

Judicial Behavior in Civil Law Systems:
Changing Patterns on the Brazilian *Supremo Tribunal Federal*

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Abstract. Civil law systems are typically associated with legal formalism, and judges' role is seen as narrow application of legal doctrine. What features of civil law systems restrict judicial behavior? In this paper we investigate the impact of institutional change on judicial behavior in Brazil. We examine all cases of the main mechanism of constitutional review -- direct constitutional actions (ADIs) -- considered by the Brazilian high court, the *Supremo Tribunal Federal* (STF), from 1989-2010, including time periods before and after a major institutional reform that expanded the influence of the STF. We find that after 2002, a new partisan cleavage emerges on the court. We argue that this evolution is a function of reforms granting increasing formal judicial authority and strategic presidential appointments. Our findings shed light on the key features of civil and common law systems, and contribute to a growing literature on comparative judicial politics.

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Introduction

Perhaps the most important distinction between types of legal systems is that of common law and civil law. Though there are areas of common ground, even increasing similarity, an enormous literature explores the many differences between these two systems, and their implications for the legal profession, criminal justice, legal doctrine, corruption, property rights, and judicial behavior (e.g., Shapiro 1981; Damaska 1986; Jacob et al. 1996; Merryman and Pérez-Perdomo 2007).

In the area of judicial behavior, comparative studies suggest that these two systems lead to very different styles of judging. The common law system is associated with more active, assertive, interpretive judges who may even be elected and are often seen as extensions of the political realm. Conversely, the civil law tradition is associated with more passive judges making narrow merits judgments on cases, focusing on the application, rather than the interpretation, of law. In the former, judges are prestigious, influential members of the political class and their decisions have tremendous impact on their legal systems; in the latter, judges are closer to administrative bureaucrats, far less prestigious, and with limited influence (Merryman and Perez-Perdomo).

Recent comparative work suggest that this dichotomy is less discriminating in classifying judicial systems, with scholars finding that some civil law systems have increasingly activist judges, or at least wide variation in the political assertiveness of judges, suggesting something other than the legal tradition they share in common is to account for differences across systems (Chavez 2004; Sieder et al.2005; Staton 2010; Rios-Figueroa 2007; Couso et al. 2010; Helmke

and Rios-Figueroa 2011). In some cases, this changing assertiveness is a form of strategic behavior that responds to changes in the political incentives for judges. For instance, judges in Argentina rule against outgoing administrations as a favorable signal to incoming administrations (Helmke 2005), and judges in Mexico tend to rule increasingly against the administration as the power of that administration fragments (Rios-Figueroa 2007). These findings align with the U.S. literature on strategic decision making (e.g., Epstein and Knight 1998). In other cases, the logic of assertiveness is shaped less by material, rational-strategic incentives, and more by non-material, ideational or ideological commitments. For example, judges in Chile (Huneus 2010; Couso and Hilbink 2011), Colombia (Nunes 2010), and Spain (Hilbink 2007b) have become distinctly more active, even "activist", due in large part to principled, programmatic commitments regarding particular issues or the proper role of judges in democratic societies. These findings align more with the literature on attitudinalism in U.S. politics (e.g., Segal and Spaeth 2002), as well as socio-legal and social movement research on the types of ideas that motivate legal actors (McCann 1994; Epp 1998; Smith 2008).

In this paper, we provide the first test for change in judicial paradigm for the Brazilian Supreme Court. Contributing an original dataset of every decision belonging to a key mechanism of constitutional review from 1989 to 2010 (N=1285), we test for political cleavages on the court and evidence of an emerging attitudinal model. Brazil is a crucial case in the study of changing patterns of judicial behavior in the civil law world as it is conventionally regarded as epitomizing much of what was traditionally understood about judging in civil law systems: judges are persistently understood as formalist, legalist, professional, and apolitical. Cutting against this widespread understanding of Brazilian judges, our quantitative analysis finds that after a series of major institutional reforms, a new partisan divide has emerged on the high court.

Complementing these results, a majority splits analysis and qualitative case studies of key decisions suggest that judges are increasingly assertive-activist in orientation, citing fundamental principles regarding individual rights and liberties, international law, and advocating notions of substantive due process. Together, the quantitative and brief qualitative excursus constitute compelling evidence of a new split in jurisprudential styles on the STF.

We proceed in four steps. We first review the literature on judicial system types and judicial behavior, identifying the key features of systems that are associated with activist and interpretive judges. We then introduce and examine the Brazilian high court, which is widely characterized as being apolitical. Third, we present our quantitative and qualitative evidence for an emerging cleavage on the court, and discuss the key factors driving that change. Finally, we discuss the broader implications for students of comparative judicial politics.

Common Law, Civil Law, and Judicial Behavior

Quite apart from a narrowly partisan or political ideology, different ideas about judging and the judge's role distinguish the common law and civil law traditions. That is, these two systems exhibit very different legal cultures or philosophies that shape how they conceptualize the role of judges and the activity of judging. For our purposes, we are interested in the legal system features that are identified with restricting judicial activism in civil law systems and increasing judicial activism in common law systems. We highlight three of these features here: (1) recruitment of judges into the profession; (2) status of judges vis-a-vis the political branches; (3) precedent and judicial authority.

First, whereas judges in common law countries are appointed because they are experienced (and therefore older) attorneys, law professors, or perhaps even attorneys returning

from other professional ventures, and can even be elected, judges in the civil law world are younger and more closely tied to the single profession of judging. Typically, judges are much younger than judges in the common law world because they are recruited into the judiciary immediately or soon after law school. Generally, legal education is an undergraduate degree completed by age 23, and aspirants to judgeships either take an exam or go to a special judicial training center. Within another year or two, they are judging cases. Judges then generally remain in the judiciary, ascending through ranks according to merit and/or seniority, accruing salary increases and benefits along with reputation among their colleagues (Merryman and Perez-Perdomo, 35). In broad terms, this is an accurate description of Brazil (Taylor 2008; Kapiszewski 2011), where judges also join state and national corporate organizations (e.g., Associação Brasileira de Magistrados, AMB) that afford further professional opportunities and a sectoral strength that is strong in lobbying power. For these reasons, lateral entry into the profession is rare in civil law countries (Merryman and Perez-Perdomo, 35), and perhaps more importantly, voluntary exit from the judicial profession is also rare.

Second, unlike the high status of common law judges, the status of judges in the civil law world vis-a-vis other political branches is low. There are historical and insitutional reasons for this, which are inextricably linked so we treat them together here. Historically, judges in the Roman tradition -- which provides the roots for the civil law system -- applied the law as one might apply a formula to a series of numbers. Others were in charge of creating the law, and these formulaic rules were handed to judges who were only supposed to apply them to the facts of disputes that came before them (Merryman and Perez-Perdomo, 35). Further, prior to the French Revolution, judges were associated with the aristocracy, so a central impulse in the aftermath of the Revolution was to deprive judges of power (Provine). Part of the French

solution was to elevate the representative legislature high above courts, reproducing the old Roman model of judges as mere applicers of legislation. Indeed, this role conception runs deep in the civil law world: judges are seen as uncreative bureaucrats, a kind of "expert clerk", or as "operators of a machine designed and built by legislators" (Merryman and Perez-Perdomo, 36, 47). The modern civil law tradition draws heavily on the Napoleonic Code and French influences, so judgeships are not as prestigious in this tradition, and judges are seen as applying the law, not making it (see Taylor 2008, 33-34, citing Weber). Thus, drawing heavily on the Roman model and the experience of the French Revolution, the civil law tradition subordinates judges to legislatures, choosing parliamentary supremacy over judicial supremacy.

A deep legal culture and folklore operate to keep the civil law "judge-proof" (Merryman and Perez-Perdomo, 48), but institutional mechanisms also keep parliamentary supremacy in place, constraining the activism and authority of judges. Principal among these mechanisms is the absence of precedent. Indeed, since abiding by a prior judicial decision in order to resolve a later dispute would essentially equate judging with lawmaking, the figure of precedent (*stare decisis*) is absent from most civil law countries. Judicial decisions are understood to be a mechanical, uncreative application of the law to a set of facts, and this decision is binding only between the parties to the specific case (*inter partes* effects). To allow the decision to be binding on others in similar situations (*erga omnes* effects) would again violate the rule of judge as uncreative bureaucrat. Thus, judges engage in highly repetitive actions, deciding similar sets of facts, often precisely the same facts, in case after case. This is not only inefficient in terms of the volume of judicial work that civil law judges confront, but also constrains any sense of judicial authority, especially in terms of the larger political debates

facing the country. Again, these historical and institutional features easily apply to Brazil, though with some recent changes, which we address below.

The abovementioned differences between the common and civil law systems -- in general, broad terms -- remain today. However, recent studies have begun to document shifting elements in the legal culture of the civil law world. Hilbink (2008), Couso (2010), Couso and Hilbink (2011) and Rodriguez Garavito (2011) have documented a remarkable transformation in the legal philosophies of civil law judges, a shift that signals a much more active role conception of judging for at least some judges. For instance, Couso's study of judges in Chile tracks the rise of a rights-protective jurisprudential role. Rodriguez Garavito's study of "neoliberal constitutionalism" and "neoconstitutionalism" contrasts the rise of a market-oriented jurisprudence and a rights-protective jurisprudence. Notably, the substantive content of legal philosophies can coincide with political ideology, e.g., a rights-protective constitutionalism tracks closely with left-leaning, progressive attitudes, and a market-oriented neoliberal constitutionalism tracks closely with right-leaning, conservative attitudes. To be clear, however, the concepts are analytically distinct and we treat them separately.²

In sum, judges in the civil law world are widely understood as more professional (as a corporate body), apolitical, passive, uncreative, and subordinate to legislatures than their counterparts in the common law world. Still, there are indications that this role conception is changing, and that principled-ideological commitments motivate judges -- both more progressive, left-leaning judges and more conservative, right-leaning ones -- to adopt a more

² A conceptual clarification is in order. There is increasing evidence of a kind of cultural-ideational transformation in the civil world, with some groups of judges becoming more active and assertive. We use the term "activist" throughout to refer to this emerging type of judge, and contrast it with the traditionally passive, politically neutral or subordinate type of judges historically associated with civil law systems.

activist-assertive style of judging. How do these patterns in the civil law world manifest in Brazil?

The Evolving Brazilian Judicial System

We focus herein on the Brazilian judicial system for several reasons. Brazil of course is an emerging power, its judiciary is understudied, and it deserves attention in its own right. It is also a system in transition - widely regarded as having an apolitical, non-activist judiciary, a position that we will challenge. Finally, and more broadly, recent changes in Brazil are suggestive of how institutions structure incentives for judicial behavior. In this section, we review the relevant literature on comparative judicial politics, introduce the Brazilian court and examine previous work on judicial behavior on the STF.

Brazil's transition to democracy in the 1980s and the new constitution of 1988 have brought an expansion of judicial power and activity. Courts in Brazil are institutionally very strong -- in terms of budgetary strength and infrastructure, gains largely due to the sectoral pressures exerted by the highly organized judicial profession --, and the STF sits atop this powerful professional structure. Though the STF existed long before the transition to democracy in 1985 and has never formally been designated a constitutional court, the 1988 Constitution created a new "infra-constitutional" court alongside the STF, named the Superior Tribunal of Justice (Superior Tribunal de Justiça, or STJ), which by default converted the STF into the country's constitutional tribunal (Kapiszewski 2010, 57). Thus, all major national constitutional disputes about the proper separation of powers -- horizontal (among branches of government) and vertical (federalism) -- are adjudicated by this court. Further, the STF is relatively accessible in this regard. The 1988 constitution broadened standing, putting the STF alongside constitutional courts of Colombia and Costa Rica as one of the most accessible constitutional

fora in Latin America (Taylor 2008, 78). The STF receives thousands of cases every year, and has increasingly been a major player in core policy debates (Taylor 2008, 3), ranging from economic stabilization programs, privatization policies, affirmative action, and the amnesty law of 1979 that barred prosecution of those guilty of torture and other abuses during the military regime.

Previous work on the Brazilian judiciary emphasizes the professionalism of this increasingly powerful court, due in large part due to the mechanisms of judicial training and selection. As noted above, this feature of the Brazilian legal system is tied closely to the patterns of judicial recruitment in the civil law tradition. Federal judges enter the profession by taking a rigorous exam, and ascending in this career requires achieving similarly high and objective benchmarks. Given that judges ascend through the institutional hierarchy based on a combination of merit and seniority, and that such a high premium is placed on corporate identity, appointment and selection mechanisms practically guarantee centrist or non-ideological judges -- judges who come from the "legal and policy mainstream" (Brinks 2011, 140; Nunes 2010). Thus, conventional wisdom among scholars and other observers of the court is that hiring and promotion standards filter in an ethos of professionalism and filter out other politically- or ideologically-charged normative orientations, leaving high-level federal judges exuding a professional or corporate identity that is frequently described as trumping any kind of partisan or ideological identity.

The few empirical analyses of the Brazilian Supreme court consistently concur with the prevailing wisdom: judges are professional, not ideological. Understandably, interest in studying the Brazilian judiciary has increased, but most of that interest has been normative or descriptive, as analysts -- primarily legal scholars -- have sought to understand the post-1988

constitutionalism (Arantes, 2005). Only a few scholars have offered empirical studies of judicial behavior and explored the questions of attitudinal or pragmatic decisions in Brazil. For example, Kapiszewski (2007; 2010; 2011) examines 50 high-profile cases on economic policy, and finds that pragmatic and apolitical assessments dominate most judicial decisions, with only a secondary role for ideology. In a statistical analysis of only the injunctions (*medidas cautelares*, MC, or *liminares*) relating to direct constitutional actions (ADIs) from 1988-2002, Taylor (2008, 83-87) finds that ideology -- measured as the partisan identity of the sitting administration -- does not have a significant effect on the direction of the judges' decisions. Oliveira (2008) examines a sample of 300 ADI cases from 1989 to 2004, again finding that there are no clear patterns that suggest an attitudinal model of judicial decision-making. More recently, Jaloretto and Mueller (2011) focused on cases decided during the Lula administration. As has been the case with prior studies, they find no evidence of ideological or partisan decision-making on the court. For all the preceding except Taylor, analysis relies on a limited and apparently non-random sample of decisions.

Two manuscripts find limited evidence that ideology plays a role in judicial decision-making. In an unpublished manuscript, Leoni and Ramos (2006) examine a sample of 400 decisions and find a left-right dimension. While very interesting, their results are limited in at least three important ways: (1) they analyze fewer than half of the decisions reached during this time period, with no apparent explanation for their selection of cases; (2) their coding of judicial decisions may be confounding absences and abstentions with minority position-taking; and (3) their analysis may suffer from generational bias in ideal point estimation (citation removed). Oliveira (2008) does find some differences between PT and non-PT judges, using a sample of 300 decisions prior to 2004. Again suggestive, the limited and non-random sample suggests a

need for a broader study. Finally, neither of these projects addresses change in the court's polarization - trying to identify when and why an ideological dimension appeared on the court, or whether it was always there.

We are particularly interested in two changes in the Brazilian judiciary that might prompt a transition from a passive, legalistic model to a more assertive, attitudinal model. The first was the passage of a national judicial reform in 2004, Constitutional Amendment 45 (EC45). This reform made several changes in the judiciary, but one of the most important was granting the STF the legal concept of precedent, called "sumula vinculante". For the first time in this civil law country, the high court can issue a decision that every other lower court and public entity must obey. This sort of universal (*erga omnes*) effect tied to *stare decisis* is familiar to observers of common law systems, but is highly unusual in the civil law tradition. For instance, Mexico underwent equally prominent national judicial reforms in 1994 (reorganizing the federal judiciary) and again in 2008 (reorganizing criminal procedure), but has not instituted this aspect of precedent. For the Mexican high court's jurisprudence to be binding in the same way, it must make five consecutive rulings in the same direction on substantially similar cases. This is a high bar to establish precedent compared with Brazil. Thus, Brazil's 2004 reform establishes a temporal boundary that marks a crucial institutional change. This matters for judges because, even though only a small number of these kinds of decisions may be rendered, the formal institutional change empowers judges as political actors to define policy at the highest level and for the entire country. This change starkly and concretely augments judicial authority, marking a shift from the deference to legislatures traditionally associated with civil law countries to a deference to courts associated with common law countries. Stated otherwise, this particular reform constitutes a significant step from parliamentary supremacy to judicial supremacy.

Considering the central deep historical rationale for parliamentary supremacy and judicial subordination in civil law countries, this is a major step in the empowerment of judges.

The second major change is the new pattern of judicial appointments beginning when the Worker's Party won the presidency in 2002. These changes suggest an increasing politicization of the court which may result in a new attitudinal judicial politics for Brazil, especially in combination with the institutional change outlined above. Previously, judges had little obvious identification with any political party - even the party of the President that appointed them. But beginning with the first PT administration of President Lula, appointees have had clearer ties to his party (Kapiszewski 2010, 55, note 5). Perhaps the most obvious example is Dias Toffoli, who was attorney for a major national labor union (Central Única dos Trabalhadores, CUT), legal counsel for the PT in the Chamber of Deputies, worked on Lula's political campaigns, and was also Lula's Solicitor General (*Advogado Geral da União*, AGU) before being nominated to the court in 2009.³

To be sure, we are not saying that no STF judge before Lula had any kind of political background. Indeed, at least six pre-Lula justices held formal elected office prior to joining the STF, and five of these justices held at least one elected office at the federal level.⁴ An additional justice, Francisco Rezek, was appointed to the court in 1983, resigned to be Collor's Minister of Foreign Relations (i.e., Secretary of State) in 1990, and was later re-appointed by Collor to the court in 1992.⁵ Multiple justices held appointed office at different levels of government,

³ Unless otherwise noted, all data on justices' background is from the STF website, which contains biographies and resumes for all justices.

⁴ Rafael Mayer (mayor), Oscar Correa (state deputy; federal deputy); Paulo Brossard (state deputy; federal deputy; senator); Celio Borja (state deputy and three terms as federal deputy); Mauricio Correa (senator); Nelson Jobim (federal deputy).

⁵ Prior to joining the court in 1983, Rezek was a federal prosecutor during 12 years (1972-1983) of the military regime, rising to Deputy Attorney General (Subprocurador-geral da Republica) in 1979.

including Gilmar Mendes (appointed by Cardoso), who like Dias Toffoli just mentioned, was AGU.⁶

However, these other justices have been spread out over several administrations. In contrast, aside from Dias Toffoli, four more of Lula's eight appointments held appointed positions in local or federal government (Carlos Britto, Eros Grau, Ricardo Lewandowski, and Menezes Direito), and only three of the eight had previously been judges (Cezar Peluso, Lewandowski, and Direito). Indeed, at least one journalistic account reports statements by Lula that show he sought to place sympathetic, leftist judges on the bench. In August 2007, the STF was populated with six justices selected by Lula -- a majority -- and was deciding a major case involving the alleged corruption of many of his party's politicians (in a scandal known as the *mensalão*). As the justices he had selected voted against the PT politicians, he complained, "all those leftist judges that I nominated are voting against me". The selection of the more apolitical, "technical" Menezes Direito the following month was due in part to Lula's frustrated reaction to the way his earlier preference for left-leaning judges had backfired in this one case (Stuart 2007).

We believe these two changes - the increasing authority of the court and the increasing politicization of appointments - drive a paradigm shift in judicial decision making in Brazil, from passive and legalistic to activist, assertive, and attitudinal. We turn now to our empirical analysis.

Data and Results

We seek to explore judicial behavior in Brazil, using the full population of constitutional decisions, and testing for changes in response to institutional reforms and different nomination patterns. We use both a standard spatial model and a nonparametric permutation tool to identify

⁶ Aside from federal elected office, Brossard, Mauricio Correa, and Jobim also held the appointed office of Minister of Justice. Gilmar Mendes was Cardoso's Solicitor General (AGU) prior to joining the Court.

patterns of conflict on the court, and to compare them with the partisanship of their appointing presidents. Our goal is to address two questions: 1) Is there evidence that the Brazilian STF - widely held to be apolitical and formalistic - reveals ideological patterns of judicial decision making? 2) When did this emerge, and what explains it? We discuss our data below, then present our methods and results.

We collected data on every Direct Action of Unconstitutionality (*Ação Direta de Inconstitucionalidade*, or ADI) over the course of more than two decades between 1989 and 2010. These decisions include both merit and procedural questions. Virtually every ADI begins with a procedural issue when the plaintiff files a request for an injunction (called either *liminar* or *medida cautelar*), seeking that the underlying state action be suspended until a final decision on the merits. Further, procedural questions frequently arise about whether the case should proceed to the merits. These procedural questions include issues about standing, mootness, and jurisdiction. Thus, there are generally at least two decisions for each ADI -- the injunction and the merits decision -- and frequently a third procedural decision⁷. All methods of decision analysis require using non-unanimous cases; 1,258 decisions between March 1, 1989, and June 18, 2010 had some dissension and are included in our dataset.⁸

We note that there were many other types of cases, and many other decisions (unanimous and nonunanimous) during the same time period. On ADIs alone, our examination of the STF's electronic docket found a total of 4,500 filed cases, with approximately 66% having reached final decisions, another 25% having reached a decision on a preliminary injunction, and 1285 non-unanimous decisions as of June 18, 2010. This number continues to grow. The Brazilian STF

⁷ In some of these constitutional cases there were as many as three separate procedural issues and as many as nine total decisions.

⁸ All data are from STF website (www.stf.jus.br), last accessed November 17, 2011.

does not control its docket (unlike the U.S. Supreme Court), and must process every case filed, though this has changed somewhat after a prominent reform in 2004 required some types of cases to meet additional criteria in order to be accepted at the court (e.g., *recursos extraordinários*, REs, must show that the legal issue has general effects or "repercussão geral" among the population). Since 1988, the volume of cases has been increasing dramatically. In 2010 alone, the court decided 103,869 cases and received 71,670 new cases. Contrast this with the 8,159 cases filed at the U.S. Supreme Court, of which the Court accepted only 82.⁹

We limited our analysis to non-unanimous decisions on ADI cases for two reasons. First, practically, we do not have the resources to collect data on all STF decisions (a total well over one million at the close of 2009). Although summaries of the decisions are available online, accurate coding of judicial decisions requires reading the case summaries and searching for decisions. A simple web-scraping program would inaccurately code justice positions, and lead to inaccurate results, because electronic summaries fail to distinguish between justices that take a minority position, and those that were absent or abstained. In other words, the summaries only report the names of judges that were in the majority, and do not list those absent or in the minority. Distinguishing between "not present" and "nay" requires a careful reading of the decision. Consequently, any web-scraping analysis would be making the unrealistic assumption that all absences were in fact minority position-taking.

Second, given that we must limit our analysis to a subset of cases, the ADIs generally include many of the most important cases. ADIs constitute the central mechanism of constitutional review in Brazil, and they capture some of the most high-profile constitutional clashes. To be clear, ADIs are not the only mechanism by which the constitutionality of state

⁹ Supreme Court of the United States (USSC). "2010 Year-End Report on the Federal Judiciary", Appendix p.9 (Dec. 31, 2010); available at: <http://www.supremecourt.gov/publicinfo/year-end/year-endreports.aspx> (last viewed February 12, 2011).

actions can be challenged. Kapiszewski (2010; 2011a; 2011b), for instance, analyzes 55 important cases adjudicated by the STF between 1989 and 2004, and 24 of these cases were not ADIs. Still, more than half of the important cases identified by Kapiszewski -- specifically, 31 cases -- were ADIs, showing that this mechanism is a central avenue of constitutional review, perhaps the most important. Notably, the constitution allows only nine actors to initiate ADIs -- the President, the Senate, the Chamber of Deputies (lower house of Congress), the Attorney General (*Procurador Geral da República*, PGR), the legislature of a state or the Federal District, the governor of a state or of the Federal District, the national bar association (*Ordem de Advogados Brasileiros*, OAB), political parties with representation in the national Congress, and federal unions or other federal professional associations (e.g., the national judges' association, *Associação dos Magistrados Brasileiros*, AMB). We examine the limitations of focusing on ADI's in our final discussion.

Our empirical analysis is focused on testing whether there is any evidence in support of the attitudinal or legalistic models. The consistent picture that emerges from existing research is that the STF is distinctly non-ideological. However, prior studies have examined smaller time periods and smaller samples of cases, so we are cognizant that our broader analysis may yield new findings. Importantly, any finding contrary to the above mentioned research would cut against the consensus that the STF justices behave non-ideologically, provoking a reassessment of the sources of behavior on the STF.

We do not have direct measures of judicial ideology, a standard challenge for judicial studies. But we can categorize judges according to the party of their nominating president, a similarly standard practice for judicial studies. The long time period we study includes judges

nominated by the military, as well as five civilian presidents from four parties (PMDB, PRN, PSDB, and PT)¹⁰.

We use two broad approaches with very different assumptions to test for ideological differences. First, following much of the literature on judicial politics, we estimate judicial ideal points on decisions using methods derived from a spatial model, and test for systematic differences across political parties in a low-dimensional space. Second, using a more flexible nonparametric method, we test for cleavages between judges based on their partisanship, combining all dimensions simultaneously.

We begin by exploring patterns in the distribution of ideal points using the spatial model, the current standard for measuring judicial preferences, understanding the policy space, and analyzing judicial coalitions and other secondary quantities of interest. The foundations of the model are that decisions and justices can be represented in a judicial ideology space of one or more dimensions, and that decisions reflect preferences or beliefs of judges about the best policy outcome. Judges must choose between two alternatives in each decision - effectively voting, or expressing a binary preference - on each issue. The typical approach to model this behavior is to begin by assuming that judges have single peaked preferences in a low dimensional space that captures all decisions. Each vote by a justice supports either position A or position B.¹¹ In this environment, judges will decide for A when

$$U_i(A_j) > U_i(B_j)$$

and for B when

$$U_i(A_j) < U_i(B_j)$$

¹⁰ President Sarney and Franco were both nominally members of the PMDB, the Party of the Democratic Movement of Brazil. Neither were committed partisans, and neither stayed in the party after their terms ended.

¹¹ In typical roll-call applications, these are presented as a status quo and alternative.

where i indexes judges, j indexes decisions, and U is the function that maps legislators' preferences onto each case. Typically, U is a function of the distance from judge i 's ideal point Θ_i and the impact of a case decision for position A or position B , plus some random error:

$$U_i(A_j) = f(\Theta_i, A_j) + \varepsilon_{ijA}$$

$$U_i(B_j) = f(\theta_i, B_j) + \varepsilon_{ijB}$$

The specific form for f is chosen to be a monotonic function of the distance between Θ_i and A_j , with typical choices of f being gaussian or quadratic. Estimation is achieved using maximum-likelihood, nonparametric, or bayesian methods. Because we are analyzing a small decision-making body, we use Poole's (2000) Optimal Classification, a nonparametric estimation technique.

Results

Figure 1 shows justice ideal points when combining all case data from the period 1998 to 2010. Appointing Presidents are represented by colors, with Lula's justices as red, Cardoso's as dark blue, Collor as light blue, Franco as cyan, Sarney as black, and the military presidents as green.

The obvious trend in the data is the dramatic split between appointing Presidents. Lula's justices all occupy the far right of the ideal space. With two exceptions, all other justices are on the other side of the ideal space. The remainder of the justices are on the left half of the graph, and the array of ideal points hints at other presidential differences, but only weakly. Note for example that on the first dimension, the Cardoso appointees have very similar locations, as do most Collor appointees, and most military (green) appointees. The Sarney appointees are perhaps the most diverse – occupying center left and right positions.

The outlier on the second dimension is Marco Aurelio. Justice Aurelio is known for erratic independence and for being an "obstructionist" on the court – and perhaps not making decisions according to the spatial model described above. Anecdotes from judicial staff tell of cases where Aurelio argued eloquently against a bill, but when his arguments succeeded in swaying the court, he changed his position so that he would still be in the minority group!

A scree plot (not shown) suggests low dimensionality to the space, with results consistent with a one-dimensional sparse voting matrix. The first dimension explains about twice as much variance in the roll-call space than any higher dimension, and a test of dimensionality fails to reject the null hypothesis that the space is unidimensional.¹²

We supplement the visual analysis with a formal test for the relationship between appointing president and ideal points by comparing the mean ideal point of each president's appointees. More formally, let justices' ideal points be a function of their appointing president's ideal point and a random error:

$$\theta_i = \sigma_k + \varepsilon_{ik}$$

where θ_i indexes the justice, as before, σ_{ki} is the ideal point of the appointing president, and ε_{ik} is the random error. With standard assumptions about the distribution of the ε 's, this translates into an analysis of variance model, where the null hypothesis is that the presidential means are all equal to the grand mean, and the alternative is that the presidential means vary.

Table 1 shows results from an analysis of variance on the first and second dimensions. The first column shows results for the entire dataset, and confirms the visual inspection: there are

¹² We randomly generated multiple unidimensional data matrices of equal size and rank as that of the Brazilian Supreme court, then tested the dimensionality of these. Any deviations from unidimensionality in this case would be due to random error - because we generated the data from a unidimensional model. The typical scree plot from this simulation was similar to that produced by our data, meaning we cannot reject the null hypothesis of just one dimension.

significant differences between presidential means, with a p-value below .01. For the second dimension, the differences were not significant.

Our results are robust, significant, and visually striking - and they disagree with most of the existing literature on the Brazilian STF. Previous work almost unanimously characterizes the court as a highly professional, non-ideological court where decisions are always made on the basis of legal arguments or apolitical macroeconomic considerations regarding national stability. Our results show that this is indeed *not* the case! There is a strong divide on the court that corresponds to the President who made the appointment.

The division is primarily driven by a divide between President Lula's many appointees, and the rest of the court, with weaker evidence of divisions for earlier appointees. Indeed, we also tried running our analysis with just a single covariate - an indicator variable for "appointed by Lula". We tested this model against one including all the presidential indicator variables. Again, the statistical analysis confirms the visual pattern; we could not reject the null that, once controlling for Lula appointees, none of the other presidential appointments significantly improved the fit (p-value = .72, results not shown).

These results suggest a transformation in the judiciary - with little impact of presidential affiliation before President Lula's appointments, but a new cleavage in judicial politics since that time. To explore this hypothesis, we continue our analysis by repeating our analysis after dividing the decisions into three periods - all decisions before Lula's administration (1989-2002), decisions during the Cardoso administration (1995-2002), and decisions during the Lula administration (2003-2010).

Figure 2-3 show the distribution of justice ideal points for all pre-Lula, and all Cardoso decisions. There is little evidence of any appointment-driven divisions. This visual analysis is

confirmed by our statistical analysis in Table 1: there is no significant difference between appointees of Presidents before 2003. In short, for that pre-2003 period, knowing who appointed a justice reveals essentially nothing about the kinds of positions he or she takes on the courts. Figures 4 and 5 show justice ideal points only for the most recent eight years of President Lula's two terms. In Figure 3, there appears to be a second-dimension split between Lula's justices and those of other Presidents, although the erratic Marco Aurelio has the highest estimated ideal point on dimension two (D2). Sensitivity analysis revealed that much of the ideal space in Figure 4 was driven by the outlier Aurelio; dropping that judge dramatically transforms the space, and reproduces the earlier pattern of Lula appointees on the right side of the distribution, and all other justices on the left side of the space. Again, this pattern is statistically significant, and again, it is driven entirely by the Lula appointees.

Permutation Analysis

To complement our spatial analysis, we also applied a nonparametric permutation approach. This approach resolves two potential problems with the spatial model. First, there is a lifecycle or generational bias in ideal point estimation that occurs naturally when analyzing long legislative periods. Often in such cases, judges (and legislators) ideal points are jointly estimated into a single space although they may have never served on the same court. In Brazil, with a mandatory retirement age, there has been substantial turnover on the court. In the 20 years in our study, a total of 29 different justices served on the court, which has 11 seats. In contrast, over the last 20 years, only 17 justices have served on the nine-seat United States' Supreme Court. The result is that our analysis seeks ideal points for justices chosen by military presidents in the 1980's as well as justices selected by the first leftist president since the military coup of 1964, President Lula.

When estimating ideal points with such generational data, there is a natural bias in ideal point estimation toward separation by generation; the nonparametric method suffers no such bias.¹³

The second advantage of a non-spatial model is that it aggregates all dimensions, instead of just relying on the low dimensional space typically estimated. In our case, the predictive power of the first two dimensions in this analysis, while substantial, was lower than in many judicial bodies. The nonparametric permutation technique that detects voting blocs without any constraints of dimensionality. The method we use has been discussed elsewhere in the literature (Desposato 2003; 2004) and software for conducting the analysis is available through the R computing platform.

Table 3 shows results from a nonparametric test for presidential cleavages in justice decisions. The permutation range shows the range of mean justice-president cohesion that would be expected just due to chance. The figures are Rice cohesion scores for each justice-president coalition - treating each president's appointees as a voting bloc, just as legislative studies examine parties (Citation removed). The actual score is the mean cohesion for these voting blocs. There is evidence of president-based splits in decisions when the actual cohesion is higher than the range of permuted values. The last column reports the effective p-value - this is the percentage of permuted scores that are larger than the actual scores (if the p-value is .05, that means that 5% of permuted values are greater than the actual observed score, suggesting significance at the .05 level).

The results parallel the ideal point analysis, and confirm our earlier findings. When lumping the entire period, there is a small but statistically significant effect: justices, on average, appear to be split into blocs for decision-making. However, when we just look at the pre-Lula

¹³ We show this in a separate working paper.

period, there is no evidence of significant splits into decision blocs based on presidential appointments.

Conversely, just looking at the Lula period, there are consistently significant voting bloc effects no matter how we parse the data. Looking at all justices, and treating each set of presidential appointments as a different voting bloc, observed voting bloc cohesion exceeds all 10,000 permuted values - evidence of cleavages significant at the .00001 level. We also compared two other approaches. In the first, noting Marco Aurelio's erratic behavior, we dropped him from the analysis. This had no impact on our results. In the second, we only analyzed two voting blocs: the Lula appointees, and all others. In this case, if our results persisted they provide evidence that the key cleavage is between the Lula appointees and earlier justices - as suggested by our spatial analysis. Again, there was evidence of cleavages, significant at the .0001 level.

There are several other notable features of the data that deserve attention. Note first that all the cohesion scores are relatively low when compared with party cohesion in legislatures. For instance, in Brazil, party cohesion scores generally range from 0.70-0.85, and can be as high as 0.97 (Figueiredo and Limongi, 1995). The implication is that, while cleavages exist, they are substantially less rigid and consistent than legislative parties. Again, this is consistent with our spatial analysis, which found that the ideal space was not dominated by a single dimension.

A closer look at patterns of division on the court further reinforce this notion that while there is a cleavage, it is not a case of extreme polarization. For this analysis, we examined patterns of presidential splits: cases where a majority of justices aligned with the sitting president voted against a majority of justices not aligned with the current president. Before the Lula administration, about 3% of non-unanimous decisions involved splits between the sitting president's appointees and the other justices. Under President Lula, that figure increased to 10% - meaning that there are three times as many

majority splits during Lula than during FHC¹⁴. These results are consistent with the spatial and permutation analysis, suggesting a new, increased separation is occurring between Lula-appointed judges and their counterparts on the court.

From Majority Splits to Qualitative Analysis

Our results are consistent, robust to multiple methods, and suggest a fundamental transformation in the court. For additional evidence, we examined the most divisive cases to analyze the arguments employed by judges within those cases and to try and identify the nature of the divisions. Leveraging the majority splits analysis to identify those cases that most separated Lula judges from non-Lula judges, ADI 1194 emerges as the case with the highest split value during the Lula administration. This decision on the merits considered whether it was constitutional for a law to require that any documents establishing legal personality (e.g., to register a small business or organization) would be legally void if not reviewed and approved by an attorney. This was important because it pitted the liberty interest of individual to form commercial or civic organizations against the institutional interest of the legal profession to maintain a source of business activity and income, as well as the public interest in enduring that business and civic organizations were operating properly. The majority found this provision constitutional, agreeing with the national bar association (OAB) that there were potential harms from improper contracts that could be avoided if all individuals seeking legal personhood were required to consult an attorney. This majority consisted of Mauricio Correa, Nelson Jobim, Sepulveda Pertence, Carlos Velloso, Celso de Mello, and Ellen Gracie. None of the Lula justices were in the majority. The minority, on the other hand, was composed of five justices, three of

¹⁴ These results are excluding the erratic outlier, Marco Aurelio. When included the pattern persists but is smaller: 10% majority splits under Lula, and 6% majority splits before the Lula administration.

which were Lula appointees: Carlos Britto (Lula), Cezar Peluso (Lula), Joaquim Barbosa (Lula), Gilmar Mendes, and Marco Aurelio.

Two things differentiate the minority position: an appeal to principles, even from international or comparative law, and an appeal to substantive due process. The minority argued the provision was unconstitutional, finding that it was corporatist in generating more income for lawyers (e.g., Mendes at 36, Peluso at 75), inefficient in that it increased bureaucracy (e.g., Mendes at 86), and also emphasizing that such a law violated core principles of legal interpretation, as well as basic individual rights and liberties of association. Mendes, a justice appointed by Cardoso, writes the lead dissent in this case. Over the course of 27 pages, he makes multiple and lengthy references to core legal principles, e.g., proportionality and necessity, in assessing whether the purpose of the legislation was achieved via the least restrictive means. In his writing, he makes repeated reference to German cases and writings. The Lula justices -- Barbosa, Britto, and Peluso -- all join Mendes's dissent, but go beyond his argument of proportionality and necessity to emphasize basic principles related to individual liberties and guarantees. Barbosa opposes the law because it infringes fundamental liberties of association, commerce, and contract (72), Britto opposes the law because it offends individual rights and liberties (73), and Peluso opposes the law based in part on the principle of substantive due process (75-76). Overall, all three Lula justices and Mendes appeal to principles -- emphasizing individual rights and liberties --, whereas the justices in the majority make rather formal, textual readings of the constitutional provisions (e.g., Correa's majority opinion, at p.26). Indeed, Jobim criticizes Mendes's appeal to underlying principles, accusing him of German essentialism and stating this essentialism cuts against the preferred guidance of positivists like Brazilian Julio de Castilhos (84). The principles-vs.-positivism divide between Lula and non-Lula justices,

respectively (with the exception of Mendes), suggests the separation of Lula justices is motivated in part by a more progressive view of constitutional interpretation, which would also overlap or coincide with a more left-leaning ideological perspective.

The reference to substantive due process is remarkable in a civil law country and further evidence of the nature of this split. *Procedural* due process stands for the proposition that there are certain constitutionally recognized rights and that the government cannot infringe on these rights without going through an appropriate set of *procedures*. This is what is commonly understood as due process. However, *substantive* due process goes one step further and says that there are some substantive rights, though perhaps not enumerated in the constitution, that cannot be infringed upon. This doctrine is controversial even in the U.S., and historically has separated progressives (in favor) from conservatives (against), as it allows judges to read rights into cases before them. Thus, the fact a Lula-appointed justice is appealing to a rights-expansive principle, and one that is controversial in other parts of the world, is further evidence that the division between Lula and non-Lula judges is ideological.

Discussion

A growing literature on the Brazilian judiciary suggests that this institution is immune from the politicization observed in other courts, especially the United States. According to this research, judges make decisions based on their understandings of legal issues or on other pragmatic considerations, and ideology plays little role in outcomes or behavior. Most of this work is based on case studies by scholars and legal observers, but the core conclusions are also supported by econometric analyses (e.g., Taylor 2008; Oliveira 2008; Jaloretto and Mueller 2011). Our results cut against all of these previous findings.

In this paper, we have examined all available ADI decisions through June 2010. Analysis of all constitutional decisions during this period found a clear ideological dimension to the ideal space of the Brazilian Supreme Court, driven almost entirely by the appointees of President Lula (2003-2010). Decisions prior to his tenure showed no impact of appointing president on ideal point or outcomes. But adding the Lula justices to the court fundamentally changed the judicial space, with a clear division between judges appointed by Lula and other appointees. These results suggest an important transition in this civil law judiciary - from a formalistic, pragmatic approach to decision-making to a broader, activist, attitudinal model.

The challenge for us - and other scholars of judicial politics - is to understand why and how this change has occurred, and what these patterns imply about comparative judicial behavior. We believe - but cannot establish definitively - that the two changes we discussed earlier played an important role in this evolution. First, the judicial reform that dramatically increased the impact of every STF decision and therefore augmented judicial authority by granting that body the power of precedent, and second, the rise of the disciplined and ideological PT and its capturing of the Presidency in 2002 (and again in 2006, and 2010!).

We believe that the judicial reform affected the STF both directly, and indirectly. Directly, the increased influence of the court has brought more focus on judicial decisions, and more pressure. Before the 2004 reforms, decisions at the STF applied only to the case at hand and had no broader impact. The interested parties were usually relatively few in number, the scope and impact limited, and the press, politicians, and citizens had little reason to monitor the court. The rise of the *sumula vinculante*, even if few in number, means that STF decisions have far greater implications for lower courts and other public authorities..The court is a far more significant and centralizing political actor since 2004. The rising intensity around decisions

would not be lost on judges, who may feel more scrutiny and pressure to make careful and consistent decisions.

Indirectly, the reforms could change appointment strategy. With new sweeping powers vested in the STF, strategic presidents should be more careful to appoint like-minded and friendly justices who will side with the appointing President and carry forward his or her policy legacy. In other words, Presidents may have had new incentives to appoint increasingly political justices. This is exactly the change observed: recent judicial appointees have held prior political positions -- Dias Toffoli is the starkest example -- and only three of Lula's seven appointments held prior judgeships. This patterns cuts against the conventional civil law standard of recruiting professional judges into these positions, though again it is a matter of degree; Lula's predecessors also did some of this, but Lula did more of it and deliberately sought to place sympathetic, leftist judges on the court, as evidenced by his reactions to decisions against him..

Of course, we cannot separate out the broader impact of the reforms on appointment strategy and the changes wrought by the PT's own nature. As the most successful of Brazil's parties, with high levels of organization and discipline, it is not surprising that PT judicial appointments are themselves increasingly political, progressive, and aligned with the party. To be clear, it is less likely that this is a division along a simple, left-right continuum, and more likely that it is a division according to schools of legal interpretation, with the non-Lula judges standing for more positivist views conventionally associated with civil law judges and Lula judges representing a more principled view associated with interpretivism or progressive constitutionalism (see Hilbink 2010; Rodriguez Garavito 2011; Couso et al. 2010).

Future research will help resolve these issues; one promising avenue of research - though labor intensive - would be to collect more data on remaining STF decisions. Our web-scraping

found many more non-unanimous decisions which could be used to examine judicial behavior more closely, but as discussed above, coding these requires reading each case and entering each decision by hand. We invite other scholars to join this research agenda using the data from this project, released on our website.

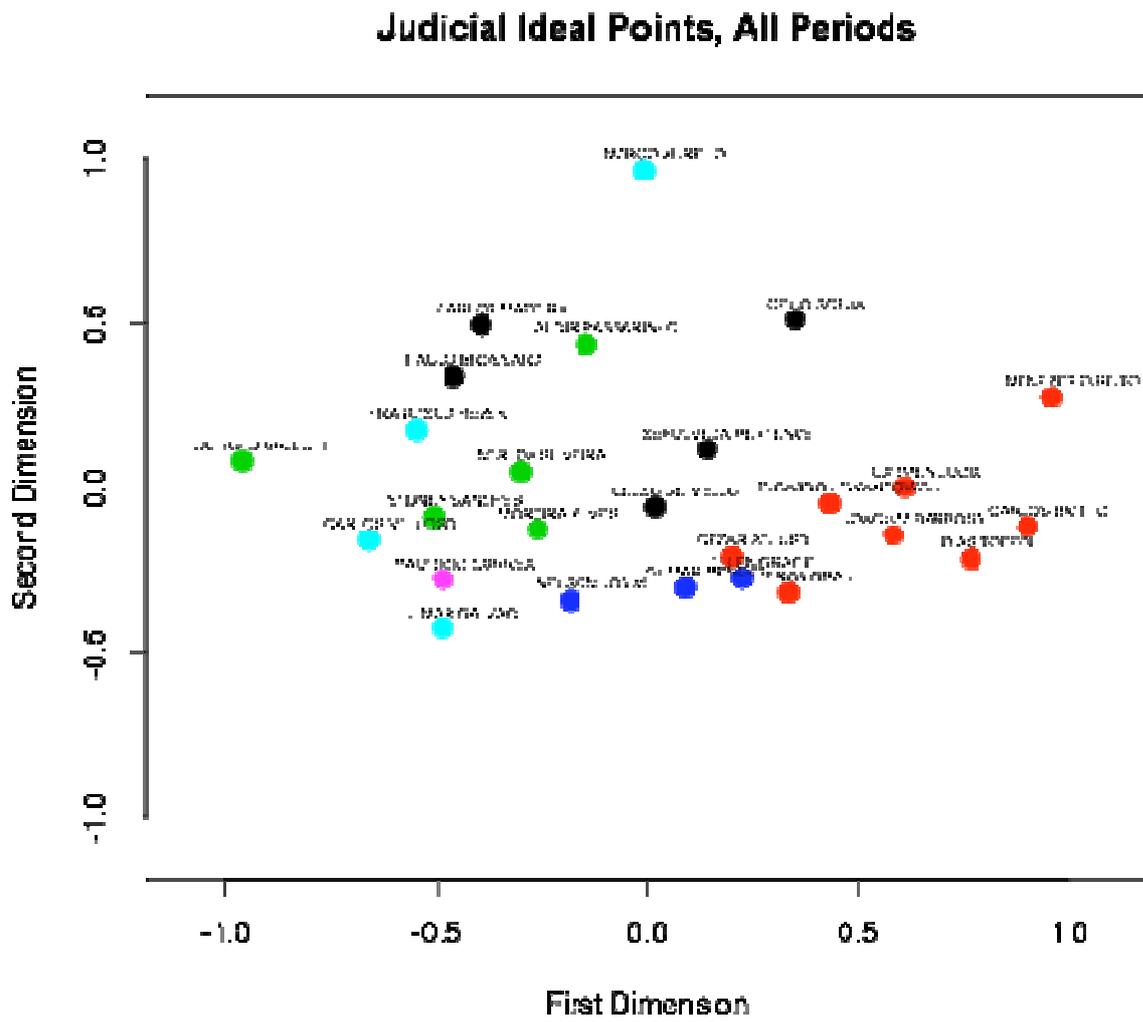
For Brazil, the transition could be positive - or negative. On the positive side, increased attention and principled position taking may be an important step toward modernizing Brazil's legal system, improving the business environment through a more efficient and principled legal culture and judicial decision process, and enhancing rights protections. More broadly, the transition may reflect the maturation of the political environment, reflecting the evolution of the political system seen elsewhere, for example, in legislative politics.

On the other hand, this transition could signal a new politicization of the judiciary that destroys judicial autonomy and merely extends presidential power. Since Brazilian justices must retire by age 70, there is more turnover on that court than on many others, and most presidents can appoint several justices to the court. Indeed, Lula's eight-year term saw enough retirements that he was able to fill *seven seats* on the Brazilian STF..

More broadly, for comparative judicial studies, our findings suggest that the civil law / common law dichotomy in judiciary types is not so stark, and clearly not stable. Our results contribute to a growing literature on judicial behavior in civil law settings, and especially to those documenting changes in legal culture and a widening division between more traditional, passive, positivist judges, and more progressive, active, assertive, interpretivist judges. Indeed, we point to the synergistic effect of formal institutional changes and strategic judicial selection on legal culture, developing a framework for advancing our understanding of comparative judicial behavior.

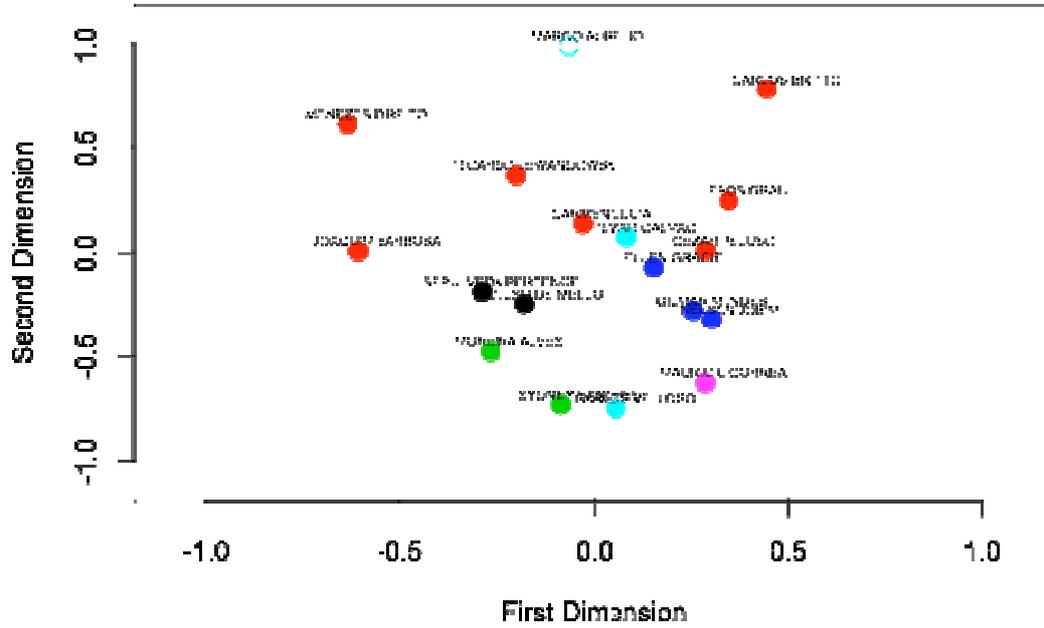
Tables and Figures

Figure 1.



Figures 4 and 5.

Judicial Ideal Points, Lula Administration



Judicial Ideal Points, Lula Administration, W/O Outliers

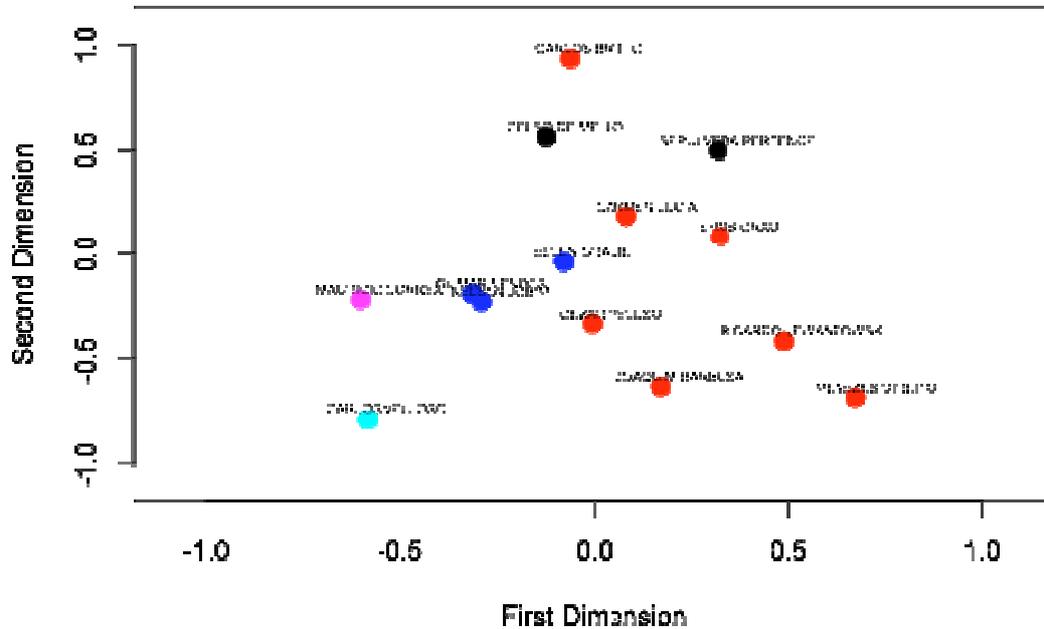


Table 1: Analysis of Variance on Judicial Ideal Points

Appointing President does predict judicial ideal points, but only for the Lula Administration

	Impact of Appointing President on Ideal Points				
	All Periods	Pre Lula (before 2003)	Cardoso (1995-2002)	Lula (2003-2010)	Lula w/o Outliers
First Dimension					
F-Test	9.0019	1.0838	1.6338	0.6895	5.0581
P-value	0.0000	0.4172	0.2675	0.6631	0.01797
N	25	17	12	17	13
Second Dimension					
F-Test	1.7983	0.1085	0.724	1.8332	1.395
P-value	0.1532	0.9883	0.6267	0.1816	0.3105
N	25	17	12	17	13

Table 3. Permutation Analysis of Cleavages on STF by Appointing President

	Permuted Range	Observed	Effective Significance
Entire Period	(.639, .658)	0.665	0.0004
Pre-Lula: 1990-2002	(.634, .675)	0.653	0.617
Lula: 2003-2010			
All Justices	(.599, .672)	0.697	0.0004
Without Marco Aurelio	(.561, .647)	0.648	<.0001
Lula / Anti Lula Blocs Only	(.564, .648)	0.648	<.0001

Appendix I. Clarification Regarding Justice Marco Aurelio

The exclusion of Marco Aurelio's dissents requires a clarification. A 20-year retrospective of his career on the STF highlighted his reputation as a consistently lone dissenter and noted his "absolute independence" and "trademark of divergence" (*sina de divergir*; Haidar 2010). His frequent solo dissents -- paired with his fondness for being in the media -- cause many observers of the STF to think his dissents are due more to whim and capriciousness than to principled conviction (Haidar 2010).¹⁵ Marco Aurelio himself stated in an interview that he "never made a point of being part of any majority", much less unanimity (quoted in Haidar). Elsewhere, he has been quoted as saying that he and his colleagues are not on the court to agree with each other, emphasizing that they are not "*vaquinhas de presépio*" (Pardelas 2008), a colloquialism that roughly means "obsequious flunky".¹⁶ His office contains three statues of Don Quixote [cite], inviting comparisons between the lone dissenter and Cervantes's whimsical knight who battled imagined enemies. Marco Aurelio's quixotic behavior has earned him many adjectives and nicknames, including the neutral "countermajoritarian" (*contramajoritario*), a play on the non-majoritarian constitutional role of the high court. Justice Nelson Jobim equated the persistently divergent opinions of Marco Aurelio to "an awful little dentist's drill" (*chato motorzinho de dentista*; Haidar). Another nickname among his colleagues is perhaps most revealing -- *ministro voto vencido*, or "justice of the defeated vote" -- capturing the predictability with which he dissents from the majority decisions (Gonçalves Couto 2009; see also Kapiszewski 2010: 72, n.46).

¹⁵ Haidar notes that some of Marco Aurelio's dissenting positions have later been adopted as the Court's majority position on an issue. However, it is not clear that this is a systematic phenomenon or simply an artifact of the fact Marco Aurelio has dissented on so many issues that one of his dissents is bound to be adopted by a later court.

¹⁶ Fuller quote: "O colegiado é um somatório de forças distintas. Não estamos ali para concordar um com o outro. Não somos vaquinhas de presépio. Cada qual deve revelar o seu convencimento."

To be sure, Marco Aurelio's dissents may be a product of personality and preferences as well as the Brazilian legal system. Taylor (2008, 34) notes that in civil law systems like Brazil, judges are generally understood to apply the law in rather straightforward, apolitical manner. However, Brazil has so many laws that it is not unusual to find laws cutting in opposite directions, a phenomenon that allows high court judges wide latitude in choosing which law to apply. Taylor quotes Marco Aurelio describing his decision making strategy: "First I imagine the most just solution ... only afterward do I seek support in the law" (Erdelyi 2006; Taylor 2008, 34, citing Amorim Alves 2006, 22). Marco Aurelio's dissents, then, would seem to hinge on what he personally deems "just" and he is unlikely to be swayed by purely legalistic arguments, leaving ample room for disagreement. In sum, Marco Aurelio's solo disagreements with his colleagues are a regular occurrence, so much so that they his style of decision making has taken on an idiosyncratic quality, justifying excluding him from the analysis.

Having said this, it is important to note that acknowledging his pattern of dissents does not necessarily mean that Aurelio decisions lack any political motivation. Kapiszewski highlights injunctions issued by Marco Aurelio on two crucial cases that suspended political deliberations: (1) the plebiscite regarding a new form of government (ADI 829, ADI 830), and (2) congressional deliberations regarding social security reform (MS 22503). In both of these cases, "crucial political processes ground to a halt as a result of these suspensions" (Kapiszewski 2010, 70-71). Thus, while we have methodological reasons to remove Marco Aurelio from the analysis, we remain cognizant that his behavior on the court is not apolitical.

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