Law & Society REVIEW

Tactical Balancing: High Court Decision Making on Politically Crucial Cases

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This article advances a new account of judicial behavior: the thesis of tactical balancing. Building on existing models of judicial decision making, the thesis posits that high court justices balance a discrete set of considerations—justices' ideologies, their institutional interests, the potential consequences of their rulings, public opinion, elected leaders' preferences, and law—as they decide important cases. Variation in a high court's balancing of those considerations as it decides different cases leads it to alternate between challenging and endorsing the exercise of government power. The way in which high courts carry out this "tactical balancing" reflects their broader strategy for prioritizing the different roles they can play in a polity, and thus has significant implications for the rule of law and regime stability in developing democracies. The thesis is illustrated through a detailed analysis of the Brazilian high court's rulings on cases concerning crucial economic policies (1985–2004).

Since the mid-20th century, courts have become increasingly important political actors in advanced and developing democracies alike. The German Constitutional Court has issued decisions with "profound influence" on legal and political dynamics (Koopmans 2003:69), resolving cases concerning federalism, separation of powers, regime dynamics, and basic rights and liberties (Kommers 1997). Since Canada adopted the Constitutional Act of 1982, the Supreme Court has handed down groundbreaking rights rulings (Howe & Russell 2001; see also Hirschl 2004). In the wake of the third wave of democracy (Huntington 1991), courts have become more prominent political actors in some developing countries as well. For instance, from its founding in 1989 until its wings were

The author wishes to thank Deborah D. Avant, Matthew C. Ingram, Druscilla L. Scribner, and Matthew M. Taylor for their thoughtful comments on earlier drafts of this article. Research for the article was supported by a Fulbright Research Fellowship (2005). Please address correspondence to Diana Kapiszewski, Department of Political Science, University of California, Irvine, 3151 Social Science Plaza, Irvine, CA 92697-5100; e-mail: dianakap@uci.edu.

Law & Society Review, Volume 45, Number 2 (2011)

https://doi.org/10.1111/j.1540-5893.2011.00437.x Published online by Cambridge University Press

clipped a decade later, the Hungarian Constitutional Court issued transformative decisions in the area of social rights (Scheppele 2003–2004; see also Sólyom & Brunner 2000). Likewise, the South African Constitutional Court has served as symbolic guardian of the constitution, shepherded that country's political transition, and handed down critical rights rulings (Dugard & Roux 2006; Klug 2000). While these developments are by no means universal—and are unfolding at different paces in different contexts—it is undeniable that a "judicialization of politics" (Tate & Vallinder 1997) is occurring in polities around the globe.

The increasing involvement of previously quiescent courts—and high courts in particular—in politics immediately raises the question of why courts decide cases concerning politically thorny issues as they do. Identifying the determinants of judicial behavior has become a central theoretical focus of the burgeoning comparative judicial politics literature. Scholars of the U.S. Supreme Court have researched the factors and forces that motivate judicial decision making for decades, and comparative scholars have borrowed and built on that voluminous literature—and devised theories of their own—to account for judicial resolution of contentious political disputes from Asia (e.g., Ginsburg 2003; Peerenboom 2002) to Russia and other post-Soviet polities (e.g., Popova 2006; Trochev 2008) to Africa (e.g., Ellett 2008; Moustafa 2007) to Latin America (e.g., Helmke 2005; Hilbink 2007).

Important strains of the U.S. and comparative literatures seek to identify a single factor motivating judicial behavior—be it legal tradition, strategic action, political ideology or institutions. Yet as Martin Shapiro (1964, 1981, 2002) has long insisted—and as various scholars of the U.S. Supreme Court now argue (see Geyh 2010 for an overview)—multiple political and institutional pressures inevitably shape judicial decisions. It seems particularly logical that a range of factors would impinge on judicial decision making in unstable developing democracies where rules and institutions are still in formation (especially in civil law systems where precedent does not bind). Similarly, it seems likely that courts ruling on different types of politically important cases in different areas of law, in different policy realms, or involving different parties likely respond to different impulses or mixes of impulses.

Building on existing models of judicial behavior, the present study advances a new account of judicial decision making on politically crucial cases that embraces its political and legal complexity: the thesis of tactical balancing. The thesis posits that as justices in developed and developing democracies alike contemplate the content of each politically important case and the context in which they are deciding it, they balance six considerations: (1) their own ideology, (2) judicial institutional interests, (3) elected

https://doi.org/10.1111/j.1540-5893.2011.00437.x Published online by Cambridge University Press

branch preferences, (4) the possible economic or political consequences of their decision, (5) popular opinion regarding the case, and (6) the law and legal considerations. Variation in the salience of these considerations over cases drives high courts to shift between challenging and endorsing the exercise of government power—what observers view as "selective assertiveness." This tactical balancing reflects justices' weighing, prioritizing, and re-prioritizing of the different roles high courts can play in a democracy—from serving as a venue for political representation, to holding elected leaders constitutionally accountable, to facilitating governance. Selective assertiveness can thus be seen as a judicial strategy for balancing a polity's competing needs and imperatives.

The article illustrates the thesis using the decision making of the Brazilian Supreme Federal Tribunal (*Supremo Tribunal Federal*, STF), the highest court for constitutional matters. The STF has received less attention in English language legal and political science literatures than have high courts in other Latin American countries (for instance, Argentina and Chile).[1] This is unfortunate, as the STF is considered by many to be a stand-out among courts in the region. It has a reputation for being assertive with respect to the elected branches (see, e.g., Arantes 2000; Sadek 1999; Santiso 2004; Werneck Vianna et al. 1999),[2] and it may be less permeable to external influences than many Latin American high courts (Taylor 2008), thus representing a crucial case for theory-building on judicial behavior (see Gerring 2007). Yet it is not a "crusading" court in the Colombian (Cepeda Espinosa 2005) or Costa Rican (Wilson 2007) mold. Rather, it most often serves as a "policy partner" for elected leaders (Nunes 2010)—playing a role more similar to that played by the U.S. Supreme Court at certain moments (see, e.g., Whittington 2005). The court's behavior thus has important implications for Brazilian democracy and for scholarly debates about the utility of comparing high court behavior between developed and developing countries.

The cases used to illustrate the thesis of tactical balancing—26 politically crucial cases decided by the STF between 1985 and 2004—were systematically selected. Comparative scholars often focus on either a handful of politically important cases selected to illustrate certain points (e.g., Cepeda Espinosa 2005; Scheppele 2003–2004; Wilson & Rodríguez Cordero 2006) or a large-*N* set of

[1] By contrast, Brazil's lower courts have garnered more attention from U.S. legal scholars and political scientists than have lower courts in most other Latin American countries (e.g., Ballard 1999; Brinks 2008; Ingram 2009). While the contrast between the performance of these courts and that of the STF is intriguing, it is beyond the scope of this article.

[2] Not all scholars completely agree: Koerner (2006) holds that analysts have exaggerated the court's assertiveness, and Hoffmann and Bentes (2008), Kapiszewski (2011), and Lima Lopes (2006) discuss the STF's weaker record in the rights realm.

cases (e.g., Helmke 2005; Popova 2010; Scribner 2004; Vanberg 2005). Isolating politically crucial cases makes sense, as deciding such cases can present high courts with significant opportunities to affect political dynamics, and because judicial decision making on such cases likely follows different logics than does decision making on lower profile conflicts. Yet the unsystematic selection of cases in small-*N* studies may bias their findings; likewise, such studies can produce particularistic explanations that are difficult to generalize. By contrast, while the cases examined in large-*N* studies are more often selected systematically, those cases are inevitably of varying levels of political importance, clouding the inferential picture for scholars seeking to explain judicial decision making on critical political conflicts. This study's focus on a medium-*N* set of systematically selected cases facilitated detailed analysis of each case and augmented the study's internal validity.

All 26 cases fall within the economic policy domain, chosen for its empirical importance. Addressing economic crisis and carrying out market-based restructuring dominated politics and policy making in developing democracies in polities in various world regions following regime transition, and Brazil is no exception. As in many countries, Brazilian leaders side stepped some institutional limits in order to implement economic policies swiftly. In response, individuals, civil society organizations, and the political opposition challenged many constitutionally questionable policies before the courts. The STF, for its part, was selectively assertive in this policy realm, endorsing some major economic policies while challenging others. The importance of economic policy and the variation in the court's assertiveness recommend the economic arena for an analysis of high court decision making on crucial cases.

The next section discusses the thesis of tactical balancing in more detail. The third section uses medium-*N* analysis and two exemplary cases to describe the Brazilian high court's selective assertiveness in the realm of economic governance since regime change (1985), and to show how the court's tactical balancing produced that outcome. As the conclusion highlights, how justices balance the multiple roles that high courts can play in developing democracies has significant implications for the entrenchment of the rule of law and regime stability.

The Thesis of Tactical Balancing

Identifying the foundations of judicial decision making is a central focus of the political science literature on courts in developed and developing democracies alike. Four theoretical models of judicial behavior have dominated the literature: the attitudinal

https://doi.org/10.1111/j.1540-5893.2011.00437.x Published online by Cambridge University Press

model, the legal model, institutional explanations, and strategic accounts. The attitudinal model argues that judges follow their policy preferences. Legal, institutional, and strategic accounts stress the ways in which judges are empowered or constrained by (respectively): law; institutional factors; and the preferences, relative power, and likely actions of other actors (including but not limited to the elected branches of government) (Epstein et al. 2001a, 2001b). While these models are not inherently incompatible, they have been viewed as competing. Recently, however, scholars of the U.S. Supreme Court have highlighted the models' complementarities, arguing that both legal and extralegal factors influence judicial decision making (see, e.g., Baum 2006; Feldman 2005; Tamanaha 2009; in addition, Geyh 2010 offers an overview).

The present study follows that lead, advancing an inductively derived multivariate account of judicial behavior: the thesis of tactical balancing. When ruling on critical cases, high court justices take into account six considerations that loosely track the attitudinal, institutional, strategic, and legal models of judicial behavior (see Table 1). As justices examine the content of each case and the context in which they are deciding it, and consider how the two interact, one or more considerations become salient and others prove less important: justices "balance" the six considerations. Different combinations of considerations motivate decision making from one case to the next, leading courts to alternate between challenging and endorsing the exercise of government power—that is, to be "selectively assertive."[3] The considerations are intuitive. The main insight is that well beyond the United States, courts consider multiple factors as they decide politically crucial disputes. The analysis builds on existing multi-causal accounts of judicial behavior (e.g., Iaryczower et al. 2000; Shapiro & Stone Sweet 1994) by identifying which interests high courts balance, illustrating how those interests overlap and combine, and revealing how their activation and interaction lead to variation in high court assertiveness.

Each of the six considerations identified in Table 1 (row one) corresponds to a particular tactical approach to high court decision making (row two). For instance, a decision in which justices' ideology was paramount is termed *preference-driven*, while a ruling in which the elected branches' desires were the most salient consideration is labeled *deferential*. The framework illuminates that high court decision making on politically crucial cases varies not only in direction and in intensity, but also in tactical approach.[4] Another

[3] I use the terms *high court* and *court* interchangeably. An "assertive" ruling challenges the exercise of government power, finding the government action, inaction, or policy questioned in a case—or elected leaders' broader exercise of power—to be partially or completely unconstitutional.

[4] Ackerman (1997) also discusses a third axis: coordinating and redemptive "styles" of judicial activity.

https://doi.org/10.1111/j.1540-5893.2011.00437.x Published online by Cambridge University Press

Table 1. Considerations Affecting High Court Decisions on Politically Crucial Cases and Corresponding Tactical Approaches to High Court Decision Making

Theoretical model of judicial behavior	Attitudinal (1)	Institutional (2)	Strategic (3)	Strategic (4)	Strategic (5)	Legal (6)
Consideration prioritized in decision	Justices' ideology	Justices' corporate/ institutional interests	Public opinion	Elected-branch preferences	Potential political/economic repercussions of decision	Law, doctrine, precedent
Corresponding tactical approach to high court decision making	Preference-driven	Self-protective	Support-building	Deferential	Pragmatic	Principled

way of thinking of the article's central claim, then, is that high courts employ a shifting blend of tactical approaches when deciding politically crucial cases, leading them to challenge the exercise of government power in some cases (and sometimes set policy themselves), and endorse it in others—that is, to be "selectively assertive." For instance, adopting a deferential approach to decision making would likely lead a court to endorse the exercise of government power, while adopting a support-building approach when ruling on a case concerning a highly unpopular policy would likely result in the court challenging the exercise of government power. I discuss each consideration and corresponding tactical approach to high court decision making below.

1. Justices' ideology. Justices' policy preferences and ideological leanings can prove important to their decision making, particularly in politically crucial cases. One can imagine, for instance, a ruling in which conservative justices' political proclivities led them to declare unconstitutional the legalization of abortion (citing the constitutional right to life). This consideration reflects the attitudinal model of judicial decision making in the U.S. literature, which would predict that courts are more assertive when a majority of judges are ideologically opposed to the policy, law, or government action whose legality or constitutionality they are asked to assess. An early manifestation of this model was Pritchett's work on the U.S. Supreme Court (1948); it was subsequently developed by Schubert (1965) and Rohde and Spaeth (1976) and is now most forcefully advocated by Segal and Spaeth (1993, 1999). In the comparative judicial politics literature, several studies point to judicial rather than political ideology to account for decision making: Karst and Rosenn (1975), for instance, argue that Latin America's formalistic legal culture impedes judicial assertiveness; Frühling (1984) suggests that Chilean judges' reluctance to challenge the constitutionality of legislation has its roots in their traditional training; and Hilbink (2007) posits that the Chilean judiciary's apoliticism (combined with incentives established by its institutional structure) has reproduced judicial conservatism and a reluctance to confront the government with "liberal" decisions. In Table 1, high court rulings in which justices' political or judicial ideological leanings are paramount are termed *preference-driven*.

2. Corporate/institutional interests. The corporate or institutional interests of the judiciary or of public sector workers may also impinge on high court decision making.[5] To give an example, justices

[5] While some scholars emphasize the importance of certain formal institutional arrangements to judicial behavior (see, e.g., Clayton & Gillman 1999; Gillman & Clayton 1999; Kagan et al. 1978; Taylor 2008), the idea here is different: that justices' desire to maintain or increase the legitimacy, integrity, or power of their institution affects their decision making.

https://doi.org/10.1111/j.1540-5893.2011.00437.x Published online by Cambridge University Press

motivated by corporate interests may strike down a public sector salary cut that affects them, their clerks, and lower court judges. Institutional interests may also motivate justices to decide a particular case in order to demonstrate that cases of its ilk fall *within* their purview (in order to tacitly extend their jurisdiction) or to duck a case to show that such cases fall *outside* their purview (in hopes of avoiding deciding a controversial set of cases, for instance). Alternatively, high courts may use their decisions on politically crucial cases to "strike back" at leaders who have threatened their institutional interests or to polish their institutional image: Huneeus (2010), for instance, argues that Chilean judges' desire to redeem the judiciary from its complicity with the Pinochet dictatorship (together with a temporary loosening of the strict hierarchy that normally constrains judicial decision making) explains their recently assertive decisions in human rights cases. Decisions in which a court's institutional interests, prerogatives, or image are the most important considerations are labeled *self-protective*.

3. *Public opinion*. A variety of scholars have suggested that courts may feel empowered to challenge the elected branches in high-stakes cases when judges believe societal support for the court (i.e., diffuse support) is sufficiently strong that retaliating would be too politically costly for elected leaders. Such arguments have been used to account for judicial assertiveness in Mexico (e.g., López-Ayllón & Fix-Fierro 2003), Argentina (Smulovitz & Peruzzotti 2003), and Egypt (Moustafa 2007). The type of public opinion highlighted here is more akin to specific support (i.e., support based on courts' policy outputs):[6] high court decision making on salient cases (regarding, for instance, immigration or health care benefits) may be influenced by popular support or media pressure for a particular ruling (see, e.g., Staton 2010). Rulings in which public opinion regarding the case is an important consideration are labeled *support-building*.

4. *Elected-branch preferences*. Elected leaders often have strong preferences regarding high court rulings on politically crucial cases, and those preferences (or direct pressure from the elected branches) may also influence court rulings. Latin American high courts, for example, have a well-established reputation for yielding to elected-branch preferences when deciding cases about key policies. Indeed, many explanations within the strategic actor or separation-of-powers framework point—directly or indirectly—to the importance of elected leaders' preferences to judicial decision making. Making the argument in reverse, studies have suggested that courts are *less* attentive to elected leaders' preferences when, for instance, the existence of a multiparty system complicates legislative repeal of their

[6] Caldeira and Gibson (1995) and Gibson et al. (2003) discuss diffuse versus specific support.

https://doi.org/10.1111/j.1540-5893.2011.00437.x Published online by Cambridge University Press

rulings (Cooter & Ginsburg 1996; Ríos-Figueroa 2003); when parties alternate in power often (Ramseyer 1994); and in contexts with strong political competition or divided government (Chavez 2004; Scribner 2004). Helmke (2005) found that in Argentina's uncertain institutional environment, justices ruled against the sitting government more often toward the end of its tenure, in hopes of gaining favor with the incoming administration. When elected leaders' preferences significantly impinge on a court's ruling, the court has assumed a *deferential* approach to decision making.

5. *Potential repercussions*. When justices feel some responsibility for governing the country, the potential repercussions of their rulings—for the institutional system, governability, or economic or political stability—may also influence their decision making on politically crucial cases.[7] For instance, a court considering the potential ramifications of its ruling might only issue a partial challenge in a case questioning a core policy of an economic reform program in order not to induce or exacerbate economic crisis. Few scholars of comparative judicial politics have argued specifically that judicial decision making is guided by practical political and economic concerns. This consideration, which corresponds to a *pragmatic* approach to decision making, is thus introduced into the analysis on an inductive basis.

6. *Legal considerations*. As the legal model posits, law, doctrine, legal precedent, or other legal considerations may impinge on high court decisions. For example, courts may challenge elected leaders more vigorously when the legal case against them is strong, when the form or content of a questioned policy blatantly violates the constitution, or when there is settled legal doctrine to support a challenge. Of course, relatively few contemporary legal scholars (and even fewer political scientists) argue that law determines legal outcomes in a mechanistic sense;[8] instead they emphasize law's subtler influences on judicial behavior. For example, scholars have suggested that law has an impact as a discursive practice (e.g., Whittington 2000), and a spate of studies since the mid-1990s have understood law as a professional "norm of reasoning" that obligates judges to forgo outcomes that cannot be justified by professionally constructed references to authoritative legal rules or procedures (e.g., Gillman 2001; Knight & Epstein 1996; Tamanaha 1996). When legal considerations dominate in a court's reasoning, it has assumed a *principled* approach to decision making.

[7] Note that if a court endorsed an economic policy because the justices did not want to be blamed for the mayhem a contrary ruling could bring, this would be a self-protective decision.

[8] Some legal scholars continue to promote a legal approach to judicial decision making in a prescriptive sense (e.g., Dworkin).

https://doi.org/10.1111/j.1540-5893.2011.00437.x Published online by Cambridge University Press

A central implication of the thesis being advanced here is that significant differences can mark judicial rulings that look quite similar—and courts that seem to rule quite similarly. That is, two high court rulings in the same direction and of the same intensity (for instance, that strongly endorse a tax hike imposed by a cash-strapped administration) may spring from very different tactical approaches to decision making: one ruling may result from a court assuming a pragmatic approach to decision making (reflecting a preoccupation with governance), while the other may result from a court adopting a deferential approach to decision making (perhaps suggesting a lack of independence from elected leaders). Likewise, one court may strike down a national wage freeze because it assumed a support-building approach to decision making, while another court may issue a similar ruling because it adopted a principled approach (based on, for instance, a constitutional guarantee of adjustable wages). Law and legal considerations, after all, are not necessarily paramount in all high court challenges even when those rulings are quite legally proper. The tactical balancing framework thus allows for a more nuanced understanding of judicial decision making and the roles courts seek to play.

If courts take multiple considerations into account when deciding politically crucial cases, the next logical questions concern how they balance those considerations and what trends are observable in their balancing, and when and why they adopt particular tactical approaches to decision making. This study's goal is to answer the first pair of questions and to show how tactical balancing affects judicial decision making. Nonetheless, the tactical balancing framework does shed some light on the second pair of questions. For instance, per the tactical balancing account, the way courts balance different considerations is contingent upon the content of the cases they receive and the context in which they are ruling. Thus in institutionally unstable democracies where judicialization is accelerating in unpredictable ways and political turmoil and economic crisis occur often, courts will likely reprioritize the six considerations relatively frequently (with concomitant variation in their assertiveness). Yet how courts interpret the cases they receive and experience their operational context are shaped by their composition: a politicized court may be more likely to adopt a deferential approach to decision making in a critical policy arena under crisis conditions, while a more professional court might adopt a more principled or pragmatic approach when deciding a similar case in a similar context. This refraction of case and context through court composition complicates developing a general model of courts' adoption of tactical approaches to decision making through an examination of one high court whose composition remained relatively stable during the time period under study.

https://doi.org/10.1111/j.1540-5893.2011.00437.x Published online by Cambridge University Press

Consequently, this article focuses on showing that courts balance multiple considerations when deciding politically important cases, and that which considerations predominate in their calculations (which tactical approaches they adopt) affects the direction and intensity of their rulings (e.g., their assertiveness vis-à-vis elected leaders).

While the thesis bears a resemblance to rational choice analysis, it departs from that model of explanation in important ways. The thesis points to the "micro-foundations" of judicial behavior, examining the purposive, autonomous decision making of a collective (similar to rational choice analysis in which states or political parties are the unit of analysis). Courts are understood to be goal-oriented entities with a discrete set of preferences (implicit in the six considerations) that seek to maximize their interests under conditions of uncertainty, reacting to the opportunities and constraints in their environment (suggesting that they are rational actors). Yet in contrast to most rational choice analysis, courts' preference orderings are not stable over time. Different subsets of considerations are "activated" by different cases received under different conditions, leading to different behavior (i.e., variation in assertiveness): judicial behavior is conditioned by both structure and micro-level dynamics (see Stone Sweet 1999:179). The argument is also clearly nonparsimonious, and no assumptions are made concerning the completeness or accuracy of information (as courts generally work with the incomplete and imperfect information provided to them selectively by actors seeking to win a legal dispute). The tactical balancing account thus suggests that it may be possible to develop and deploy a rational choice–style argument without tethering it to all of the assumptions about political behavior that normally underlie such explanations.

Illustrating the Thesis of Tactical Balancing: The Case of Brazil

The thesis of tactical balancing was inductively derived by examining 55 politically crucial cases in various policy arenas decided by the Brazilian high court (the STF) in the post-authoritarian period (1985–2004). The cases were systematically selected by triangulating case-salience data from 25 expert interviews, systematically chosen newspaper accounts, and scholarly books and articles (see Appendix A). The argument that high court decision making on politically crucial cases is driven by justices' balancing of multiple factors builds on existing literature and is not wholly new. However, garnering systematic empirical evidence of the claim—through extensive interviews about each case with experts and participants, careful analysis of STF rulings, and methodical review

https://doi.org/10.1111/j.1540-5893.2011.00437.x Published online by Cambridge University Press

of newspapers and scholarly sources—is innovative. Given the intensive data collection required, a subset of the sample of 55 politically important cases was chosen for analysis—cases concerning economic policy ($N = 26$). Those cases comprised the largest subset of the sample (by policy type) and are of great substantive importance.[9] To be clear, the medium-*N* analysis and exemplar cases presented here do not constitute a "test" of the thesis,[10] but rather an illustration of the claims at its heart.

The STF and Selective Assertiveness in the Realm of Economic Governance

The STF has existed since the founding of the Brazilian republic in 1889. It became a constitutional court by default when the 1988 Constitution created the Supreme Tribunal of Justice (*Supremo Tribunal de Justiça*, STJ) to deal with infra-constitutional matters. The 1988 charter also established new mechanisms to access the STF and broadened standing to employ others. Civil society and the political opposition increasingly turned to courts to resolve political and social conflict in the post-authoritarian period and the STF's caseload ballooned, reaching more than 100,000 cases per year six times between 2000 and 2010 (see the STF Web site, http://www.stf.jus.br). The court can engage in both concrete and abstract review of legislation and administrative action, and the 26 cases under study include cases of both types.[11] Table 2 lists those cases, and Appendix B describes the mechanisms used to bring them to the STF.

The cases trace the evolution of economic policy making in post-authoritarian Brazil. The country transitioned to democracy in 1985 in significant economic crisis. Starting in the late 1980s, leaders implemented a series of economic stabilization programs in an effort to control inflation. Many of these plans involved wage and price freezes and imposed new indexes to correct for inflation, disrupting the indexing of prices and wages that had been written into most contracts in the late 1980s and early 1990s. The ubiquity of these contractual violations and, more broadly, the ability of Brazilian lawyers to devise strategies to question the constitutionality of these reform programs, led to the filing of tens of thousands of court cases, such as those regarding the Collor Plan (introduced in 1990) (ADIn 223, ADIn 295, ADIn 259, ADIn 534, RE 226855).

[9] While 26 cases may seem to provide insufficient leverage for an analysis involving six independent variables (considerations high courts take into account), the main goal is to illustrate the (evolving) importance of all of the considerations to the court's selective assertiveness rather than to assess the relative causal import of each consideration.

[10] An argument cannot be tested using a subset of the data employed to develop it.

[11] Interview respondents often named two key cases questioning the same policy. The 26 cases under analysis relate to a total of 20 government policies or actions and are organized into 20 "case groupings."

https://doi.org/10.1111/j.1540-5893.2011.00437.x Published online by Cambridge University Press

Table 2. STF Assertiveness on 26 Important Cases Regarding Economic Policy (1985–2004)

Case and Topic[1,2,3]	Parties	Date of Final Decision
STRONG ENDORSEMENTS		
ADIn 04 Constitutional cap on interest rate of 12%	Democratic Workers Party (PDT) v. President	07 Mar. 1991
ADC 01 Contribution for Financing Social Security (COFINS)	President and Leadership of the Senate & Chamber of Deputies (*all plaintiffs*)	01 Dec. 1993
PET 2066 Privatization of the Bank of the State of São Paulo (BANESPA)	Brazil v. Regional Federal Tribunal of the 3rd Region (TRF)	29 Aug. 2000
ADIn 1582 Privatization of Vale do Rio Doce Co. (CVRD)	Federal Council of the Brazilian Bar Association v. President/Congress	07 Aug. 2002
ADC 09 "The black-out"	President and Attorney General (*both plaintiffs*)	13 Dec. 2001
ADIn 2111 Formula for calculating retirement benefits	National Metalworkers' Confederation v. President/ Congress	No final decision
WEAK ENDORSEMENTS		
ADIn 3105	National Association of Members of the Public Ministry (CONAMP) v. Congress	18 Aug. 2004
& **ADIn 3128** Tax on public sector pensions (II)	& Nat'l. Association of Federal Prosecutors (ANPR) v. Congress	& 18 Aug. 2004
ADIn 223	Democratic Workers Party (PDT) v. President	26 Feb. 1996
& **ADIn 295** No injunctions in cases related to Collor Plan I	& Federal Council of the Brazilian Bar Association v. President	& 09 Nov. 2001
ADIn 259 **&** **ADIn 534** Collor Plan I—freezing of savings accounts	Workers Party (PT) v. President & Brazilian Socialist Party (PSB) v. Congress	11 Mar. 1991 & 26 Aug. 1992
ADIn 2238 Law of Fiscal Responsibility	Communist Party of Brazil, Workers Party, Brazilian Socialist Party (PSB) v. President/Congress	No final decision
WEAK CHALLENGES		
RE 150755 (*weak endorsement*)	Brazil v. Nordeste Segurança de Valores, Ltda.	18 Nov. 1992
& **RE 150764** Social Investment Fund (FINSOCIAL)	& Brazil v. Empresa Distribuidora Vivacqua de Bebidas, Ltda.	& 16 Dec. 1992
ADIn 1497 (*weak endorsement*)	National Confederation of Health Workers (CNTS) v. Congress	30 Oct. 2003
& **ADIn 2031** Provisional Contribution on Financial Transactions (CPMF)	& Workers Party (PT) v. Congress	& 03 Oct. 2002

https://doi.org/10.1111/j.1540-5893.2011.00437.x Published online by Cambridge University Press

Table 2. Continued

Case and Topic[1,2,3]	Parties	Date of Final Decision
RMS 22307 Salary increase of 28.86%	Janete Balzani Marques and others v. Brazil	11 Mar. 1998
RE 226855 Adjustment of salary-tied accounts in Length of Service Guarantee Fund (FGTS)	*Caixa Econômica Federal* (CEF) v. Ademar Gomes Mota and others	26 Oct. 2000
MS 21969 Salary retention for certain public sector workers (10.94%)	Union of Congressional Workers and Workers of the *Tribunal de Contas* (SINDILEGIS) v. President	05 May 1994
ADIn 1946 Constitutional Amendment #20—maternity leave salary	Brazilian Socialist Party v. Leadership of the Chamber of Deputies & Senate, and the Minister of Pensions and Social Assistance	03 Apr. 2003
STRONG CHALLENGES		
RE 147684 Readjustment of retirement benefits of 147.06%	The Public Ministry and Brazil v. Union of Workers in the Metallurgic, Mechanical, and Electrical Industries of São Paulo	26 Jun. 1992
ADIn 2061 Annual salary review for civil servants	Democratic Workers Party (PDT) and Workers Party (PT) v. President	25 Apr. 2001
ADIn 2010 Tax on public sector pensions (I)	Federal Council of the Brazilian Bar Association v. President/Congress	15 Mar. 2004
ADIn 926 **&** **ADIn 939** Provisional Tax on Financial Transactions (IPMF)	Governors of five states v. President/Congress & National Confederation of Commerce Workers (CNTC) v. President/Congress	02 Mar. 1994 & 15 Dec. 1993

[1] The ruling evaluated was the one to which the government, public, and press reacted. On some occasions, and in particular with cases of the type "ADIn," the ruling that mattered was an injunction, with a final decision following only years later.

[2] Because the study seeks to explain variation in the STF's assertiveness when deciding cases concerning different economic policies, rulings on cases concerning the same policy are considered together even when the court endorsed parts of the policy in one case and challenged parts in another; their categorization reflects the "average" of the court's assertiveness when deciding each.

[3] Abbreviations such as ADIn, ADC, etc., refer to particular types of high court cases (discussed in Appendix B); the numbers following these abbreviations are the case numbers assigned by the STF.

Once inflation was tamed by the Real Plan in 1994 (Da Fonseca 1998), elected leaders initiated broader efforts to reorient Brazil's economy and reform the state. However, certain aspects of the new constitution promulgated in 1988 complicated economic governance. First, because the new charter had both statist and nationalist tendencies, reforms that sought to extricate the state from the many roles it played in the economy—such as selling off state-owned companies to foreign firms—often collided with constitutional provisions. Cases concerning the privatization of *Companhia Vale do Rio Doce* (a major mining concern, ADIn 1582) and *Banespa* (São Paulo's state bank, PET 2066) demonstrate this conflict.

https://doi.org/10.1111/j.1540-5893.2011.00437.x Published online by Cambridge University Press

Further and critically, the constitution hampered the government's efforts at fiscal rectitude. Brazil has long suffered from intrinsic fiscal imbalance, and the extended crisis of the 1980s and early 1990s heightened the need for effective schemes to augment extraction and decrease state spending. Yet the new constitution prioritized just the opposite, strengthening fiscal federalism and limiting the state's ability to tax while laying the groundwork for a generous welfare state. Consequently, elected leaders' attempts to spend less on public sector salaries or benefits (or to tax pensions) were questioned repeatedly (for example, in RMS 22307, MS 21969, and ADIn 2061 regarding salaries; and in ADIn 2111, ADIns 3105 and 3108, RE 147684, and ADIn 2010 dealing with pensions). Further, various tax initiatives were challenged before the high court (for example, in ADC 01, ADIn 1497, ADIn 2238, RE 150755, RE 150764, and ADIns 926 and 939). In short, the constitution placed law and fiscal discipline at odds. No matter what strategy elected leaders adopted to collect more, spend less, and advance their economic initiatives, judicial challenges sprang from all sides.

The cases in Table 2 are arranged by the rulings' degree of assertiveness vis-à-vis the elected branches. Assertiveness is challenging to assess, particularly when courts strike down only a portion of questioned policies. The rulings under study were scored on both their direction and intensity (creating an ordinal scale of assertiveness) in an effort to address this challenge, and to avoid the potentially misleading simplification associated with categorizing multifaceted rulings as simply "for" or "against" the government. To gauge the court's assertiveness, I examined the legal and political content of each case (including reading plaintiffs' original petitions) and the institutional, political, and legal context in which each was filed, considered, and resolved. Scoring took into account the degree to which the salient decision (be it a long-standing injunction or decision on the merits) endorsed (or challenged) the specific policy or action questioned *and* the extent to which it endorsed (or challenged) the broader exercise of government power; whether analysts alleged strategic acceleration or delay in the timing of the ruling; the relationship of the decision to that of a lower court (if applicable); the form of the ruling (injunction or final decision); the reasoning employed (whether the ruling was made on purely technical grounds or based on case substance); any procedural irregularities in the court's consideration of or decision on the case; and the degree of division in the vote on the case. For rulings challenging the exercise of government power, scoring also took into account the questioned policy's or required action's degree of importance to the government, and whether the government that issued the policy was still in power at time of the ruling.

The STF handed down challenging decisions in 11 of the 26 cases under study (that is, 42 percent of the time); five of those

https://doi.org/10.1111/j.1540-5893.2011.00437.x Published online by Cambridge University Press

rulings were strong challenges. Of the court's 15 endorsements (58 percent of the rulings), nine were weaker while six were stronger. In other words, the court was selectively assertive when deciding crucial economic policy cases during the country's post-authoritarian decades. Why would the STF endorse the exercise of government power on some cases concerning economic policy, yet strongly challenge that exercise in others?

Tactical Balancing on the STF

The thesis of tactical balancing argues that high court justices prioritize and balance a range of considerations when ruling on politically important cases (or, put another way, they adopt different tactical approaches to decision making across cases), leading them to alternate between challenging and endorsing the exercise of government power and to do so with varying intensity. The Brazilian high court engaged in precisely this balancing when deciding politically important cases relating to economic policy in the post-transition period, resulting in its "selective assertiveness" vis-à-vis elected leaders.

Table 3 reintroduces the case groupings under study, with the groupings again arranged by the degree of assertiveness the STF exhibited when ruling. The percentages and fractions reported in each column for each case correspond to the percentage and number of sources consulted that imputed each particular consideration to the high court's decision making on that case. The higher the percentage associated with a particular consideration (that is, the more often the consideration was mentioned in connection with a particular case), the greater the likelihood that it was "important" to the justices when they were deciding that case.

The study rests on two evidentiary bases. The first is expert opinion. I interviewed diverse experts (policy makers and other government personnel, journalists, economists, legal scholars and lawyers, and political scientists chosen using a snowball sampling technique) in three cities (Brasília, Río de Janeiro, and São Paulo) concerning each case; I also examined systematically selected newspaper articles focusing on each case (on average 12 articles per case) and consulted multiple scholarly sources on each (see Appendix A). Second, evidence was garnered from participants in these cases. I interviewed the plaintiffs and defendants (generally government officials) involved in several cases as well as a majority of the justices who sat on the STF during the time period under study, and I also reviewed the court's written decision on each case. I used content analysis to identify mentions of considerations affecting the STF's decision making on each case grouping in the transcripts (or in a few cases, detailed notes) from the expert and

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Table 3. Considerations Imputed by Experts/Participants to Influence STF Decisions on Economic Policy Cases and Corresponding Approaches to Decision Making: Percentage of Respondents (Number of Mentions/Number of Sources)

Theoretical model of judicial behavior	Attitudinal	Institutional	Strategic			Legal	
Considerations imputed to high court decision making (approach to decision making)	Justices' ideology (Preference-driven)	Justices' corporatist/ institutional interests (Self-protective)	Public opinion regarding case (Support-building)	Elected-branch preferences (Deferential)	Potential politico-economic repercussions of decision (Pragmatic)	Law, doctrine, precedent (Principled)	Tactical Approach to High Court Decision making[2]
STRONG ENDORSEMENT							
Constitutional cap on interest rate at 12%	4% (1/24)	4% (1/24)	4% (1/24)	4% (1/24)	**75%** (18/24)	8% (2/24)	**Pragmatic**
Contribution for Financing Social Security (COFINS)		7% (1/14)		14% (2/1)	**71%** (10/14)	7% (1/14)	**Pragmatic**
Privatization of the Bank of the State of São Paulo (BANESPA)				(2/8)	25% (6/8)	**75%**	**Principled**
Privatization of Vale do Rio Doce Co. (CVRD)	11% (2/19)	21% (4/19)		16% (3/19)	11% (2/19)	**42%** (8/19)	**Principled**
"The black-out"		11% (2/18)	17% (3/18)	11% (2/18)	**44%** (8/18)	17% (3/18)	**Pragmatic**
Formula for calculating retirement benefits					**33%** (3/9)	**67%** (6/9)	**Principled/ Pragmatic**
WEAK ENDORSEMENT							
Tax on public sector pensions (II)		10% (4/42)	10% (4/42)	**29%** (12/42)	26% (11/42)	26% (11/42)	**Deferential**[3]
No injunctions in cases related to Collor Plan I		31% (4/13)		8% (1/13)	**46%** (6/13)	15% (2/13)	**Pragmatic**
Collor Plan I—freezing of savings accounts	2% (1/55)	16% (9/55)	4% (2/55)	11% (6/55)	**56%** (31/55)	11% (6/55)	**Pragmatic**
Law of Fiscal Responsibility		11% (2/18)	11% (2/18)	11% (2/18)	**50%** (9/18)	17% (3/18)	**Pragmatic**

Table 3. Continued

Theoretical model of judicial behavior	Attitudinal	Institutional	Strategic			Legal	
Considerations imputed to high court decision making (approach to decision making)	Justices' ideology (Preference-driven)	Justices' corporatist/ institutional interests (Self-protective)	Public opinion regarding case (Support-building)	Elected-branch preferences (Deferential)	Potential politico-economic repercussions of decision (Pragmatic)	Law, doctrine, precedent (Principled)	Tactical Approach to High Court Decision making[2]
WEAK CHALLENGE							
Social Investment Fund (FINSOCIAL)				14% (1/7)	14% (1/7)	**57%** (4/7)	**Principled**
Provisional Contribution on Financial Transactions (CPMF)		10% (1/10)		30% (3/10)	20% (2/10)	**40%** (4/10)	**Principled**
Salary increase of 28.86%		**45%** (5/11)			**36%** (4/11)	18% (2/11)	**Protective/ Pragmatic**
Adjustment of salary-tied accounts in Length of Service Guarantee Fund (FGTS)	8% (2/26)	8% (2/26)	12% (3/26)	19% (5/26)	**38%** (10/26)	15% (4/26)	**Pragmatic**
Salary retention for public sector workers (10.94%)		**50%** (4/8)			**38%** (3/8)	13% (1/8)	**Protective/ Pragmatic**
Const. Amendment #20—maternity leave salary		17% (1/6)	17% (1/6)			**50%** (3/6)	**Principled**
STRONG CHALLENGE							
Readjustment retirement benefits of 147.06%	8% (1/12)	8% (1/12)	**33%** (4/12)		2% (3/12)	25% (3/12)	**Support-building**
Annual salary review for civil servants		**33%** (2/6)			**33%** (2/6)	**33%** (2/6)	**Protective/ Pragmatic/ Principled**
Tax on public sector pensions (I)	3% (1/36)	**58%** (21/36)				**39%** (14/36)	**Protective/ Principled**
Provisional Tax on Finan. Transactions (IPMF)		**43%** (10/23)	9% (2/23)		30% (7/23)	17% (4/23)	**Protective**

[1]When a particular judicial decision, expert or participant, newspaper article, or written source mentioned more than one consideration the court took into account when deciding a certain case, those mentions were counted as separate mentions of those considerations.
[2]Approach to decision making corresponds to considerations that constituted 33 percent or more of mentions.
[3]No consideration constituted at least 33 percent of mentions; approach to decision making corresponds to the most-mentioned consideration.

participant interviews (approximately 70 interviews), the newspaper articles, and the scholarly sources. Those mentions were then coded and tallied. The varied range of sources from which information was drawn helps reduce the effect on the analysis of bias from which any one source might suffer; it also decreases the likelihood that I am simply relating the narrative regarding the STF and its decision making on economic policy cases advanced or popularized by any source. As the exemplars offered here demonstrate, the political and social context in which the cases were filed and decided offer evidence supporting experts' and participants' accounts of the factors that drove the STF's rulings on these critical cases.

As Table 3 shows, experts and participants suggested that each consideration implicit in the thesis of tactical balancing had some bearing on the STF's decision making on the cases under study, and different considerations proved dominant in different cases. In fact, each consideration was taken into account in at least six rulings, and with the exception of "justices' ideology," each was imputed to have strongly motivated STF decision making in at least one case. Further, almost a third of the time (in six of the 20 case groupings), experts and participants suggested that two or more factors were important to the court's decision—and those considerations generally pointed to rulings in *opposite* directions.[12] These findings demonstrate that the court engaged in tactical balancing both over time and when ruling on particular cases.

Concerning the relative importance of the six considerations to the STF's decision making, expert opinion and participant accounts suggested that the potential repercussions of the court's decisions were important in more rulings than any other consideration. The STF's approach to decision making was said to be completely pragmatic in seven case groupings (or 35 percent of the time) and at least partially pragmatic in 11 case groupings (or 55 percent of the time). It seems logical that courts in young crisis-prone democracies would consider the consequences of their rulings on cases regarding economic policy (even when the comparative literature on judicial decision-making has largely ignored this possibility). Experts' and participants' views that this consideration predominated in almost three-quarters of the court's endorsements—and that elected leaders' preferences were a dominant consideration in only one endorsement—also evidence the STF's independence. The court frequently adopted a princi-

[12] For instance, justices' institutional interests (consideration of which often encouraged a challenge to the exercise of government power in cases questioning economic policies aimed at increasing fiscal discipline) and the anticipated consequences of a ruling (consideration of which often led justices to endorse the exercise of government power in such cases) were both Salient in the salary increase of 28.86 percent case.

https://doi.org/10.1111/j.1540-5893.2011.00437.x Published online by Cambridge University Press

pled approach to decision making as well. According to experts and participants, law, doctrine, or precedent stood alone as the primary consideration in the court's rulings in five of the 20 case groupings (25 percent of the time) and were an important consideration in eight case groupings (or 40 percent of the time). Finally, the high court adopted a wholly or partially self-protective approach to decision making (that is, justices prioritized their own institutional or corporate interests) in five of the 20 case groupings (or 25 percent of the time).

By contrast, experts and participants suggested that the STF rarely considered the elected branches' preferences when ruling on important cases in the economic policy realm:[13] in only one case (5 percent of the time) did the court adopt a deferential approach to decision making. Likewise, experts and participants suggested that the court employed a support-building approach (considering public opinion) in only one of the 20 case groupings under study (5 percent of the time). The STF maintained a relatively positive public image during much of the time period of interest, which may have freed the justices from reacting to public pressure for particular rulings. Finally, per expert opinion and participants' accounts, justices' attitudes or ideology were never the defining consideration in the STF's rulings on crucial cases regarding economic policy.

Most important, in support of the argument advanced here, the data reveal a clear association between the STF's attention to the six considerations and the direction and intensity of its rulings. The court was more likely to endorse the exercise of government power when a single consideration predominated in its decision making (doing so in nine of 14 case groupings where expert opinion and participant accounts converged on one consideration), and it was more likely to challenge the government when two or more considerations impinged on its ruling (doing so in five of the six case groupings in which experts and participants highlighted more than one consideration). Further, the court was almost twice as likely to endorse than to challenge the exercise of government power when it adopted a pragmatic approach to decision making (endorsing in seven of the rulings in which it adopted such an approach, and challenging in four).[14] By contrast, the STF was

[13] One might object that, to the contrary, the STF *was* attentive to elected leaders' preferences, simply delaying ruling on cases in which their preferences differed from its own, effectively removing such cases from the sample and biasing my study against identifying this consideration as important. However, as noted in Appendix A, my case selection technique involved identifying politically important *cases* rather than decisions. Indeed, years elapsed between the filing of, and the STF's decision on, some of the cases under study. In short, had delay rooted in elected-branch preferences been a dominant dynamic on the STF, I would have captured it.

[14] More generally, the court's disproportionate focus on extralegal considerations (and pragmatic considerations in particular) when endorsing the exercise of government

https://doi.org/10.1111/j.1540-5893.2011.00437.x Published online by Cambridge University Press

almost twice as likely to challenge than to endorse the exercise of government power when it adopted a principled approach to decision making (challenging in five of the rulings in which it adopted that approach, and endorsing in three). In addition, the court never endorsed the exercise of government power when adopting a self-protective approach to decision making (i.e., when its own institutional prerogatives were in play). This remained true even when pragmatic considerations (which likely encouraged endorsement) were simultaneously important (as they were in three of the case groupings in which self-protection was paramount). This finding both supports the tactical balancing explanation for judicial behavior and demonstrates how seriously the STF takes protecting its interests and image.

Further, with regard to ruling intensity, when considerations pointed in opposite directions, the court's rulings were generally of weaker intensity—as was the case in the "Formula for calculating retirement benefits," "Tax on public sector pensions II," "Salary increase of 28.86 percent," "Salary retention for public sector workers," and "Readjustment of retirement benefits of 147.06 percent" cases. Likewise, in two of the STF's strongest challenges ("Annual salary review for civil servants" and "Tax on public sector pensions I"), the two most important considerations pointed to a ruling in the same direction.

In short, Brazilian justices weighed all the considerations connected with the thesis of tactical balancing when ruling on the economic policy cases under study, and the way in which they did so—favoring pragmatic and principled approaches to decision making—affected both the direction and the intensity of their rulings. More detailed analysis of the STF's rulings on two of these economic policy cases brings its tactical balancing to life and sheds additional light on how it adjudicates among the various roles high courts can play in developing democracies. Any of the 26 cases under study might have been chosen as exemplars; the two discussed here depict two tactical approaches to decision making that the STF often adopted.

Adopting Pragmatism, the Interest Rate Case

In the interest rate case,[15] the STF was required to confront one of the many obstacles to governability embedded in the 1988 Constitution. Article 192 defined the aims of the national financial system and called for its regulation by "*one* complementary law," listing specific objectives for the law. In particular, the article stip-

power could—but does not *necessarily*—suggest that some of its endorsements may have condoned unconstitutional behavior.

[15] ADIn 04, *Partido Democrático Trabalhista* (PDT) vs. the Presidency of the Republic; preliminary ruling 19 Oct. 1988; final ruling 07 March 1991.

https://doi.org/10.1111/j.1540-5893.2011.00437.x Published online by Cambridge University Press

ulated that the annual real interest rate could not exceed 12 percent and that charging a higher rate would be understood as usury, punishable as the law would determine. The clause was controversial. Some on the left, who believed that the financial system and banks in particular "made" money through their indexing schemes when the inflation rate skyrocketed, hoped the clause would prevent the charging of high interest rates and considered the constitutionalization of this rule a symbolic "victory" against the financial sector (EC-21).[16] Economists balked at the cap, however, because control of interest rates is a crucial tool of monetary policy. They suggested that banks would be forced to shut down were the clause enforced (particularly in a hyperinflationary context) (EC-30).

On the eve of the Constitution's promulgation, Ministry of the Treasury and Central Bank officials met to discuss the problematic stipulation. They decided that Attorney General Saulo Ramos would quickly draft a memo (*parecer*) stating the government's formal position on the matter: that the interest rate clause was not self-executing, that it would need implementing legislation in order to enter into effect, and that legislation would define the "real interest rate." Government officials hoped that the writing of such a document and its approval by the president (making it mandatory for the administration, including the Central Bank), its publication in the Official Gazette (*Diário Oficial*), and its wide dissemination would be persuasive to the STF if it were to be called upon to resolve a case in connection with the clause (EC-30; EC-31; Rocha 2004:135).

Attorney General Ramos wrote a hefty document (SR No. 70) that clearly stated the government's understanding of the interest rate clause. The president approved it, and it was published in the Official Gazette on October 7, 1988, just two days after the promulgation of the Constitution (EC-31). In the meantime, on October 6, the Central Bank had issued *Circular* 1365, which—based on a draft of the Attorney General's memo—stipulated that until the complementary legislation regulating the national financial system was passed, financial institutions and all other entities operating under the authority of the Central Bank would continue to be subject to existing legislation (EC-30; EC-31; Rocha 2004:135).

On October 12, the Democratic Worker Party (*Partido Democrático Trabalhista*, PDT) filed an abstract review case with the STF alleging that the attorney general's memo and the Central Bank's *circular* violated Constitutional Article 192. In its petition, the PDT requested that the high court issue an injunction suspending im-

[16] Citations of this form refer to interview data: the prefix "CSE" denotes case selection interviews, "CSM" and "JG" denote interviews with justices, and "EC" denotes expert interviews about economic policy cases.

https://doi.org/10.1111/j.1540-5893.2011.00437.x Published online by Cambridge University Press

mediately the efficacy of the Central Bank document. The STF dismissed the PDT's request for an injunction a week after receiving the case but did not immediately hand down a final ruling. Memos from lawyers outlining the financial chaos that would ensue if the STF were to enforce the constitutional clause in question soon flooded the court (EC-30).

On March 7, 1991—two and a half years after the case was filed—the STF handed down its ruling upholding the constitutionality of the questioned government documents. The ruling reflected the administration's reasoning that Article 192 of the Constitution was not self-executing. The article called for a single complementary law regulating the entire financial system (addressing all the objectives listed in the article), and until that law had been issued, the court reasoned, Article 192 was not in force, and the attorney general's memo and the Central Bank *circular* were thus not unconstitutional.[17] Moreover, the court highlighted that it was unclear what a "real annual interest rate of 12 percent" meant in financial terms, and that this too would have to be clarified in the complementary law.[18]

The STF's decision on the case in effect confirmed practices regarding setting interest rates that had been adopted in the 28 months between the promulgation of the 1988 Constitution and the high court's ruling in 1991 (EC-04). Nonetheless, a ruling in the opposite direction could have created significant confusion, financial problems, and possibly bank failures (EC-30; EC-03). Moreover, a ruling that suggested that the judiciary could step in and evaluate interest rate policy against this constitutional limit would have made it much more difficult for Brazil to maintain its credibility with the international financial community (EC-03). Experts and participants largely agreed that it was precisely this consideration—the negative political and economic consequences of a ruling in the opposite direction—that motivated the STF's decision to take the problematic clause "out of constitutional play" (EC-42). The interaction of case content and the decision making context increased the salience of practical considerations, leading the STF to adopt a pragmatic approach to decision making: It sought to inoculate the country against a constitutional clause that would likely complicate monetary policy, to stabilize the financial system, and to smooth over one of the "original defects" of the 1988 Con-

[17] By emphasizing the constitutional requirement for *one* complementary law to regulate the broad and lengthy Article 192—i.e., to reform and regulate the entire financial system—the court made that regulation more difficult, thus indirectly (but perhaps not inadvertently) further impeding the activation of the interest rate clause (EC-40).

[18] Unless otherwise noted, all summaries of petitions and STF decisions are drawn from the actual petitions and decisions themselves, available on the STF Web site (http://www.stf.jus.br).

https://doi.org/10.1111/j.1540-5893.2011.00437.x Published online by Cambridge University Press

stitution—while simultaneously doing at least the letter of the charter no violence (EC-30; EC-31; EC-40; EC-50).

Adopting Self-Protection and Pragmatism: The 28.86 Percent Salary Adjustment Case

Brazil experienced astronomical inflation during the 1980s. At the same time, the country was obliged to make large payments on the public sector debt. These imperatives compromised the government's ability to invest domestically and made increasing public sector salaries difficult. The abrupt suspension of periodic inflation-driven salary adjustments in 1994, when inflation was finally contained, only exacerbated salary discontent (EC-18). Two 1993 laws awarded wage increases (averaging 28.86 percent)[19] to members of the armed services and introduced a much smaller "repositioning" of the salaries of executive branch civil employees (as of January 1, 1993) (Mueller 2001:626; NP 03-542).[20] Soon after, the legislature, judiciary, Government Accountability Office (*Tribunal de Contas*), and Public Prosecutor's Office (*Ministério Público*) informally extended a wage increase of 28.86 percent to their employees (also as of January 1, 1993), pointing to constitutional guarantees of salary equity among military and civil public sector employees (Art. 37, Paragraphs X and XV). In response, civil servants who had not received the increase (mainly of the executive branch) filed cases in lower courts arguing that the 28.86 percent index should be applied to their wages as of January 1993 as well (EC-04). As civil sector workers and the government alike generally appealed when they lost cases filed in the lower courts, most cases eventually reached the STF.

One such case was a collective *writ of mandamus*, originally filed in July 1993 by a group of employees of the Labor and Social Security Ministries and appealed to the STF on May 31, 1995. The government feared that an STF ruling in favor of the civil servants would encourage lower instance judges to rule in favor of workers on cases they held and would receive, with serious fiscal consequences. Accordingly, elected leaders launched a media campaign emphasizing the negative effects of a decision favoring workers for Brazil's fiscal stability. Minister of Administration Bresser Pereira noted publicly that a decision against the government would cause a "national disaster," and he made a "dramatic appeal to the public spirit of the justices" to rule for the government (NP 03-E-19). Newspaper headlines warned that if the nearly 1 million active and retired work-

[19] RMS 22307, *Janete Balzani Marques and others v. Brazil*, decision 19 Feb. 1997 (appealed), final decision 11 March 1998.

[20] Laws 8.622 and 8.627 (of 19 Jan. and 19 Feb. 1993, respectively). References beginning "NP" refer to newspaper articles about the Brazilian high court and the cases under study drawn from *O Estado de São Paulo*. All articles are on file with the author.

ers who could eventually file similar cases were to attain the wage adjustments, the government could spend close to R$ 7 billion annually simply to make up for lost wages, in addition to paying the adjusted wage bill in the future (NP-03-283; NP 03-E-17; NP 03-E-18).

The STF delayed for almost two years. Finally, on February 19, 1997, the court awarded the executive branch civil servants the increase of 28.86 percent they were claiming. However, the ruling only held back to July 1993, the date on which the workers had originally submitted their case, rather than back to January 1993, as they had requested. Accepting the workers' reasoning, the court argued that the constitution guarantees pay equity between military and civil public sector employees (Art. 37, paragraphs X and XV). While the ruling only held for the 11 civil servants who had brought the case, it incited hundreds of additional public sector workers to file cases and encouraged lower court judges to issue injunctions awarding the salary adjustment.

President Fernando Henrique Cardoso's provocative reaction to the decision—"it's a shame they [the justices] are not thinking of Brazil"—became infamous.[21] Newspapers threatened that the court-mandated salary adjustments would bring devastating economic effects. And pundits noted that the government had begun to consider cancelling other planned salary adjustments and laying off public sector workers in the wake of the ruling (NP 03-310; NP 03-E-29). Further, once the STF's decision was published in June 1997 (making appeal possible), the Executive immediately appealed (as it often does to delay execution of STF rulings against it; EC-08; NP 04-108). In its appeal, the Executive argued that the civil servants did not have a right to the salary adjustment because the increases received by workers in the other branches of government had not been awarded through a law. Moreover, the government insisted that executive branch civil servants—including those who filed the case—had received other salary adjustments (including via Laws 8.622 and 8.627 of January 19 and February 19, 1993—the very laws that had started the controversy), which, to differing degrees, compensated for their failure to receive the 28.86 percent salary increase in question.

The government's appeal did little to stem the rising tide of cases concerning the salary increase. Judges all over Brazil were handing down provisional rulings awarding plaintiffs the right to the funds *immediately*—despite the fact that the government's appeal on the test case at the STF hung in the balance. As a result, beyond their concerns about the impact that the increase in the wage bill would have on the country's budget deficit, leaders also

[21] Original quote: "*Pena que eles não pensem no Brasil.*" *Folha de São Paulo*, 20 Feb. 1997, p. 2.

https://doi.org/10.1111/j.1540-5893.2011.00437.x Published online by Cambridge University Press

worried about how they would retrieve the money that judges were awarding hand over fist if the STF's final ruling on the case before it did *not* award the workers a 28.86 percent salary increase. Consequently, on August 21, 1997, President Cardoso issued MP 1.570 (converted into Law 9.494 on September 10, 1997), prohibiting judges from handing down injunctions that anticipated an STF ruling before the test case had been fully and finally decided by the high court (NP 03-E-35).

On March 11, 1998, the STF issued its badly split (6–5) decision on the government's appeal.[22] Ignoring internal procedures prohibiting the introduction and consideration of new argumentation or evidence in the kind of appeal the government had employed, the STF agreed that the salary adjustments awarded to the civil servants who had filed the case should take into consideration adjustments they had previously received. Practically, this meant that most of the workers in question would receive an adjustment of less than 28.86 percent, thus significantly decreasing the amount the government would have to pay—some suggested by more than half (EC-05; NP 03-470).

Jurists, politicians, and bureaucrats alike questioned the final ruling (Fonseca de Araújo Faria 1998:33–4). Experts and participants suggested that the court's approach to decision making was simultaneously self-protective and pragmatic. On the other hand, corporate considerations—the interests of public sector workers (a category into which justices and their assistants fall) and of the judiciary specifically—weighed heavily on the STF's decision. Public sector salaries had been frozen for more than two years (beginning in 1995; NP 03-E-17), and public sector worker lobbies strongly pressured the high court to rule in favor of the executive branch employees (NP 03-283; CSE-120; EC-11). Further, experts and participants posited, the justices were exasperated by the pressure the government was placing on them and the judiciary as a whole and sought to project an image of independence (NP 03-417). Moreover, the constitutional clause regarding salary equity was very clear, leaving the court (ever-attendant to its image before Brazil's powerful legal community) little choice but to award some sort of adjustment to the workers in question. On the other hand, the country's fiscal health and its immense budget deficit remained at the forefront of the justices' minds (CSM-03; NP 03-416; EC-12). In the end, the court balanced these conflicting considerations and issued a weak challenge to the exercise of government power.

[22] While the unit of analysis in this study is judicial decision rather than an individual justice's vote, split decisions such as these demonstrate that individual justices may carry out tactical balancing in different ways, suggesting that the thesis may also explain the behavior of individual justices; I thank an anonymous reviewer for this insight.

https://doi.org/10.1111/j.1540-5893.2011.00437.x Published online by Cambridge University Press

Conclusions

A central weakness of democratic regimes in many developing countries is elected leaders' propensity to disregard constitutional constraints on their exercise of power. It often falls to high courts, as the ultimate constitutional guardians, to adjudicate the conflicts that can result when such action is challenged in the judiciary. As in developed democracies, these controversies frequently arise at moments of intense political or economic transformation, for instance, under conditions of war or economic crisis. It is at these moments of turmoil, after all, that leaders trying to manage conflict or change may tend to test—and perhaps feel most justified in testing—institutional limits. Resolving pressing political questions at such moments is as difficult for courts as it is important: Doing so offers courts the opportunity to make a significant contribution to governance, and to defining the way their country's policy and politics will evolve.

Courts that are called upon to decide cases concerning key government initiatives face critical choices. In a case questioning the constitutionality of a freeze on bank accounts imposed to prevent a run on banks, for instance, a court may choose to declare the policy unconstitutional due to its violation of property rights—a ruling that society may view favorably but that could hamper economic recovery. Alternatively, the court could declare the policy constitutional in order to avoid deepening crisis, risking criticism that it is shirking its constitutional duties and lacks independence from elected leaders.

Building on the dominant models of judicial decision making, this article has advanced an account of judicial behavior that captures that complexity. The thesis of tactical balancing suggests that high courts balance a range of considerations—ideological, institutional, strategic, and legal—when ruling on politically crucial cases, and that the way in which they do so influences the direction and intensity of their rulings. To state the claim another way, courts engage in a shifting blend of tactical approaches to decision making, leading them to challenge the exercise of government power in some cases and endorse it in others—or to be "selectively assertive" vis-à-vis elected leaders. The tactical balancing framework reveals the overlaps among the main models of judicial behavior and synthesizes them into a single, flexible account.

The article illustrates the tactical balancing account through a case study of post-authoritarian Brazil. The STF balanced the considerations included in the thesis when deciding 26 cases concerning critical economic policies, leading it to be selectively assertive vis-à-vis Brazilian leaders. Given the intermediate size of the group of cases under study, given that they were chosen (albeit purpo-

https://doi.org/10.1111/j.1540-5893.2011.00437.x Published online by Cambridge University Press

sively) from a systematically selected sample of politically important cases, and given that they touch on a range of political issues such as the limits of presidential power and rights, it seems safe to assert that the STF employs tactical balancing to decide crucial cases in other policy arenas as well. The court would not necessarily emphasize the pragmatic and principled approaches it most often employed when deciding cases in the economic realm when resolving disputes in those other arenas, however.

The tactical balancing account also holds promise to explain the decision making of other high courts that have become involved in governance and policy making. Some students of the U.S. Supreme Court have already suggested that a variety of pressures impinge on justices, highlighting the possible utility of the account for explaining judicial behavior in some advanced democracies. The thesis holds even more potential to explain high courts' selective assertiveness in other developing democracies in which courts have built up some independence from elected leaders, but where perhaps weaker commitments to the rule of law open the way for a variety of extralegal factors to influence justices' decision-making calculus. Of course, given that case content and the decision making context—as well as court composition—influence precisely *which* considerations dominate judicial decision making, there is no reason to assume that all high courts would emphasize the same tactical approaches as did the STF when deciding cases concerning economic policy. Studying how other courts balance the considerations included in the thesis when deciding different types of politically important cases will allow for further development of the predictive power of the thesis.

What difference does it make that high courts balance a range of considerations when deciding politically crucial cases and that doing so can lead them away from full-fledged constitutional defense? It seems unquestionable that judicial decisions defending constitutionalism bolster the rule of law. There is less consensus concerning the relationship between judicial review and democracy. Much of the literature produced by U.S. political scientists over the past two decades (e.g., Linz & Stepan 1996; Przeworski 1995) as well as an important swath of legal theorists (e.g., Ackerman 1997; Dworkin 1990) reason that courts' brave exercise of judicial review strengthens democracy, because by carrying out a "horizontal accountability" function courts help prevent overweening executives from exercising too much power (i.e., drawing their countries in authoritarian directions). Other legal theorists emphasize the inherent *tension* between judicial review and democracy (e.g., Kramer 2004; Tushnet 1999).[23]

[23] See Hilbink (2008) for an excellent summary of the debate.

https://doi.org/10.1111/j.1540-5893.2011.00437.x Published online by Cambridge University Press

To assess these ideas, consider the Brazilian STF's rulings on the cases analyzed here, many of which it was called upon to resolve precisely at moments of political or economic flux. Had the court prioritized its role as constitutional guardian above all others, eschewing a pragmatic approach to decision making, steadfastly adopting a principled approach, and consistently ruling to limit the exercise of government power—would the government have complied fully with its rulings despite insisting that doing so would bring financial ruin given Brazil's economic difficulties? Or would leaders have failed to comply, casting doubt on judicial authority and further flouting the rule of law? Would the court's more consistent defense of the constitution have increased regime quality and stability? Or might additional challenges to the young democracy's political leaders have shaken its very foundations? Legal researchers will never know. What we do know is that Brazil's rule of law is at least as strong as it was upon the transition from authoritarian rule in 1985. Moreover, the country is still a democracy a quarter-century after regime change—one that withstood the death of its first democratically elected president at regime transition and the impeachment of the second, as well as sustained economic upheaval. By considering and balancing a range of factors, imperatives, and pressures when ruling on politically crucial cases—by playing the roles of constitutional guardian, economic policy maker, *and* regime stabilizer—the STF may well have made a greater contribution to institutional stability than it would have had it clung unwaveringly to constitutional defense.

In short, this article neither equates nor opposes judicial constitutional defense with the rule of law or democracy. Instead, it suggests that justices may best bolster the rule of law and supplement Schumpeterian democracy—performing the "second-guessing" role posited by Ian Shapiro (2003)—if they balance a range of considerations when deciding crucial cases, using judicial review to challenge government policy and action in some cases and endorse it in others. Understanding judicial decision making in this way—as a reflection of courts' broader strategy for balancing the various roles they can play in developing democracies—represents an important step toward unraveling the complicated relationship between judicial power, the rule of law, and democracy.

Appendix A. Case Selection Methodology

Case selection involved two phases. First, I selected a sample of the most politically important cases to come before the STF between regime change in 1985 and 2004 ($N = 55$). "Politically important" cases are those in which the court had the opportunity to

https://doi.org/10.1111/j.1540-5893.2011.00437.x Published online by Cambridge University Press

set boundaries on the exercise of government power. Three sources informed case selection:[24]

1. Mentions of cases in articles and books: In part using advice gained through introductory expert interviews in Brazil, I assembled and skimmed a bibliography of books and articles addressing the contemporary jurisprudence of the STF, generating a list of the cases that were mentioned three or more times (the "list of politically important cases"). I created a separate list of every case mentioned in two Brazilian constitutional law texts.

2. Mentions in *O Estado de São Paulo*: I trained four research assistants to employ a systematic methodology to identify (and digitally photograph) each article focusing on an STF case in every issue of *O Estado de São Paulo* (an important Brazilian daily newspaper) from March 1985 through December 2004. Simultaneously, we created a chronological list of all of the cases mentioned in *O Estado de São Paulo* and all of the articles discussing each case.

3. Mentions in "case selection interviews": Following completion of Step 1, I conducted 25 structured interviews with experts (including sitting and retired justices, lawyers, constitutional scholars, members of nongovernmental organizations dealing with judicial themes, and government officials), requesting that each respondent name nine politically important cases (per my definition) that the STF considered between 1985 and 2004: two considered during José Sarney's presidency (1985 to 1990), two considered during the presidencies of Fernando Collor and Itamar Franco (1990 to 1994), four considered during Fernando Henrique Cardoso's presidency (1995 to 2002), and one considered during the first two years of Luiz Inácio Lula da Silva's presidency (2003 to 2004).[25] At the end of each interview, I presented respondents with the list of politically important cases created in Step 1 and asked them to indicate (with a check) the cases they considered to be politically important, thus gaining standard data from all 25 interviews.

I then added to the list of politically important cases those cases that were mentioned in the spontaneous portion of the case selection interviews that were not already on the list. Next, I tallied the number of times each case on that longer list (113 cases total) was mentioned in the literature (Step 1), in the newspaper articles (Step

[24] Each source likely overemphasized certain types of cases: For instance, journalists likely recorded and remembered more politically controversial cases, while legal journals and books likely included more cases of legal or juridical importance. Using multiple sources reduced the risk of over-representation of any consideration inherent in the thesis of tactical balancing.

[25] I tried to reduce selection effects and maximize variation on the dependent variable (high court assertiveness) by asking respondents to identify cases in which the STF had the opportunity to issue a politically important ruling (rather than decisions they considered politically important).

https://doi.org/10.1111/j.1540-5893.2011.00437.x Published online by Cambridge University Press

2), and in the spontaneous portion of interviews; and the number of times each case was checked by interview respondents. Cases that were mentioned more than a minimum number of times in three categories[26] *and* that were mentioned in the spontaneous portion of at least one interview were included in the sample. I then selected the group of cases on which this article focuses: those in which the constitutionality of an economic policy of any sort (tax policy, privatizations, salaries, pensions, etc.) was challenged ($N = 26$).

Appendix B. Four Mechanisms to Reach the STF

Concrete Review Mechanisms	
Extraordinary Appeal (*Recurso extraordinário*, RE)	• Can be used to appeal most lower court rulings on constitutional grounds. • Rulings have *inter partes* effects.
Writ of Mandamus (*Mandado de segurança*, MS; on appeal: *Recurso em mandado de segurança*, RMS)	• Filed directly with the STF or appealed to STF to protect against rights abuses by administrative authorities. • Rulings have *inter partes* effects.
Abstract Review Mechanisms (filed directly with the STF; do not involve case or controversy)	
Direct Action of Unconstitutionality (*Ação direta de inconstitucionalidade*, ADIn)	• Renamed and standing expanded in 1988 Constitution. • Allows a specific set of political actors to challenge the constitutionality of executive decrees, constitutional amendments, federal and state laws, and administrative decrees issued by federal or state courts since 1988. • Temporary injunctions suspend part or all of a questioned norm until the STF decides the case on the merits and have *erga omnes* effects (Rocha & Paulo 2003:46–8, 92). • Per Law 9.868 (1999) and Article 102 of the 1988 Constitution (as reformed in 2004), rulings on the merits have *erga omnes* and retroactive effects and are binding on all courts and the public administration.
Declaratory Action of Constitutionality (*Ação declaratória de constitucionalidade*, ADC)	• Created via Constitutional Amendment No. 3 (1993). • Allows a specific set of political actors to request that the STF declare the *constitutionality* of a particular federal norm. • Per Law 9.868 (1999), temporary injunctions issued by the STF are binding and require that judges and courts suspend judgments that involve the application of the norm in question until the STF has issued a final decision (Rocha & Paulo 2003:46–8, 92). • Rulings on the merits have *erga omnes* effects and are binding on all courts and the public administration.

[26] The bar for the number of mentions in books, articles, and newspapers varied slightly among my four time periods because I had many more sources analyzing the first three time periods than the last time period, and because coverage of the STF increased dramatically in *O Estado de São Paulo* between 1985 and 2004 as the media began to focus more heavily on the courts.

https://doi.org/10.1111/j.1540-5893.2011.00437.x Published online by Cambridge University Press

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https://doi.org/10.1111/j.1540-5893.2011.00437.x Published online by Cambridge University Press

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https://doi.org/10.1111/j.1540-5893.2011.00437.x Published online by Cambridge University Press