Courts as the first and only legislative chambers? The Brazilian Supreme Court and the legalization of same-sex marriage*

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Abstract: Since 2012, same-sex marriage has been legal in Brazil. This, however, was accomplished without the participation of any political branch: the only law-making actor involved was the Supreme Court. In existing studies on the judicialization of politics, lawmakers are typically the first movers, while courts function as actual or potential veto players regarding the outcome of the legislative process. The Brazilian Supreme Court, however, when provoked by social and political actors under specific circumstances, has delivered decisions that: (a) established rules in areas of law where the elected branches had not made any decisions in the last decades; and (b) at least in how they came to be treated by the Supreme Court itself, foreclosed further congressional or presidential lawmaking on these topics. This paper is a case study on the conditions in which this judicial role – of a *first* and *only* legislative chamber – has emerged in Brazil. Although Brazilian constitutional law includes a couple of mechanisms designed for judicial review of legislative omissions, it was the Supreme Court's increasingly expansive reading of its own powers – not those deliberately designed to allow for judicial legislation – that created opportunities for social and political movements to bypass Congress and change the constitutional status quo according to their ideals. This new role of the Supreme Court, however, creates tension between two different justifications for judicial intervention in politics – when judges act *last,* they are constrained by not having also been the *first* to decide what the constitution requires and allows for on a given issue. In same-sex marriage litigation and in several other recent cases, however, the Brazilian Supreme Court has been trying to have it both ways.

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A. Introduction

In 2011, in its *Arguição de Descumprimento de Preceito Fundamental* (ADPF) 132 decision, the Brazilian Supreme Court (STF) determined that the Constitution directly protects the individual right to establish a same-sex civil union for all legal purposes. In the following year, the National Council of Justice (CNJ) enacted a resolution – binding on all public notaries in the country – interpreting the ADPF 132 decision as prohibiting any differentiation between civil unions on the basis of the parties' sexual orientation. As the Brazilian Constitution states that "*the law will enable the conversion of civil unions into civil marriages,*" the CNJ understood that, by direct implication of the STF's ruling, same-sex partners in civil unions could get married. These two decisions – one administrative, one judicial – are currently the legal basis for same-sex marriages in Brazil. Such marriages have been routine for several years now.[1]

This major legal transformation was accomplished without the participation of an elected branch. The only actual lawmaking actor involved was the Supreme Court. What's more, in technical terms, the Court did not even strike down as unconstitutional a law by which Congress had prohibited same-sex marriages. The Brazilian Civil Code of 2002 extended protection to civil unions formed by "*the union of a man and a woman*"; in doing so, it merely repeated the exact language used in the Constitution, which said nothing specific about same-sex marriages.

Upon enacting the Civil Code, Congress may have missed the opportunity to discuss and adopt a constitutional amendment more in tune with the times. But, in the terms of the Constitution as it stood at that point, the legislators were not creating anything new. Rather, they mimicked the Constitution's words regarding *civil unions* – which the text seemed to restrict to only "a man and a woman" – and the constitutional silence on the specific issue of same-sex *marriage*. At the end of the day, the Court intervened by dramatically reinterpreting the constitutional clause, shifting from an apparent prohibition of same-sex civil unions to a mandatory recognition of same-sex marriages.

The story of ADPF 132 presents a twist on the typical accounts of "judicialization of politics." The interplay between the rules enacted by legislators and the decisions handed down by constitutional courts has been widely studied in several countries. "Judicialization" scholars have shown how in many democracies in which there is judicial review, the lawmaking process involves strategic interactions between legislators and judges.[2] As they deliberate on a bill, foreseeing the possibility of constitutional review, legislators may

1 According to data provided by the CNJ, one year after the Council's decision, more than 1000 same-sex couples had already gotten married. See, e.g., *Regina Bandeira,* Um Ano Após Norma sobre o Casamento Gay, Chegam a 1.000 as Uniões entre o mesmo Sexo, http://www.cnj.jus.br/noticias/cnj/61657-um-ano-apos-resolucao-do-casamento-gay-chega-a-1000-o-numero-de-unioes-entre-pessoas-do-mesmo-sexo (last accessed on 20 August 2017).

2 For an overview of the literature on this phenomenon and the many variables it involves, see *Ran Hirschl*, The judicialization of mega-politics and the rise of political courts, Annual Review of Political Science 11 (2008), pp. 93-118.

choose to simply ignore the court as a potential threat and discuss the constitutionality of the would-be statute on their own terms. They can, however, and often will, use the court's precedents to try to predict the substantive limits that future judicial rulings could impose. Political minorities are expected to challenge these laws as soon as they are enacted. This makes the mere existence of constitutional review mechanisms sufficient to render the court's preferences (as revealed by their precedents) relevant in the lawmaking process, as legislators try to anticipate and preempt future challenges.

Judicial preferences are thus taken into account in the lawmaking process by means of complex interactions between different actors within the political system. Typically, however, judicial action modulates – either directly or indirectly, by incentivizing strategic behavior – some sort of legislative action. Existing literature on the judicialization of politics in different national and transnational scenarios includes many variations on the possible outcomes and patterns of the interaction between "lawmakers", broadly defined, and courts. The legislature creates new rules; the court may disagree with them, to some extent, and call for substantive changes to make these rules constitutional. In turn, the legislature might anticipate these decisions in the next round of rulemaking. In these narratives, however, lawmakers are always the first movers, even if their actions are influenced by the threat of judicial intervention; courts, meanwhile, function as actual or potential veto players regarding the outcome of the legislative process.

In the last few years, Brazilian constitutional politics has developed in ways that signal a very different role for courts in the legislative process. The STF has demonstrated its capacity to act not simply as a veto player – a third legislative chamber – but as a *first* and *only legislative chamber*. Social and political actors wishing to completely bypass the political decision-making process have successfully prompted the Court to deliver decisions that: (a) established rules in areas of law where the elected branches had not taken any decisions for the last decades; and (b) at least in how they came to be treated by the Supreme Court itself, left no room at all for further congressional or presidential lawmaking on these topics. In these circumstances, the Supreme Court completely bypassed and tentatively foreclosed the lawmaking process. In this paper, we analyze these features of the ADPF 132 decision and explore the institutional conditions that have fostered this judicial role in Brazil. In our reconstruction, the Court's role as a first legislative chamber will appear as the outcome of a set of variables, namely: the political strategies of actors outside the Court; the institutional configuration of the Court's powers; and the specific ways in which the current generation of Supreme Court justices has interpreted its powers.

The rest of the article is organized as follows: In section II, we conduct a literature review on the ways in which constitutional courts have traditionally been accounted for as relevant actors in the national decision-making process. Even though there are many possible variations in how constitutional politics takes place in different countries, the common image in these studies is the court as a *third legislative chamber* or as a kind of *veto player*. In section III, we analyze the ADPF 132 decision and the role the STF played in legalizing same-sex marriage in Brazil. In section IV, we explore the conditions that made this ju-

dicial role possible. Although Brazilian constitutional law includes mechanisms allowing for judges to act in cases of *legislative omission,* deliberate institutional design cannot explain the rise of the STF as a first and last legislative chamber. Rather, the specific kind of lawsuit employed by the plaintiffs has provided the Court with unexpected opportunities to act as a first lawmaker. These opportunities seem to have arisen from an expansive judicial interpretation of what can be considered "legislative omission." In section V, we conclude by discussing how the institutional features described in section III, when combined with certain reform-centered litigation strategies from outside actors, and when interpreted in specific ways by STF justices, produce the conditions under which the ADPF allowed the Court to act as a legislator.

B. Courts as legislators

Constitutional courts can play a variety of roles in the broader political decision-making process.[3] Most existing comparative constitutional scholarship focuses on these courts' powers to review the constitutionality of statutes, administrative measures and/or international treaties.[4] Constitutional review includes two kinds of powers, each with its own political logic: (a) the resolution of conflicts between different political decision-makers under a vertical (federalist) or horizontal (separation of powers) relationship, with the court clarifying the boundaries between these different levels of government; and (b) rights adjudication, in which "*the policy-making role of courts is more apparent* (…) *because the logic of seemingly neutral dispute resolution does not really mask it*."[5] Most scholarship on the judicialization of politics focuses precisely on this second dimension, as rights adjudication forces courts to determine what would be the permissible content of any statute under the constitution.[6]

As their legislative output is challenged before the court, congress and the president have a variety of recourses available.[7] If they decide to comply at least partially with the court's decisions, however, judicial participation in the lawmaking process begins to become more substantive, as the court's preferences regarding the substance of permissible

3 See, e.g., *Tom Ginsburg* and *Zachary Elkins,* Ancillary Powers of Constitutional Courts, Texas Law Review 87 (2009).

4 According to *Ginsburg* and *Elkins* (note 4) more than 80 percent of contemporary democracies include in their sample some kind of constitutional review.

5 *Ginsburg* and *Elkins*, note 4, p. 1436: "When the court substitutes its own judgment for that of the government or legislature, it cannot be doing anything other than policymaking.".

6 *Ginsburg* and *Elkins*, note 4, p. 1437: "Regardless of whether the court is functioning as a boundary-guarding dispute resolver or as a rights-enforcing constraint on government, a common thread in both forms of constitutional review is judicial lawmaking.".

7 *J. Mitchell Pickerill,* Constitutional Deliberation in Congress: The Impact of Judicial Review in a Separated System, Durham 2004.

legislation will find their way into the legislative status quo.[8] In particular, when other institutional actors create a law that only *partially* incorporates the court's decision, they are putting forth a compromise solution, which will then most likely be subjected to a new round of judicial review. To a large extent, such partial incorporations of revealed judicial preferences take place because executive and legislative actors wish to minimize the risk of a complete judicial rejection of their new legislative proposal. Policymaking will only reflect the preferences of the political branches exclusively when these branches fully ignore the judicial threat.[9]

More precise empirical and theoretical accounts of this kind of judicial participation in policymaking can be found in Stone Sweet's work on the French Constitutional Council as a "third legislative chamber",[10] which was then expanded to other European democracies.[11] In his analyses of constitutional courts as *third legislative chambers,* Stone Sweet describes constitutional politics as the outcome of close, recurrent legal-political interactions between courts and legislatures.[12] His model is built on an analysis of the actual effects of constitutional review on the broader political decision-making process. Constitutional courts' decisions actually shape the content of existing policies, as judges not only "veto" laws by voiding them but can also change the laws' content by establishing their own preferred interpretation as binding.

8 The idea that constitutional courts can (and should) only act as "negative legislators" – i.e., they can remove laws and provisions from the legal system but not add anything new – is credited to *Hans Kelsen's* discussion of his proposal to create a constitutional court for Austria. Whether the existing constitutional courts can still be considered as "negative legislators" in *Kelsen's* original terms is a matter of debate (see *Alec Stone Sweet*, Governing with Judges: Constitutional Politics in Europe, New York 2000, Chapter V). However, as a practical matter, as we will discuss below, there are decisions by means of which a constitutional court effectively changes the substance of a law by adding something that had not been foreseen by legislators (for example, when the court reads one or more provisions into the statute in order to save it from being declared unconstitutional). See, generally, *Alec Stone Sweet*, ibid.

9 The likelihood of each of these different scenarios taking place is influenced by: (a) structural, institutional design variables, especially the design of constitutional review mechanisms (e.g., how the court's agenda is shaped; who can trigger abstract review; how the other branches can participate in the judicial decision-making process; who appoints the judges); and (b) contextual factors, like the intensity of political support for the court and for constitutional democracy itself, the degree of political fragmentation and the kind of policy that the political actors are trying to enact. See *Julio Ríos-Figueroa* and *Matthew M. Taylor*, Institutional Determinants of the Judicialization of Policy in Brazil and Mexico, Journal of Latin American Studies 38 (2006), pp. 739-766; and *Tom Ginsburg*, Judicial Review in New Democracies: Constitutional Courts in Asian Cases, Cambridge 2003.

10 *Alec Stone*, The Birth of Judicial Politics in France: The Constitutional Council in Comparative Perspective, Oxford 1992.

11 *Stone Sweet,* note 8.

12 *Stone Sweet*, note 8 and 10*; Alec Stone Sweet*, Constitutional Courts and Parliamentary Democracy, West European Politics 25 (2002), pp. 77-100.

Moreover, as politicians realize the risk of their policies being challenged and defeated before the constitutional court, and because the court provides written reasons for its decisions, over time, legislators will consider constitutional arguments, extracted from the court's previous decisions, when shaping and defending their policy proposals. This mutually reinforcing interaction between judges and politicians makes for a decision-making process in which legal discourse is incorporated in the political process, which then becomes judicialized.[13]

The impact of judicialization on the political process can thus be direct or indirect. In the first situation, once constitutional review is triggered, the court vetoes part or all of a given statute. In the second, as legislators decide on the contents of a given bill, they account for the possibility of constitutional review on the basis of the court's past decisions and of other political actors' future willingness to challenge the policy. This makes political actors behave strategically, and the threat of constitutional challenges may lead to political compromises between the legislating majorities and the political opposition.

This kind of indirect influence can take the form of "self-limitation" on the politicians' part – when the governing coalition gives up on taking a particular legislative path due to the threat of judicial review – or "corrective revision" when legislators rewrite a legal text that has been reviewed by the court to respond to judicial objections and secure the bill's constitutionality.[14] In any event, this judicialized political process is sensitive to the dynamics of constitutional adjudication and the arguments it creates, as these arguments signal potential judicial vetoes. The result is a process of "complex coordinate construction" of national policies.

In such a model, constitutional courts can always be conceived as a *last* or *third* legislative chamber (assuming there are two chambers in the national legislature), whether their influence on the political process is direct or indirect. They participate in the political process after legislators have taken the initial step, and they deliberate and decide on the basis of an actual statute adopted by a governing majority. Over time, the constitutional arguments provided by the court fuel processes of self-limitation and corrective revisions of statutes, in which the legislators seek to act in a way that will decrease the risk of judicial

13 According to *Stone Sweet*, note 11, p. 225, "the existence of abstract review leads (inevitably?) to the jurisdicization of policy-making processes; as a matter of concrete policy-making impact, constitutional courts behave as third legislative chambers whenever they engage in abstract review." Treating constitutional courts as a third legislative chamber does not necessarily entail equating them with legislative bodies, as there are some institutional features of these courts that distinguish their policymaking from legislative policymaking.

14 *Stone Sweet*, note 12,. Self-limitation can sometimes be politically beneficial to the legislating majority, in cases where it gives the government the possibility of shifting the blame for the failure to adopt certain policies that had been demanded by the government's constituents to the constitutional courts and their legal arguments.

action.[15] In any case, the first mover is always the legislature; the court intervenes at the end of a formal cycle that has taken place within the legislature.

This, however, is not a necessary feature of the phenomenon of judicial participation in the political process, but rather an aspect of the specific institutional design of the countries analyzed in existing studies – an aspect which might not be present in other legal systems. In the next section, by looking at how same-sex marriage was legalized in Brazil, we will discuss the possibility of high court justices directly turning their preferences into positive law even in the absence of congressional action on a given issue – and actually *because* of the lack of legislative output in that area of law.

C. ADPF 132/2011 and the legalization of same-sex marriage in Brazil

In the widely celebrated ADPF 132 case, decided in 2011, the STF constitutionalized same-sex marriage in Brazil. The Court did so without actually striking a single provision enacted by Congress. Instead, it interpreted the constitutional text in a way that was compatible with only one legal treatment of same-sex unions: full equality between heterosexual and homosexual couples in all spheres of life. Some of the justices acknowledged that less-than-complete equality was possible – if the Constitution was interpreted as still allowing Congress to regulate matters such as the specific procedures for a gay couple to adopt children, for example. Still, a majority determined that the Constitution required a specific arrangement of full equality, and therefore left no room for Congress to create any new rules in this regard. Furthermore, in their reasoning, some of the justices explicitly stated that Congress had failed to update the Civil Code as public opinion and *mores* had changed on these issues since the Constitution was enacted in 1988.

Accusing judges of "legislating from the bench" is a familiar practice in many countries. Such accusations usually allege judicial deviation from established precedents, textual meanings or other widely accepted methods of interpretation or binding legal materials. In ADPF 132, however, the justices themselves presented the narrative of "judicial legislation." In their opinions, they recognized that they were acting on a matter that, ideally, should have been dealt with by Congress, not the Court. However, they determined that congressional inaction had threatened fundamental rights, and therefore the Court was justified in establishing the legal regime that should be applicable to these situations.

Against the backdrop of the literature discussed in the previous sections, ADPF 132 is an interesting case because the Court did not act as a third legislative chamber but rather as the *first* and *only* legislative chamber, justifying its decision on the grounds of a "congressional omission." The Court presented congressional inaction as a necessary condition for this kind of "legislative" decision on its part; yet, as we will see below, such "inaction" led to a decision that left no further room for legislative action in this area.

15 *Stone Sweet*, note 9, p. 212: "Constitutional jurisprudence is nothing more or less than the lasting, written record of a third reading by a third institution required to give its assent on a bill before promulgation.".

The landmark decision in ADPF 132/2011 was a major leap following a series of judicial steps in the lower courts that, since the 1990s, had been granting increased protections to same-sex couples.[16] Before the 2000s, such decisions typically avoided directly addressing the underlying constitutional issues of equality or individual freedom. They focused instead on the material implications for the right to equality of rules that prevented people of the same gender from building a life together.[17] It was not until the beginning of the last decade that lower courts began to rule on lawsuits brought by same-sex couples explicitly seeking legal recognition of their familial status – and even of their civil union.[18]

Moreover, even when such decisions were favorable to the plaintiffs, a feature of the Brazilian legal system limited their impact on the country's constitutional law. Brazil has a dual-track system of constitutional review of legislation, combining both U.S.-style diffuse, concrete review, and a set of concentrated, abstract review mechanisms located only at the level of the Supreme Court. Formally, decisions taken by any court (including the Supreme Court) in a concrete review context have only *inter partes* effect, that is, they bind only the parties involved in the litigation. Only when the Supreme Court decides an issue by means of abstract review mechanisms the outcome does become binding to all other courts and public institutions. The limited scope of concrete review decisions eventually shaped the litigation of the legalization of same-sex unions. Even if specific gay couples obtained a favorable decision from a high court, other courts could still rule differently on similar cases.

To actually change Brazilian law on same-sex unions in a stable way, therefore, it was necessary to either institute a formal change in the legislation, or to have the Supreme Court issue a decision within the context of an abstract review lawsuit.[19] The Constitution's wording, however, seemed to block the path of ordinary legislation:

> ***Article 226.*** *The family, which is the foundation of society, shall enjoy special protection from the state.*
> ***Paragraph 3.*** *For purposes of protection by the state, the stable union between a man and a woman is recognized as a family entity, and the law shall facilitate the conversion of such entity into marriage.*

16 For an overview of the STF's decision within the broader context of civil rights litigation in Brazil, see *Adílson José Moreira*, We are Family! Legal Recognition of Same-Sex Unions in Brazil, American Journal of Comparative Law 60 (2012).

17 Take, for example, the 1998 decision by the Superior Court of Justice (STJ) asserting that, even in the absence of explicit legal recognition of same-sex unions, the judiciary should acknowledge the fact that people of the same gender can join their material efforts to create a life together. See *Moreira*, note 18, p. 1017.

18 *Moreira*, note 17, pp. 1026-1027.

19 *Moreira*, note 17, pp. 1032-1033 (claiming that, because "most decisions that extended full equal protection to cohabiting couples affected only individual cases, a consequence of the limited application of *stare decisis* in Brazil (...) the leaders of the gay and lesbian organizations sought other ways to extend legal protection to all same-sex couples (…) that could substitute for legislative measures.".)

This explicit wording was not accidental. As Justice Lewandowski suggested in his opinion in ADPF 132, the drafters of the provision in 1988 were very aware that it would block the recognition of same-sex couples' civil unions.

Regardless of the legislative intent behind Paragraph 3, the provision's wording indeed presented a clear obstacle for legislation extending this protection to same-sex unions, creating an easy argument for the unconstitutionality of such protections. In this scenario, and considering the highly decentralized system of judicial review in Brazil, creating new laws would not be enough. Conservative judges across the country could still easily rely on Article 226's language to consider these new laws unconstitutional. It seemed that, as the Supreme Court remained silent, the only path to create stable legal protections for same-sex unions would require amending the Constitution.

On 2 September 2003, Senator Sérgio Cabral presented to the Senate the *Proposta de Emenda Constitucional* ("Proposal to Amend the Constitution" or simply "PEC") n. 70. This PEC would have explicitly changed the wording of Article 226 of the Constitution, so as to remove the specification that civil unions are "between a man and a woman."[20] This formal amendment would have explicitly authorized same-sex civil unions. But Cabral's PEC had a brief and ultimately inconsequential life within Congress.[21] In 2004, the representative tasked with writing a report on the bill recommended that it should be debated in a public hearing with civil society organizations [*audiência pública*]. Still, Senator Cabral himself withdrew his proposal on 5 November 2006, and PEC n. 70 was sent to the congressional archives.

According to the newspaper *Folha de São Paulo*, Senator Cabral withdrew his proposal due to electoral strategic considerations. *Folha* reported that Cabral, who was running for governor of Rio de Janeiro in 2007, backtracked in order to secure the support of Senator Marcelo Crivella, a neo-Pentecostal evangelical preacher who had allegedly demanded the removal of PEC n. 70 as a condition for his support.[22] Cabral, who went on to win the gubernatorial campaign, denied *Folha's* version of the events, suggesting instead that given how little progress his proposal had made within Congress, he had begun to consider alternative routes to constitutionalize the protection of same-sex civil unions.

The only other open path was judicial, and it pointed directly to the Supreme Court. There had been a previous attempt to take the issue of the constitutionality of same-sex marriage to the Brazilian Supreme Court, in 2007, when a group of prosecutors attempted to convince the attorney general to initiate a lawsuit requesting the STF to rule on the issue.

20 If PEC n. 70 had been approved in its original version, Article 226, *§ 3º* would be read as follows: "For the purposes of protection by the state, the civil union between heterosexual or homosexual couples is recognized as a family entity, and the law must facilitate its conversion into marriage in the case of civil unions between a man and a woman." (translated by the authors).

21 For more details, see Senado Federal, http://www.senado.gov.br/atividade/materia/detalhes.asp?p_cod_mate=61093 (last accessed on 20 August 2017).

22 Folha de São Paulo, Cabral diz que não irá perder votos de gays por retirar projeto, http://www1.folha.uol.com.br/fsp/brasil/fc0710200627.htm61093 (last accessed on 20 August 2017).

The attorney general chose not to take any action in this regard. However, another effort to judicialize the issue was in the making. On 27 February 2008, former senator and then-Governor Cabral brought his former legislative agenda back on stage, but now via a lawsuit. The State of Rio de Janeiro filed ADPF n. 132, asking the Supreme Court to interpret Article 1723 of the Brazilian Civil Code, which repeats the wording of the Constitution:

> ***Article 1723***. *The stable union between a man and a woman is recognized as a family entity, characterized by the public, continuous and lasting sharing of one's life toward the constitution of a family.*[23]

The plaintiff argued that, due to the mainstream interpretation of Article 1726, the State of Rio's homosexual civil servants could not be treated as equals with other civil servants on a number of issues, most notably the rules concerning state-provided pensions for spouses.[24] The interim attorney general filed a new lawsuit on 2 July 2009, requesting the same as ADPF 132, with the additional request that the Court's decision apply to all states, not only to Rio de Janeiro.[25] In both petitions, the Court was being asked to enforce the right to equality against the wording of Article 1723, so as to assert a constitutional recognition of the right of gay couples to have civil unions, which would then be protected by the state like any other kind of family.

From 4 to 5 May 2011, an unanimous Court ruled that the Constitution protects stable relationships as civil unions regardless of gender or sexual orientation.[26] The justices disagreed on the exact scope of this constitutional protection: three opinions explicitly stated that it would be up to Congress to rule on how same-sex couples should be treated in a variety of situations (for example, on the procedures for the adoption of children, or on if and how same-sex unions could be converted into same-sex marriages). Still, the Court unanimously agreed that Article 226 would be interpreted to include same-sex unions in its protection of family units.[27]

23 "É reconhecida como entidade familiar a união estável entre o homem e a mulher, configurada na convivência pública, contínua e duradoura e estabelecida com o objetivo de constituição de família.".

24 Both the attorney general and the solicitor general wrote briefs in support of the plaintiff's position, and a large number of *amicus curiae* briefs were presented to the Court.

25 This suit became ADPF 178, but, upon a decision by then-Chief Justice Gilmar Mendes, it was modified on technical grounds into ADI 4277. As opposed to the attorney general, governors, although mentioned in Article 103 of the Constitution, only have "special", restricted standing for abstract review. In that case, this meant that the governor of Rio de Janeiro could only have standing to file such a lawsuit if he showed that the interests of the State of Rio de Janeiro were specifically affected by the denial of equality to same-sex couples. Governor Cabral dealt with this requirement by pointing to the Civil Code's implications for state rules concerning pensions for same-sex spouses of civil servants.

26 For an extended analysis of the court's reasoning in this decision, see *Moreira*, note 18, p. 1037.

27 *Moreira*, note 18, p. 1038: As he notes, constitutional protection of families extends to several different arrangements: "[C]onstitutional provisions do not distinguish between families derived from marriage and those solemnized by the state. The social goals of the family can be achieved both by

According to the justices, in mentioning the protection of civil unions "between a man and a woman," Article 226 merely gave an example of a typical family structure, which should by no means be understood as a constitutional prohibition on the recognition of same-sex unions.[28] This is the core legal argument that seemed to bind all the justices in the unanimous ruling: the "between a man and a woman" clause was read as an example of a kind of family unit directly protected by the Constitution, not as an exclusion of other kinds of families. In this way, the Court turned a potential constitutional *prohibition* of same-sex unions into the constitutional *requirement* that these unions must be acknowledged and protected by Brazilian law.

Brazilian same-sex couples then proceeded to take two other paths to obtain full equality before the law, including the right to marry. According to Article 226 of the Constitution, the law must recognize the possibility of converting civil unions into marriages. Therefore, the Constitution itself grants couples in civil unions the right to convert their relationship into a legal marriage. But was this provision also applicable to same-sex unions? Once again, Brazil's decentralized judicial system kicked in, with some judges accepting and some judges rejecting this argument. Several lower courts' decisions employed separation-of-powers arguments that had been mentioned by the justices in the Supreme Court's ruling. They noted that, although ADPF 132 stated that same-sex unions were under constitutional protection, the Supreme Court did not specify the full extent of legal implications and possible arrangements that would be compatible with this basic requirement.[29] It would therefore be up to Congress to decide on matters such as conversion to marriage and child adoption by same-sex couples.

The intervention of a new institution – the National Council of Justice (CNJ) – settled the debate in the lower courts. Although not technically a court, the CNJ is part of the judiciary (Article 102 of the Constitution). It was created in 2004 to oversee the administration of the Brazilian judicial system, overseeing disciplinary proceedings against judges and the creation of policies and rules to promote judicial efficiency, transparency and accountability.[30] The CNJ is presided by the standing chief justice of the Supreme Court (who is always the most senior justice who has not yet served as chief justice, elected for a term of 2 years). On 15 May 2013, Chief Justice and CNJ President Joaquim Barbosa – who, in the

same-sex and opposite-sex unions. (...) According to the Court, the institution of the family aims to offer emotional stability to its members and an ideal set of conditions for the development of human personality. This, not reproductive capacity, makes this institution the basis of human society.".

28 In his opinion, the case reporter, Justice Britto's, argued that homosexuality is a legitimate expression of the human personality that deserves legal protection, and choosing one's partner freely is a necessary condition for the individual pursuit of happiness. Gender and sexuality cannot be a legal burden..

29 See *Moreira*, note 18, p. 1039 and for examples of such decisions, p. 1040, fn. 103 and 104.

30 See *Leandro Molhano Ribeiro e Christiane Jalles de Paula*, Inovação institucional e resistência corporativa: o processo de institucionalização e legitimação do Conselho Nacional de Justiça, Revista Brasileira de Políticas Públicas 6 (2016).

ADPF 132 decision, had joined Justice Britto's majority opinion with no reservations – asked his fellow CNJ members to vote on what would become Resolution n. 175.

Approved by 14 votes to 1, Resolution n. 175 made it binding for all public notary offices and judges in Brazil to accept the possibility of converting a same-sex civil union into a same-sex legal marriage, on the basis of Article 226 of the Constitution.[31] Regarding the Resolution's text proposed by Chief Justice Barbosa, in its 2011 decision the Supreme Court had already settled the matter in a way that did not require further congressional legislation.[32] He claimed that, as the ADPF 132 decision had clearly established that the Constitution forbade Congress from treating same-sex couples differently, *in all possible dimensions,* it made no sense to wait for Congress before accepting the possibility of conversion to marriage. After all, even if Congress legislated on the matter, the only legal arrangement compatible with the Constitution would still be an identical set of rules for all couples.

In recent years, a handful of individual injunction decisions by Supreme Court justices have endorsed Justice Barbosa's and the CNJ's stance on the meaning of the 2011 decision. In 2015, for example, Justice Carmen Lúcia, in an individual decision on an appeal, ruled that a lower court judge accept the adoption of a child by a same-sex couple under the same rules applicable to heterosexual couples.[33] While the CNJ resolution itself has been challenged before the Supreme Court by means of an abstract review lawsuit, the existing individual rulings confirming the expansive reading of ADPF 132 give very little indication, at this point, that a majority of justices would be willing to revisit and restrict the scope of that decision.[34] At the time of writing, more than six years after same-sex marriage was made

31 Conselho Nacional de Justiça, Resolução que disciplina a atuação dos cartórios no casamento gay entra em vigor amanhã, http://www.cnj.jus.br/noticias/cnj/24686-resolucao-que-disciplina-a-atuacao-dos-cartorios-no-casamento-gay-entra-em-vigor-amanha (last accessed on 20 August 2017).

32 "CONSIDERANDO que o Supremo Tribunal Federal, nos acórdãos prolatados em julgamento da ADPF 132/RJ e da ADI 4277/DF, reconheceu a inconstitucionalidade de distinção de tratamento legal às uniões estáveis constituídas por pessoas de mesmo sexo; CONSIDERANDO que as referidas decisões foram proferidas com eficácia vinculante à administração pública e aos demais órgãos do Poder Judiciário; CONSIDERANDO que o Superior Tribunal de Justiça, em julgamento do RESP 1.183.378/RS, decidiu inexistir óbices legais à celebração de casamento entre pessoas de mesmo sexo; CONSIDERANDO a competência do Conselho Nacional de Justiça, prevista no art. 103-B, da Constituição Federal de 1988; RESOLVE**:** Art. 1º É vedada às autoridades competentes a recusa de habilitação, celebração de casamento civil ou de conversão de união estável em casamento entre pessoas de mesmo sexo. Art. 2º A recusa prevista no artigo 1º implicará a imediata comunicação ao respectivo juiz corregedor para as providências cabíveis. Art. 3º Esta resolução entra em vigor na data de sua publicação.".

33 Portal Brasil, STF reconhece adoção de criança por casal homoafetivo, http://www.brasil.gov.br/cidadania-e-justica/2015/03/ministra-do-stf-reconhece-adocao-de-crianca-por-casal-homoafetivo (last accessed on 20 August 2017).

34 ADI 4966, filed by the Christian Social Party (*Partido Social Cristão,* PSC) in June 2013. The Court has yet to schedule this case for judgment. Given how easily the Court and even its individual justices can prevent a decision on any case considered inconvenient or not a priority, however, there is no guarantee it will go back to this case anytime soon. For a discussion of timing control

constitutionally required, the legislative status quo shaped by the Court and the CNJ has remained undisturbed.

D. The first, the last, and everything: a new role for the Supreme Court?

Under the discursive mantle of reviewing "legislative omissions," in ADPF 132, the STF actually functioned as the *first* and (even if tentatively) *last* legislator, by implicitly reading into the Constitution a requirement that all kinds of unions between people of any gender or sexual orientation should be regulated under exactly the same set of rules. Some of the justices explicitly phrased the issue in terms of legislative "inaction," and several of the opinions even cite bills and reform proposals on same-sex marriage that had stopped in their tracks in Congress.[35] However, as we noted, there is an explicit constitutional provision using the words "man" and "woman" in conjunction with the protection of stable unions, making it harder to see how Congress could have possibly legislated same-sex unions into the Brazilian legal system without actually amending the Constitution. Accepting the discourse of "legislative omission" in this case would force us to consider that a failure to amend the Constitution can be treated as an unconstitutional omission – that is, that one part of the original constitutional text can be used as a standard against which another original constitutional provision could be considered so problematic as to require amending as a constitutional (not just political) matter. This then leaves us with the question of if and how we can treat different parts of the same, original constitutional text as incompatible with one another.

In spite of the talk of "legislative omissions," however, the Court's decision presents Congress with only one possible arrangement – full and complete equality – that would be compatible with the constitutional principle of equality. In this picture, even if Congress had created a legal framework to protect same-sex civil unions and even same-sex marriages, any such arrangement that established any difference in the rules applicable to same-sex and heterosexual couples would be unconstitutional. Several of the justices – including the reporter's opinion – go as far as framing this understanding of equality as connected to the unamendable provisions of the Constitution, signaling to Congress that future amend-

mechanisms in the STF, see *Diego Werneck Arguelhes* and *Ivar A. Hartmann*, Timing Control without Docket Control: How Individual Justices Shape the Brazilian Supreme Court's Agenda, Journal of Law and Courts 5 (2017), pp. 105-140.

35 See, for instance, Justice Marco Aurélio's opinion: "Here is the fundamental question in this debate: if the public and lasting sharing of a life together, with the goal of forming a family, between people of the same sex should be admitted to be a family unit under the Law of the Land [*Lei Maior*], considering the legislative omission (...) Would it be possible to include, under this legal category, a situation that was not explicitly dealt with by the legislature (...)? Would this be going beyond the limits of the judicial power? The answer to this last question is (...) unequivocally negative." For other references in the opinions to the reform proposals that had been "stuck" in Congress, see *Rachel Nigro*, A decisão do STF sobre a união homoafetiva: uma versão pragmática da linguagem constitucional, Direito, Estado e Sociedade 41 (2013), p. 166.

ments attempting to remove or restrict the protection of same-sex couples could themselves be considered unconstitutional.

Regardless of one's substantive view of the principle of equality, there would be other, less ambitious roles for the Supreme Court to play in such a scenario so as to increase legal protection for same-sex couples.[36] The Court could have emphasized its role as a *first* mover by signaling to Congress that a constitutional amendment was needed, or that it was prepared to read Article 226 in a more flexible light so as to uphold legislative measures to protect same-sex unions and marriages.[37] It could have even created a set of rules – including full equality – that could be tentatively changed by Congress. These adjustments would themselves be challenged before the Court in future cases, and the Court could then gradually influence public policy in this area by exercising a veto role and allowing its jurisprudence to shape new rounds of legislation. Judicial intervention as a *first move* is typically justified because it is not the last one; conversely, and in contrast, judicial intervention as a *last word* is typically justified on the basis that the court is deciding on something that Congress actually did. In ADPF 132, however, the Supreme Court had it both ways.

This is a very ambitious role for an apex court to play in the political process, even in regard to fundamental rights. But what set of conditions allowed the Court to act as a *first and last legislative chamber* in this fashion*?* Three potential elements can be extracted from our analysis of ADPF 132. The first is litigation itself, that is, the availability of cases that presents this opportunity to the Court, in the form of ADPFs brought before the justices in which they are asked to "fix" a constitutional problem that has been ignored by Congress. Litigation is shaped by social and political actors' expected benefits (including but not limited to an actual victory) to be obtained from both the legislative and the judicial arena.[38] These incentives for judicalization are shaped by a second variable – institutional design – which, in turn, is shaped by yet another variable: the Court's interpretations of its own powers.[39]

Consider how these three factors interacted in leading to the decision in ADPF 132: As we discussed in section C above, social movements and political actors moved to the abstract review arena after realizing that the political decision-making process was closed to them. They would arguably need a constitutional amendment to change the legal status quo

36 See, e.g., the comparative discussion in *Sabrina Ragone* and *Valentina Volpe*, An Emerging Right to a 'Gay' Family Life? The Case Oliari v. Italy in a Comparative Perspective, German Law Journal 17 (2016).

37 See, e.g. *Michaela Hailbronner,* Overcoming obstacles to North-South dialogue: Transformative constitutionalism and the fight against poverty and institutional failure, Verfassung und Recht in Übersee 49 (2016), pp. 253-262: the "engagement remedy" suggested by *Hailbronner* in cases of "institutional failure" as a broader category of unconstitutional omission by the state.

38 See *Julio Ríos-Figueroa* and *Patricio Navia*, The constitutional adjudication mosaic of Latin America, Comparative Political Studies 38 (2005), pp. 189-217; *Matthew M. Taylor*, Judging policy: courts and policy reform in democratic Brazil, Stanford 2008.

39 *Diego Werneck Arguelhes*, Poder não é querer: preferências restritivas e redesenho institucional no Supremo Tribunal Federal pós-democratização, Universitas Jus 25 (2014).

according to their preferences and allow for the protection of same-sex unions. But what instruments did the legal system give them to trigger judicial review in such a scenario of legislative silence, rather than legislative action? This had been a topic of explicit debates in the constitutional convention of 1987-88, and the Brazilian Constitution contains a set of mechanisms that explicitly empower the Supreme Court to exercise constitutional review of congressional inaction. These mechanisms – the *Mandado de Injunção* (MI) and the *Ação Direta de Inconstitucionalidade por Omissão* (ADO) – were new institutional solutions to the old problem of potentially transformative rights provisions that never made any practical difference, due to being considered "non-self-applicable" – and therefore not judicially enforceable – until Congress and the president approved enabling legislation.[40]

As an abstract review lawsuit, the ADO may be filed by a selected few political actors and institutions; an MI, in contrast, may be filed by any plaintiff in a situation where legislative or presidential omission has "disabled" the exercise of a fundamental right. According to the STF's interpretation of these mechanisms, however, they are of limited use to litigants expecting the Court to act as first legislative chamber.[41] The ADO may only be used to ask the Court to certify that there is an unconstitutional omission and to issue a corresponding warning to Congress. The MI, in contrast, has been actually interpreted in recent years as allowing the STF to create provisional rules to neutralize the omission while Congress does not legislate. However, the MI can only be filed against an "omission" in a narrower sense, as defined by an explicit constitutional clause – for example, when a given constitutional guarantee explicitly mentions the need for Congress to make enabling laws for its full application, and no such a law has been passed.[42]

Although in establishing rules for the enforcement of the special retirement conditions for some categories of public servants the Court *does* act as a legislator, this area of law provides rather limited opportunities for the Court to engage with constitutional politics as described by Stone Sweet and others. Moreover, the MI is very circumscribed by the constitutional text itself: it can only be filed when the Constitution explicitly states in a provision that some kind of specific law of Congress or another lawmaking authority is required before a fundamental right can be exercised. That is, the Constitution itself creates very specific areas in which the failure to enact a specific statute could lead to judicial review.

40 See *Alexandre Araujo Costa* and *Henrique Augusto Figueiredo Fulgêncio*, O mandado de injunção na Assembleia Nacional Constituinte de 1987-1988, Revista Estudos Institucionais 2 (2017), pp. 818-870; *Luís Roberto Barroso*, O direito constitucional e a efetividade de suas normas: limites e possibilidades da Constituição brasileira, Renovar 2009.

41 For a detailed discussion of how the Supreme Court of the 1990s read the Constitution with restrictive lenses when it came to establishing the boundaries of constitutional review, see *Arguelhes*, note 40; *Diego Werneck Arguelhes,* Old Courts, New Beginnings: Judicial Continuity and Constitutional Transformation in Argentina and Brazil, New Haven 2014.

42 The Court had been tweaking its understanding of the MI for a decade before finally setting it aside in 2007. For an account of the Court's transformation of its jurisprudence in the MIs 708 and 712, see *Alice Voronoff*, Ativismo judicial e democracia: por uma teoria eclética do mandado de injunção, Revista Brasileira de Direito Público 10 (2012).

Institutional design has been relevant in Brazil in making this new judicial role possible, but only insofar as it has been connected to the Court's expansive readings of its own powers. Beyond the MI and the ADO, another mechanism in Brazilian constitutional law – the one that has been central to our analysis here – has unexpectedly allowed the Court to engage in policy areas before Congress or the president have enacted any rules: the *Arguição de Descumprimento de Preceito Fundamental* (ADPF). Although the ADPF is mentioned in the original constitutional text enacted in 1988, it was not until 1999 that this type of lawsuit was given a more concrete form and made available for litigation.[43] Article 103, § 1o simply states that *"a claim of non-compliance with a fundamental precept deriving from this Constitution shall be examined by the Supreme Federal Court, under the terms of the law.*" In 1998, Congress enacted Law n. 9882, designing the ADPF as an abstract review lawsuit, with the same standing rules as the other abstract review lawsuits before the Supreme Court.[44]

In contrast to the generic abstract review lawsuit created by the Constitution ("*Ação Direta de Inconstitucionalidade,*" or ADI), however, the ADPF can be used to challenge any "acts of the public powers" (a broader array of possible targets than just federal or state statutes) that violate "fundamental precepts" of the Constitution (a narrower substantive standard of review). Although the ADPF was not directly created as a mechanism to deal with legislative omissions in a broader scope than the MI and the ADO, it has been used in some recent, high-profile cases by the Supreme Court to do exactly that. Law n. 9882/99 says that the ADPF can be filed against any "acts of the public powers" but the Court has read it as being employable against inactions and omissions as well.[45]

Judicial interpretation of the Court's own powers becomes even more decisive precisely because the scope and uses of the ADPF have been so disconnected from textual limitations. In contrast to the more circumscribed omission in the case of the MI*,* which can only be filed when a constitutional provision explicitly requires the creation of a specific law, the "omission" here is in the eye of the (judicial) beholder. The Supreme Court justices have employed the language of legislative omission in cases that could perhaps be just as reasonably described as cases of legislative *decision*. For example, the new Civil Code, enacted as recently as 2002, did not change existing policies regarding same-sex marriage. The justices described this as an *omission,* but those legislators would arguably see themselves as

43 See *Dimitri Dimoulis* and *Soraya Lunardi*, Curso de processo constitucional: controle de constitucionalidade e remédios constitucionais, 2013, p.160: observing that the ADPF was "inactive" until 1999, and that even after that it had "limited relevance".

44 Article 103 of the Constitution. It was the STF's own interpretation of the new constitutional text in the early 90s, however, that established that existing abstract review mechanisms could not be used against pre-constitutional statutes. See *Arguelhes*, notes 40 and 42.

45 *Dimoulis* and *Lunardi*, note 44, p. 166; *Gilmar Ferreira Mendes*, Controle de constitucionalidade: uma análise das leis 9868/99 e 9882/99, Revista Diálogo Jurídico 11 (2002), pp. 76-78. *Dimoulis* and *Lunardi,* note 44, p. 167: They also note how the scope of the ADPF is expanding in other directions as well – for example, the STF has established that, in some circumstances, it is possible to challenge *judicial decisions* by means of an ADPF.

presenting the nation with a *decision* not to change the status quo: the existing laws are fine as they are, and we, legislators, do not currently think we need to accommodate same-sex partnerships within the framework of marriage and civil unions.

The Court's majority decision in ADPF 132 will most likely be the subject of new rounds of legislation, perhaps even of new judicial decisions, even though the justices presented their decision as actually precluding any further lawmaking by Congress. It is still early to determine whether the Court will be successful in moving from *first* legislator to *first and last* legislator on the issue of same-sex marriage, and it is very likely that Congress will react. For the time being, however, ADPF 132 (as interpreted by the CNJ) stands as the law of the land: as several legislative proposals to legalize same-sex marriage came to a halt within Congress, a judicial decision and an administrative resolution made this change possible in Brazil. It would be surprising if activists connected to other social and political causes missed this event, and the kind of opportunity for strategic litigation that it exemplifies.

E. The rise of an "all-purpose" constitutional review procedure?

The literature on the judicialization of politics across the globe has mostly been developed by observing the impacts that constitutional courts had in the policy-making process when deciding on rules that had just been created by the political branches. Some studies do focus on constitutional review of legislative omissions more generally but these scenarios usually consist of the court forcing the political branches to comply with existing rules.[46] Existing scholarship on judicialization in Brazil also focuses on cases in which the STF had shaped policies that had just been adopted by Congress or, to a much lesser extent, the president.[47]

There is a reason why these cases are the centerpiece of judicialization studies: when the constitutional court enters the policy-making process after a new statute has been enacted, it is at its most publicly and politically exposed point. When it acts as a third legislative chamber, the court is deciding on an issue that is still very much on the governing majority's agenda. The image of the court as a third legislative chamber, shaping law directly (by vetoing statutes or reading new clauses into them) or indirectly (as legislators start to behave strategically before the threat of judicial review), is still central to understanding judicial power in the political process. However, in recent years, some of the most high-profile cases decided by the Brazilian Supreme Court have taken a different form: the Court self-consciously stepped in to enact rules in areas in which Congress had not legislated but according to the justices should have.

In this paper, we have discussed ADPF 132 as an example of this phenomenon – but it is not the only one. Other comparable decisions have been taken in the last few years. In

46 See, in the case of Colombia, *Rodrigo Uprimny*, Judicialization of politics in Colombia: cases, merits and risks, Sur - Revista Internacional de Derechos Humanos 3 (2007), pp. 53-69.

47 See, e.g., *Taylor*, note 39.

2012, for example, the STF decided, also by means of an ADPF, that the abortion provisions of the 1940 penal code could only be reconciled with the Constitution by creating an exception for cases in which the fetus has no brain.[48] While a few justices also pointed to legislative omission in that case, remarking that Congress had failed to "adjust" the old penal code to recent technological changes in prenatal diagnostics, the Court's decision established that forcing a woman to take such a pregnancy to term would amount to a violation of human dignity. Once again, behind the language of legislative omission we find the justices determining exactly what the legislation should look like on that specific issue in order to be constitutional – without any previous legislative controversy created by any measures taken by Congress.

A more recent example is ADPF 378/2015, the landmark decision made by the STF at the beginning of President Dilma Rousseff's impeachment procedure in the House of Representatives. A left-leaning political party (*Partido Comunista do Brasil,* PCdoB*)* filed a lawsuit against Federal Law n. 1079/50, which regulated impeachment procedures and detailed impeachable offences within the federal government. PCdoB argued that Law n. 1079/50 was not fully compatible with the Constitution, as it gave Congress too much leeway to define an impeachable offense, and also established trial procedures that were insufficiently protective of due process of law and the separation of powers. Law n. 1079/50, however, had been applied in the early 1990s in President Fernando Collor's impeachment trial, when its basic compatibility with the Constitution had already been asserted by both Congress and the Court. Just as with ADPF 132, it made little sense to frame the issue as a congressional omission. What the plaintiffs wanted (and got, to a large extent) from the Court was to rewrite the impeachment procedures according to the justices' view of what the Constitution requires.[49]

More recently, the Court started to decide ADPF 402, filed by the political party *Rede Sustentabilidade* (REDE) in May 2016. REDE argued that because the Constitution determined that a president should be suspended from office for 180 days when being tried for criminal offences, it should also be interpreted as prohibiting any politician who is a defendant in a criminal lawsuit before the Supreme Court from heading one of the branches of government. That is, no one facing criminal charges before the STF could be the speaker of the house, the president of the senate, or the chief justice of the Supreme Court, and anyone who became a defendant this way would have to be suspended from office as soon as the STF accepted to hear such charges.[50] Before REDE filed this lawsuit, such an argument was unprecedented in Brazilian politics or constitutional law. There was no hint of public or

48 ADPF 54.

49 ADPF 378. See *Juliano Zaiden Benvindo,* Institutions Matter: The Brazilian Supreme Court's Decision on Impeachment, http://www.iconnectblog.com/2015/12/institutions-matter-the-brazilian-supreme-courts-decision-on-impeachment/ (last accessed on 15 October 2017).

50 Estado de São Paulo, Réus, Presidentes, Senadores e Ministros*,* http://politica.estadao.com.br/blogs/supremo-em-pauta/reus-presidentes-senadores-e-ministros-cronica-da-adpf-402 (last accessed on 20 August 2017).

scholarly debate or mobilization in that direction. Although the Court has not reached a decision on ADPF 402 yet (one of the justices interrupted the trial asking for more time to consider the issue), the opinions announced so far suggest a majority in support of the plaintiff's argument.[51]

These examples point to a transformation in the dynamics of the judicialization of politics in Brazil.[52] From an extension of the political arena (a "third chamber" or a "veto player"), the Supreme Court has been moving to the first stage of policy-making debates. This new role includes being the first mover in debates on how the Constitution should be changed to solve problems that have just appeared in the national public sphere, on which Congress had neither legislated or actively considered the issue and decided to leave the legislative status quo untouched. Congressional action was made unnecessary in ADPF 132/2011, but that was still the outcome of social and political forces that, for years, had organized and pressured legislators to amend the Constitution. To some extent, the same is arguably applicable to ADPF 54, when the Court decided in favor of measures supported by reproductive rights and public health activists in cases before the lower courts. In the more recent examples we discussed above, however, there was no previous stage of attempting to change the law through Congress before taking the "omission" to the Court.

This suggests that the backing of a social movement or the existence of organized, sustained political action might not be a necessary condition to make the STF act as a first and last legislative chamber. It would be surprising if activists connected to other social and political causes had not yet realized the kind of opportunity for strategic litigation that the ADPF provides. We believe that the future of judicial politics in Brazil will be shaped by how litigants and the Court itself deploy the powerful tool of the ADPF as a mechanism to identify a problem Congress has not yet decided – and tentatively settle it once and for all, with judges as the first and only legislators.

51 In the Brazilian Supreme Court, deliberations can be suspended by a series of informal mechanisms even after a majority of the Justices have already announced their opinions. The official justification is that, until the final result is formally announced, any Justice can in principle change his position or adjust his opinion to account for a new argument. For a discussion of strategic uses of such mechanisms to control the timing of the STF's decisions, see *Arguelhes* and *Hartmann*, note 35.

52 For a development of this argument in dialogue with the literature on judicial politics in Brazil, see *Diego Werneck Arguelhes* and *Leandro Molhano Ribeiro*, Criatura e/ou Criador: transformações do Supremo Tribunal Federal sob a Constituição de 1988, Revista Direito GV 12 (2016), pp. 405-440.
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