons behind this arrangement? Considering how arguments developed for political bodies could be applied to courts, Waldron maps three kinds of arguments in favour of MR: (i) efficiency (MR is the cheapest and fastest way to solve a dispute); (ii) epistemic (MR allows the institution to make better decisions and reach better conclusions); and (iii) justice arguments (MR treats all the parties involved as political equals).⁶⁵ Can IJR and other individual powers be justified by such arguments?

Efficiency, argues Waldron, cannot in itself be a decisive argument in favour of any voting rule, because there must always be an underlying concern with the legitimacy and the ‘decisiveness’ of the procedure. A ‘decisive’ procedure is one that would lead to the same outcome, over time, if employed again for the same reasons – otherwise, the answer we obtained from the institution now is indeterminate and unstable, and we would expect a different answer if we tried again. This is why we would not allow courts to reach a decision by flipping a coin – the cheapest, fastest possible decision-making mechanism.⁶⁶

Using the ‘decisiveness’ standard to look at individual allocations of powers yields mixed results, depending on the specific configuration of the court. In the STF, each and every judge can veto judicial intervention by removing a case from the agenda – that is, each judge has a negative agenda-setting power. Whatever other problems this procedure might have, it is undeniably ‘decisive’: if Justice X wants to take the case out of the agenda, all other things being equal, she would do so again if we employed the same procedure to solve the same question. The same cannot be said, however, of the case reporter’s power to issue provisional (and potentially *de facto* final) rulings. The case reporter is assigned randomly

⁶⁵ J Waldron, ‘Five to Four: Why Do Bare Majorities Rule on Courts?’ (2014) 123(6) *Yale Law Journal* 1692.

⁶⁶ *Ibid.*, 1710–11.

as the lawsuit enters the court's docket. If we consider the assignment of the reporter to be part of the full decision-making procedure – as we should, in order to understand how the STF actually works in practice –, then each re-run of the procedure would lead to a different outcome. Different reporters can have different views on the same issue, and depending on who gets the case we may or may not have a display of individual judicial review.⁶⁷

Broadly speaking, epistemic arguments in favour of majority rule claim that this promotes better decisions. Once we assume that judicial decisions involve some degree of expertise and experience, when judges face internal disagreement the position that has the support of the largest number of these 'experts' should prevail.⁶⁸ But if, in a given court that is divided over this issue, a single Justice is able to force the court's power in her preferred direction, we have an institutional problem on epistemic grounds. There is no guarantee that the court's power is being used in a way that carries at least the support of *at least* a majority of the court. This would be a problem even if all judges were forced to listen to their colleagues' reasons and arguments before using their individual powers; it is even more problematic and unjustified when they can do so before the discussion takes place.

Finally, we have a justice-based argument, which appeals to political equality: majority rule is the only way to ensure that every participant in the decision-making process has equal weight in the decision.⁶⁹ Waldron is somewhat sceptical of whether we must always treat the justices themselves as complete political equals in this sense. In some courts, the institution is designed so that certain offices (like the Chief Justice) have increased influence in the internal decision-making process, sometimes even by means of an extra vote in the case of a tie. The stronger case for treating judges in a multi-member court as equals comes from considering the democratic majorities behind them. Procedures of political appointment to judicial offices express an attempt and a commitment to make judicial interpretation open to influence by the cycles of politics – perhaps not in the short run,

⁶⁷ We are not referring here to the mere fact that a randomly assigned case reporter has some advantages in the decision-making procedure. Many courts rely on individual reporters to draft a tentative first draft of the opinion: see generally Cohen (n 24). Depending on other factors like the court's workload and the reporter's reputation, the reporter's initial assessment of the case might actually influence the outcome. This, however, would be one amongst many other factors influencing the collective decision, while the mechanisms we have discussed in the STF make the randomly assigned reporter's preferences enough to determine the outcome. The problem arises not with randomness of the reporter *per se* (even if this position carries some weight in the decisional procedure), but with randomness combined with the reporter's agenda-setting and decision-making powers.

⁶⁸ Waldron (n 65) 1712–18.

⁶⁹ Ibid, 1718–23.

after a single election, but certainly after a majority coalition wins enough elections to make a certain number of appointments to the court.⁷⁰

Treating judicial appointees as equals within the court, then, means giving equal weight to all the political choices made by elected representatives. Whatever the specific ideals, reasons, and calculations behind these attempts to regulate the translation of electoral victories into constitutional law, however, minority or individual rule in judicial bodies turns everything upside down. *One* appointment becomes enough to enable or disable judicial intervention in politics, even when a given political coalition has appointed several (or perhaps even a majority) of the justices of that court. An arrangement that gives each individual member of court, by herself, both the power to decide or to veto a decision would thus seem to fail on this standard as well.⁷¹

IV. Conclusion

The notion of collegiality – in its most basic sense as a group of people deciding something together – is often taken as an ‘institutional fact’ when it comes to supreme and constitutional courts.⁷² Theorists who focus solely on how to interpret the constitution, not accounting for collegiality, are criticised for ignoring the kind of institution that courts are in practice.⁷³ In this article, we point to the opposite direction. As we have argued, courts can affect the outside world by means of different powers that are not limited to formal decision-making, and which can be allocated in very decentralised ways. We are used to looking into the powers of specific offices, like the Chief Justice, but it is possible to allocate powers in even more decentralised

⁷⁰ See e.g. J Balkin and S Levinson, ‘Understanding the Constitutional Revolution’ (2001) 87(6) *Virginia Law Review* 1045. Fixed term limits can be conceived as a more specific attempt to treat all political coalitions and presidents alike, by making all electoral victories give them the exact same number of opportunities in influencing a court’s composition.

⁷¹ In considering, in a sympathetic light, the possibility of requiring a super-majority (such as two-thirds of the court) for performing judicial review, Waldron is indirectly discussing minority-voting rules. See Waldron (n 65) 1696–97 and 1730. Such an arrangement would enshrine, in practice, a deferential attitude towards legislative and administrative acts – not in interpretive approaches and jurisprudential positions, but built into the voting procedure itself. See A Vermeule, *Mechanisms of Democracy: Institutional Design Writ Small* (Oxford University Press, New York, NY, 2007) 73–85. But, as happens with all super-majority rules, this would also mean that a minority of justices has the power to prevent the court from using its power.

⁷² Mendes (n 52); L Kornhauser, ‘Deciding Together’ (2015) 1 *Revista Estudos Institucionais* 38.

⁷³ See e.g. Mendes (n 52); Michelman (n 55); RM Cover, ‘Violence and the Word’ (1986) 95(8) *Yale Law Journal* 1601; Kornhauser (n 72) (‘Normative theories of adjudication typically consider a single judge, deciding alone. Appellate judges in every country, however, sit in panels. They decide *together*. These theories thus implicitly suggest that a judge, sitting on a collegial court, should decide as she would decide were she sitting alone.’)

and individualistic ways within a multi-member judicial body. Even in its most basic sense, then, collegiality should not be assumed from the outset.

The STF has been interpreted (and criticised) for being particularly individualistic in its deliberative process – a ‘soloist court’, in which opinions tend to take the form of serial monologues, with very little engagement from individual Justices with one another’s arguments.⁷⁴ In this article, we focus not on collective decision-making practices, but rather on the effect of allocating powers to individual Justices *within* a multi-member court on the legislative status quo outside the court. Here, too, the STF is highly individualistic in its design. When a case is taken to a chamber or to the plenary court for judgment, every single Justice has the power to prevent a decision from being made, thus keeping the legislative status quo untouched. However, the interaction between certain decision-making and agenda-setting powers gives the randomly assigned case reporter in each case the power to change the legislative status quo by herself, by issuing a preliminary injunction and then refraining from taking the issue to the rest of the Court for deliberation. This practice means that individual case reporters might perform judicial review by themselves *before* a case is sent to the collective spaces within the court – that is, to the plenary or the two chambers. Moreover, even *if* and *after* a case reporter takes a case to the plenary or one of the chambers, all it takes is a decision from one Justice to indefinitely prevent a majority from reaching a decision. In both scenarios, majority rule would seem to have no relevant place within the STF.

Our analysis has implications beyond Brazil. Individual assignments of agenda setting, position taking, and decision-making powers can be found in other countries, and might have been overlooked even in national descriptions of how different supreme courts and constitutional courts function. Indeed, comparative studies of constitutional adjudication have also largely adopted collegially and majority rule as assumptions when looking at how courts operate. The typology of powers built on the basis of the Brazilian case points to an underexplored spectrum for comparing different courts in terms of (i) which powers they allocate and (ii) how they allocate these powers to their component members. One can investigate *how majoritarian* different courts are from the point of view of their

⁷⁴ The expression comes from Mendes’s reconstruction of legal reasoning practices in the STF. See CH Mendes, ‘The Supreme Federal Court of Brazil’ in A Jakab, A Dyeve and G Itzcovich (eds), *Comparative Constitutional Reasoning* (Cambridge University Press, New York, NY, 2017) 115. On individualism and the limited scope of the exchanges between the Justices (and between their opinions), see also Silva (n 22); J Rodrigo Rodriguez, *Como Decidem as Cortes? Para uma crítica do direito (brasileiro)* (FGV, Rio de Janeiro, 2013); A Vojvodic, AMF Machado and EC Cardoso ‘Escrevendo um Romance, Primeiro Capítulo: Processo decisório e precedentes no Supremo Tribunal Federal’ (2009) 5(1) *Revista Direito GV* 21.

internal organisation by looking at how agenda setting, position taking, and decision-making powers are assigned (in more or less majoritarian ways) within the institution. If this is so, then the Brazilian case might point to a much more pervasive phenomenon, which becomes visible when we move away from the court to the individual justices – as well as from actual decision-making to other powers that can be used to change the status quo outside the court even in the absence of judicial decisions.

Once this expanded typology of court powers are in place, we can ask new and specific normative questions about them. In this article, we have presented different reasons why *individual judicial review*, as it manifests itself in the STF, is at odds with some basic tenets of constitutional theory. But these reasons should be taken as the initial steps toward a broader conversation on other aspects of ‘atomised’ judicial behaviour in apex courts. Should agenda setting and position-taking powers be treated as judicial decision-making powers? Should we treat them as a power so relevant as to require a majority decision, for example? Should official statements by constitutional judges be voted on and approved by a majority of their colleagues before sent to the press? How can we justify the possibility of provisional rulings taken by a few justices or a single one, even if for brief periods of time, when judicial intervention can completely change the political landscape in favour of one party or the other? What kinds of powers should we give judges to deal with emergencies – and how can we oversee and limit them? And should we normatively assess these mechanisms one by one, or should we focus on how they interact with each other and empower the judges in practice? We pointed to possible answers to some of these questions when it comes to the STF, but, regardless of the answers, we believe they present difficult and urgent problems, for both constitutional theorists and institutional designers, beyond the case of Brazil.

Acknowledgements

The authors would like to thank Juliana Alvim, Luiz Gomes Esteves, Marcio Grandchamp, Eliezer Gomes da Silva, Jamal Greene, Conrado Mendes, Gregory Michener, Thomaz Pereira, Andrea Pozas-Loyo, Mariana Prado and Evandro Sússekind, as well as the two anonymous reviewers, for comments on earlier versions of this article. The first version of this article was presented at the 2017 annual meeting of the Seminar in Latin America on Constitutional and Political Theory (SELA), in Quito, Ecuador. Research for this article was conducted while the first author was a Visiting Fellow at the Information Society Project, Yale Law School (Spring 2017), and Hauser Global Research Fellow, NYU School of Law (Fall 2017); we are thankful for the support of both institutions and their communities.