

REFORMING THE BRAZILIAN SUPREME FEDERAL COURT: A COMPARATIVE APPROACH

MARIA ANGELA JARDIM DE SANTA CRUZ OLIVEIRA*

TABLE OF CONTENTS

I. INTRODUCTION	100
II. DEFINITION OF BRAZILIAN SUPREME FEDERAL COURT’S JURISDICTION	103
A. <i>History of the Brazilian Model</i>	103
B. <i>Procedures and Present Structure of the Supreme Federal Court</i>	108
III. MODELS OF CONSTITUTIONAL ADJUDICATION	115
A. <i>Decentralized Model</i>	115
1. <i>United States</i>	115
B. <i>Centralized Model</i>	123
1. <i>Austria</i>	125
2. <i>Germany</i>	127
3. <i>Italy</i>	129
4. <i>France</i>	131
IV. PRESENT POLITICAL SITUATION IN BRAZIL.....	134
A. <i>New Government’s Interest in Reforming the Judiciary</i>	135
V. NEWLY-ENACTED CONSTITUTIONAL AMENDMENT 45	138
A. <i>The Doctrine of Binding Precedent</i>	139
B. <i>General Repercussion for the Admission of Extraordinary Appeals</i>	143
C. <i>Additional Hypothesis of Extraordinary Appeal</i>	145
VI. OTHER PROPOSALS TO REFORM THE BRAZILIAN SUPREME FEDERAL COURT	145
A. <i>Constitutional Court</i>	145

* Visiting Researcher at Harvard Law School (2004–2005); LL.M. (2004), Harvard Law School; Former Advisor to the Presidency of the Brazilian Supreme Federal Court (1996–2003); Postgraduate studies in Economic and Corporate Law (1993), Universidade de Brasília, Brazil; Professor (on Leave) of Institute de Educação Superior de Brasília, Brazil.

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<i>B. Stay of Proceedings</i>	147
VII. CONCLUSION	148

I. INTRODUCTION

The Brazilian flag, whose motto was inspired by nineteenth century positivism, trumpets “Order and Progress.” One of the main pillars supporting order in a democratic society is an efficient judiciary. The Supreme Federal Court (SFC) of Brazil faces a challenge nowadays. The eleven-Justice Supreme Federal Court has been increasingly encumbered by an accumulation of processes: in 2001 alone, 110,771 appeals were presented before the Court, of which 109,692 were decided.¹ Those appeals represented a 660% increase when compared to the 14,366 cases decided in 1991.² In 2002, there were 160,453 appeals filed with the SFC, and 83,097 judgments were rendered.³ In his article, *The Judiciary Reform*, published in 1975, when the number of cases reached 8,775, the late Justice Baleeiro was already commenting on the alarming growth of cases addressed to the SFC, emphasizing the import of its predicament.⁴

The increase in cases may be seen as resulting from the proliferation of provisional measures issued by the President of the Republic, the several controversial economic plans issued by the government, or Brazil’s steep population growth. However, I believe the main cause to lie within the structure of Brazil’s decentralized judicial review. The Brazilian decentralized model, although inspired by the American model, lacks a principle comparable to vertical *stare decisis*, in which the decisions of the SFC would be considered binding to lower courts. After the Brazilian SFC delivers its decision on a constitutional controversy in a lower court case, it has to re-analyze each individual lawsuit arising from the same constitutional controversy. Consequently, the SFC repeats its efforts in analyzing cases whose solution has already been delivered. Beyond elongating the judicial process, this situation puts the court in a dilemma.

1. Banco Nacional de Dados do Poder Judiciário, STF, Movimento Processual nos Anos de 1940 a 2004 [National Database of the Judicial Power, SFC, Procedural Movement in the Years of 1940 to 2004], available at <http://www.stf.gov.br/bndpj/stf/MovProcessos.asp> (last visited Feb. 3, 2006).

2. *Id.*

3. *Id.*

4. Aliomar Baleeiro, *A Reforma do Judiciário* [*The Judiciary Reform*], 241 DIGESTO ECON. 67 (1975).

Either the SFC prioritizes the speed of its judgments, or the quality of its decisions.⁵

Reforming the decentralized judicial review of Brazilian courts is necessary to deflate the number of cases brought before the SFC and to make the judiciary system more productive. Constitutional Amendment 45, enacted in December 2004, introduced several modifications to the jurisdiction of the Supreme Federal Court.⁶ It endowed the pronouncements of the *Súmula* of the Predominant Jurisprudence of the Supreme Federal Court⁷ with binding force, by establishing the mechanism of *Súmula Vinculante*.⁸ The American doctrine of *stare decisis* has broader implications since it requires new cases to present identical facts and circumstances in order to apply the same holding to future cases.⁹ However, the principle of *stare decisis* could not be fully implemented in Brazil, since case law analysis would not be a realistic proposal in a civil law country and would demand a complete change in the system, with repercussions even in how law is taught in law schools.

One criticism of the binding effect is that in civil law systems each judge must maintain their independence to decree the unconstitutionality of a given law. However, independence should denote autonomy and uninfluenced judicial power headed by the SFC, not, in my opinion, uncontrolled enfranchisement of each individual judge on controversies already adjudicated by the SFC. If judges were bound by the SFC's rulings, discrepant verdicts would be avoided, making the system more efficient. Moreover, the inconsistency of constitutional law decisions issued from the numerous lower court judges causes grave perplexity, threatening both the efficacy and credibility of the Brazilian judiciary.

This Article defends giving the SFC power to issue provisional measures to stay the proceedings of identical cases in lower courts when the constitutional controversy has already been presented before the SFC. These provisional measures should be applied when numerous individual cases point to the same constitutional issue, commonly known as "mass cases." This measure would prevent the SFC from receiving thousands of

5. Justice Maurício Corrêa, Speech at his Inauguration as President of the SFC (June 5, 2003), available at http://www.stf.gov.br/noticias/imprensa/palavra_dos_ministras/discursos.asp (last visited Feb. 3, 2006).

6. Constituição Federal (C.F.) amend. 45 (Braz. 1988).

7. Miyuki Sato, *Judicial Review in Brazil, Nominal and Real*, 3 GLOBAL JURIST ADVANCES 1, arts. 4, 5 n.26 (2003). The purpose of the *Súmula* is to reiterate the rulings of the Supreme Federal Court on the most controversial questions over which the Court has already taken a firm position. *Id.*

8. *Id.*

9. See generally KARL LLEWELLYN, COMMON LAND TRADITION: DECIDING APPEALS (1960).

similar cases, which congest the docket and do not contribute to the final decision, as will be shown in this Article.

Following from the expanding global influence of the European centralized model of judicial review, a growing number of Brazilian critics suggested eradicating the American model of decentralized judicial review from Brazil in favor of the adoption of a single organ authorized to rule on constitutional matters, such as the Federal Constitutional Court in Germany.¹⁰ The European constitutional court model centralizes all cases pertaining to the constitutionality of existing laws, freeing the other courts from this duty and further specializing the function of constitutional adjudication.¹¹

Another solution to the overload of processes at the SFC is the implementation of a review on “writ of certiorari,” which “is not a matter of right, but of judicial discretion.”¹² Such a device would confer discretionary power to the SFC to refuse jurisdiction toward unimportant or non-meritorious cases. Moreover, it would therefore limit its caseload, since the selection of cases would not require justification, nor would it admit any appeal.¹³

Further solutions to the Brazilian SFC’s overload may be as cogent as, or even more efficient than, the implementation of the binding effect, the inclusion of stay of proceedings of extraordinary appeals, the adoption of the European model, or the application of the *writ of certiorari*. The comparison of judicial structures within constitutional courts internationally will disclose their degree of efficiency, as well as their impacts on democratic societies, suggesting the most appropriate solution to reform the Brazilian judicial review. By “efficiency” I mean a steadfast and expeditious justice, which is paramount to stability and legal certainty.

10. Ronald Rebello de Brito Polletti, Corte Constitucional Brasileira [Brazilian Constitutional Court], available at http://www.unb.br/fd/colunas_Prof/ronaldo_poletti/poletti_18.htm (last visited Feb. 3, 2006); Paulo San Martin, *Presidente do STJ Pedu Corte Constitucional* [President of the STJ asks for Constitutional Court], AGENCIA ESTADO, Dec. 17, 2001, available at <http://www.estadao.com.br/agestado/noticias/2001/set/17/280.htm> (last visited Feb. 3, 2006); [Advogados Aprovam Criação de Corte Constitucional Court], REVISTA CONSULTOR JURÍDICO, Nov. 15, 2002; *OAB Apóio Sugestão de Mudança no Perfil do STF* [OAB Supports Suggestions of Profile Change of the SFC], REVISTA CONSULTOR JURÍDICO, Sept. 18, 2001, available at <http://uol.com.br/> (last visited Feb. 3, 2006).

11. See *infra* Part III.B.

12. SUP. CT. R. 10.

13. *Id.* As a matter of fact, a similar procedure was adopted in 1975 by the Federal Supreme Court, which required a federal relevance question for the admissibility of extraordinary appeals. Regimento Interno do Supremo Tribunal Federal (R.I.S.T.F.) amend. 3 (1975). However, it was revoked by the Federal Constitution of 1988. See C.F. art. 102. This mechanism will be better explained at Part VI of this Article.

Judicial reform is necessary to allow the SFC to decide the fundamental constitutional issues of Brazil, returning the SFC to its cardinal role as the sanctuary of the Constitution and as the safeguard of democracy.

This Article will focus on different models of judicial review among the main constitutional models in the world to formulate proposals to ease the burden and the overload of the Brazilian SFC. It will first present the historical antecedents of the Brazilian SFC, up to the present jurisdiction, structure, and procedures. A brief description will explain judicial review in the United States, Austria, Germany, Italy and France, showing statistics of the caseload of each highest body in charge of constitutional adjudication in these countries. This Article will then provide an explanation of the current political situation in Brazil and discuss why this is the right time to implement judicial reform. The newly-enacted Constitutional Amendment 45, which promoted several changes in the Brazilian SFC, will be criticized. Finally, this Article will confront the models of constitutional adjudication and propose the best alternatives for reforming the Brazilian SFC.

II. DEFINITION OF BRAZILIAN SUPREME FEDERAL COURT'S JURISDICTION

A. *History of the Brazilian Model*

To understand the Brazilian mixed system of constitutional adjudication, it is necessary to understand its most important historical antecedents of both decentralized and centralized judicial review.

After the independence of Brazil from Portugal in 1822, the Brazilian Emperor, Dom Pedro I, enacted the first Brazilian Constitution in 1824 (1824 Imperial Constitution), which established a monarchical government with four political powers: the legislative, the executive, the judiciary power and the moderator power exercised by the Emperor himself.¹⁴ The 1824 Imperial Constitution established the "Supreme Court

14. Constituição Política do Império do Brasil (C.POL.) art. 98 (Braz. 1824). Article 98 of the Political Constitution of the Empire of Brazil (Mar. 25, 1824) provides that "the Moderator Power is the key of all political organization, and it is delegated exclusively to the Emperor, the Supreme Chief of the Nation and its First Representative, in order to guard incessantly the maintenance of the Independence, equilibrium and harmony of the other Political Powers." *Id.* The Moderator Power was inspired by the political doctrine of Henri-Benjamin Constant de Rebecque (1767–1830), who distinguished five different powers: royal power, executive power, representative power of long duration (hereditary assembly), representative power of public opinion (elective assembly), and judicial power. According to him, the royal power "is in the middle, yet above the four others, a superior and at the same time intermediate authority, with no interest in disturbing the balance, but on the contrary, with a strong interest in maintaining it." BENJAMIN CONSTANT, POLITICAL WRITINGS

of Justice,¹⁵ which was regulated by the Imperial Law of September 18, 1828, and functioned as an appellate court from the provincial courts, without power to declare an act of Congress unconstitutional.¹⁶ It was composed of judges nominated from the provincial courts by seniority, with the competence to grant or deny appeals in cases as the law disposes and to judge crimes and mistakes of office committed by their judges, the provincial courts, diplomats and provincial presidents.¹⁷ Therefore, the determination of the constitutionality of laws was done by the Congress itself and the Emperor was the key for political organization, safeguarding the independence, balance and harmony among the powers of the nation.¹⁸

Later on, the influence of judicial review, as established by the U.S. Supreme Court, was already felt in Brazilian territory. In July 1889, the second and last Emperor of Brazil, Dom Pedro II, told two officials who were going to a mission in the United States:

Carefully study the organization of the Supreme Court of Justice of Washington. It seems to me that the secret of the good functioning of the North American Constitution lies in the functions of its Supreme Court. . . . Things here are not well, and I believe that if we could create a tribunal like the North American one and confer to it the attributions of the moderator power of our Constitution, the latter would benefit. Give maximum attention to this point.¹⁹

184–85 (Biancamaria Fontana trans., 1988). He asserted that

the Royal power (I mean the power of the head of the state, whatever title he happens to bear) is a neutral power. That of the ministers instead is an active power. In order to explain this difference, let us define political powers as they have been known thus far. The executive, legislative and judicial powers are three competences which must cooperate, each in their own sphere, in the general movement. When these competences, disturbed in their functions, cross, clash with and hinder one another, you need a power which can restore them to their proper place. This force cannot reside within one of these three competences, lest it should assist it in destroying the others. It must be external to it, and it must be in some sense neutral, so that its action might be necessarily applied whenever it is genuinely needed, and so that it may preserve and restore without being hostile. Constitutional monarchy creates this neutral power in the person of the head of state. The true interest of the head of state is not that any of these powers should overthrow the others, but that all of them should support and understand one another and act in concert. Until now, three powers only have been identified in political organizations.

Id.

15. C.POL. arts. 163–164.

16. LENINE NEQUETE, O PODER JUDICIÁRIO NO BRASIL A PARTIR DA INDEPENDÊNCIA, VOL. I—IMPERIO [THE JUDICIAL POWER IN BRAZIL SINCE INDEPENDENCE, VOL. I—EMPIRE] 41–42 (Cidade Grafica e ed., 2000).

17. C.POL. art. 164.

18. *Id.* art. 98.

19. LÉDA BOECHAT RODRIGUES, HISTÓRIA DO SUPREMO TRIBUNAL FEDERAL VOL. II [HISTORY

Accordingly, with the fall of the monarchy in November 1889, the influence of American legal culture was evident in the 1891 Republican Constitution.²⁰ Federalism replaced the unitary system and the Supreme Court of Justice was transformed into the SFC with explicit competence for judicial review. Article 59, section 1 of the 1891 Republican Constitution provided that there would be a right to appeal to the SFC against state justice decisions whenever the validity of treaties and federal statutes were argued or whenever the validity of statutes or acts of state governments upon the Constitution were contested.²¹ Indeed, the 1891 Republican Constitution of Brazil recognized the constitutional adjudication of the judiciary, with the SFC as the highest organ.²²

Albeit inspired by the North American decentralized judicial review, the Brazilian decentralized system has not implemented either *stare decisis* or the *writ of certiorari*. Due to Brazilian Romanist tradition, the binding force of a precedent is considered to be counter to the legal culture of independence of the judiciary, and the selection of cases by the SFC is seen as a restriction of subjective rights. Therefore, any party has the right to appeal to the SFC if there is a constitutional controversy involved in the case. As a result, the constitutional borrowing of the North American system was implemented without the pivotal elements to regulate and coordinate the decentralized system of judicial review.

In 1975, the ever-increasing number of cases arriving at the SFC led to the creation of a mechanism inspired by the *writ of certiorari*: the requisite of a federal issue.²³ This device was designed to limit the number of “extraordinary appeals”²⁴ before the SFC by allowing the SFC to decide, in secret session and without providing reasons, which cases were considered relevant to be judged.²⁵ With the Constitution of 1988, which created the Superior Court of Justice with jurisdiction on federal law matters, this mechanism was abolished as it was deemed unnecessary because the SFC’s extraordinary appellate jurisdiction was reduced to constitutional questions only.²⁶

OF THE FEDERAL SUPREME TRIBUNAL] 1 (Civilização Brasileira ed., 1991).

20. Repub. Const. Braz. (1891).

21. *Id.* art. 59, § 1.

22. *Id.* art. 59, § 1, b.

23. R.I.S.T.F. amend. 3.

24. In Portuguese, it is called “recurso extraordinário.”

25. R.I.S.T.F. amend. 3.

26. C.F. art. 102.

The first signs of the implementation of a centralized judicial review model in Brazil appeared in 1934.²⁷ However, centralized judicial review became significant only in 1965 when the Writ of Representation of Unconstitutionality was included in the original jurisdiction of the SFC.²⁸ This writ, the standing of which was exclusive to the Attorney General of the Republic, was designed to challenge federal and state normative acts in abstract before the Federal Constitution. In other words, there were no parties and no actual conflict involved in the controversy. Each state could establish an action to challenge municipal statutes in conflict with the state constitution, as original jurisdiction of the respective state court of appeals.²⁹

With the supervening and present Federal Constitution of 1988, standing for the centralized judicial review before the SFC was broadened. The above mentioned Writ of Representation of Unconstitutionality was replaced by a writ named Direct Action of Unconstitutionality, which is also an action by which one can raise the unconstitutionality of a statute directly before the SFC, without actual injury by an enforcement of the legislation.³⁰ The main difference between these two writs is that the latter enlarges the number of potential petitioners, whereas the former was exclusive to the Attorney-General of the Republic.³¹ A Direct Action of Unconstitutionality can be filed before the SFC by: the President of the Republic; the Directing Board of the Federal Senate; the Directing Board of the Chamber of Deputies; the Directing Board of a State Legislative Assembly; a State Governor; the Attorney General of the Republic; the Federal Council of the Brazilian Bar Association; a political party represented in the National Congress; a confederation of labor unions; or, a professional association of a nationwide nature.³² Indeed, this writ not only permits the government but also private entities to challenge

27. *See* Constituição (C.) (Braz. 1934). The Constitution of 1934 allowed states to have their own constitutions and statutes, which would have to observe some constitutional principles. *Id.* In case states enacted legislation that violated the Federal Constitution, the Attorney General was allowed to file a “representation for federal intervention” before the SFC, seeking a declaration of the unconstitutionality of that normative act. *See* RONALDO POLLETTI, *CONTROLE DE CONSTITUCIONALIDADE DAS LEIS* [THE CONTROL OF CONSTITUTIONALITY OF LAWS] 80–81 (Forense 1995).

28. C. amend. 16 (Braz. 1946) (changing article 101 (I) (k) and article 124 (XIII)).

29. *Id.*

30. C.F. art. 103.

31. *Id.*

32. *Id.*

legislation before the SFC, thus democratizing the access to the centralized judicial review.³³

Following the expansion of centralized judicial review, the Third Amendment to the Federal Constitution of 1988 created a Declaratory Action of Constitutionality, by which final decisions on the merits pronounced by the SFC are given force and binding effect, with regard to all other bodies of the Judicial Power, as well as the Executive Power.³⁴ This writ differs from the Direct Action of Unconstitutionality in that it aims to confirm the constitutional validity of a federal statute, as opposed to seeking a declaration of its unconstitutionality. Given the presumption of the constitutionality of legislation, as well as its binding effect, this writ was sharply criticized because it originally allowed the government, whose officials had exclusive standing for this writ, to submit the question of the constitutionality of a statute directly to the SFC when there was evidence of the existence of substantive judicial controversy over the legitimacy of a statute, therefore preventing the reflection of lower court's judges on the question.³⁵ It was also criticized because of its binding effect. However, this writ is used only in extreme cases of national controversy over a normative act, and is a very important mechanism to avoid thousands of lawsuits, diverse judicial rulings, overburdening of the judiciary and perplexity in the population. As a matter of fact, only nine Declaratory Actions of Unconstitutionality were filed before the SFC since its creation in 1993, which proves the caution of the government in filing this kind of suit, as well as the strong requirement of admissibility imposed by the SFC.³⁶ In December 2004, however, this difference was conciliated by Constitutional Amendment 45, which, among other changes shown below, expands the list of legitimate petitioners of a Declaratory Action of Constitutionality and confers binding effect to Direct Actions of Unconstitutionality.³⁷

33. *Id.*

34. Originally C.F. amendment 3, which inserted paragraph 4 in article 103. In 2004, C.F. amendment 45 inserted the declaratory action of constitutionality in article 103, and revoked paragraph 4.

35. As originally prescribed in C.F. amendment 3, only the following government bodies were legitimate to file a declaratory action of constitutionality: the President of the Republic, the Directing Board of the Federal Senate, the Directing Board of the Chamber of Deputies and the Attorney General of the Republic.

36. As mentioned before, this kind of action requires evidence of the existence of judicial dissent in relevant proportions on the national level. The SFC is very strict with this requirement. Otherwise, it would become a consultancy organ, which would be incompatible with its jurisdictional function. Banco Nacional de Dados do Poder Judiciário [National Database of the Judiciary Power], available at <http://www.stf.gov.br/bndpj/stf/ADC.asp> (last visited Feb. 3, 2006).

37. C.F. amend. 45.

As can be seen, the SFC combines the original jurisdiction of centralized judicial review and the highest jurisdiction of the decentralized system of constitutional adjudication. This Article will next focus on problems related to decentralized judicial review, which are the cause of the structural problems that are leading to enormous backlogs and delays in rendering final decisions in the Brazilian judiciary.

B. Procedures and Present Structure of the Supreme Federal Court

Following the American model, the judges of the SFC are appointed by the President of the Republic after their nomination has been approved by an absolute majority of the Federal Senate.³⁸ Nonetheless, the number of judges is established in the Federal Constitution, preventing a legislature dissatisfied with a position of the SFC from passing an ordinary act augmenting or diminishing its composition.³⁹ Article 102 of the Federal Constitution establishes the original jurisdiction of the SFC.⁴⁰

38. C.F. art. 101.

39. *Id.* “The Supreme Federal Court is composed of eleven Justices, chosen from among citizens over thirty-five and under sixty-five years of age, of notable juridical learning and spotless reputation.” *Id.*

40. *Id.* art. 102.

The Supreme Federal Court is responsible, essentially, for safeguarding the Constitution, and it is within its original jurisdiction to institute legal proceeding and trial, in the first instance, of:

- a) direct actions of unconstitutionality of a federal or state law or normative act, and declaratory actions of constitutionality of a federal law or normative act;
- b) in common criminal offenses, the President of the Republic, the Vice-President, the members of the National Congress, its own Justices and the Attorney-General of the Republic;
- c) in common criminal offenses and crimes of malversation, the Ministers of State, except as provided in article 52, I, the members of the Superior Courts, those of the Federal Court of Accounts and the heads of permanent diplomatic missions;
- d) habeas corpus, when the petitioner is any one of the persons referred to in the preceding subitems; the writ of mandamus and habeas data against acts of the President of the Republic, of the Directing Boards of the Chamber of Deputies and of the Federal Senate, of the Federal Court of Accounts, of the Attorney-General of the Republic and of the Supreme Federal Court itself;
- e) litigation between a foreign State or an international organization and the Union, a state, the Federal District or a territory;
- f) disputes and conflicts between the Union and the states, the Union and the Federal District, or between one another, including the respective indirect administration bodies;
- g) extradition requested by a foreign state;
- h) revoked by C.F. amend. 45;
- i) habeas corpus, when the constraining party or the petitioner is a court, authority or employee whose acts are directly subject to the jurisdiction of the Supreme Federal Court, or in the case of a crime, subject to the same jurisdiction in one sole instance;
- j) criminal review of and rescissory action against its decisions;

Additionally, the SFC hears, by ordinary appeal, cases dealing with political crimes. The SFC also hears, by habeas corpus, writs of mandamus, habeas data and writs of injunction decided in a sole instance by the Superior Courts in the event of a denial. Moreover, a claim of non-compliance with a fundamental precept derived from the Federal Constitution can be examined by the SFC under the terms of the law.⁴¹ This extensive list might suggest that the original and appellate jurisdiction of the SFC is quite broad; however, it is manageable and original jurisdiction is not the cause of the case overload of the Court, as will be shown.

The main source of the monstrous number of cases that reach the SFC is its extraordinary appellate jurisdiction. Currently, the SFC has jurisdiction to judge, on extraordinary appeal, cases decided in a sole or last instance, when the decision appealed: a) is contrary to a provision of the Constitution;⁴² b) declares a treaty or a federal law unconstitutional;⁴³ c) considers valid a law or act of a local government contested in the light of the Constitution;⁴⁴ d) considers valid a local law contested in the light of a federal law.⁴⁵ Moreover, one must keep in mind that the Brazilian Federal Constitution, like many modern constitutions, is very broad, not only controlling the political government and its organization, but also ensuring extensive fundamental guarantees and social rights, as well as

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- l) claims for the preservation of its powers and guarantee of the authority of its decisions;
 - m) enforcement of court decisions in the cases where it has original competence, the delegation of duties to perform procedural acts being allowed;
 - n) a suit in which all members of the judicature are directly or indirectly involved, and a suit in which more than half of the members of the court of origin are disqualified or have a direct or indirect interest;
 - o) conflicts of powers between the Superior Court of Justice and any other courts, between Superior Courts, or between the latter and any other court;
 - p) petitions of provisional remedy in direct actions of unconstitutionality;
 - q) writs of injunction, when drawing up of the regulation is the responsibility of the President of the Republic, of the National Congress, of the Chamber of Deputies, of the Federal Senate, of the Directing Boards of one of these legislative houses, of the Federal Court of Accounts, of one of the Superior Courts, or of the Supreme Federal Court itself;
 - r) actions against the National Council of Justice and the National Council of Public Prosecution.

Id. art. 102.

41. The mentioned law is Federal Law 9.882/99, which is currently being challenged before the Federal Supreme Court in the Direct Action of Unconstitutionality 2.231-DF.

42. C.F. art. 102, § IIIa.

43. *Id.* § IIIb.

44. *Id.* § IIIc.

45. *Id.* § IIIId.

organizing the principles of economic order.⁴⁶ Consequently, many litigants evoke constitutional rights in their pleadings, which are very likely to end up in the SFC, since the defeated litigant will seek to reverse a disfavourable judgment.

Before Constitutional Amendment 45 of December 2004, the Brazilian system, unlike the American counterpart, did not provide a formal mechanism to select which cases the SFC would hear. The procedure for appealing to the SFC was the following: extraordinary appeals were filed before the *court a quo* whose president analyzed their admissibility.⁴⁷ If the president of the *court a quo* denied the extraordinary appeal, the unsuccessful appellant could file an interlocutory appeal to the SFC⁴⁸ asking for review of the denial of admissibility of the extraordinary appeal.⁴⁹

With Constitutional Amendment 45, a new requirement was added: the appellant must show the general repercussion of the constitutional controversy presented in his case in order to have the SFC receive the appeal.⁵⁰ Under this new rule, however, the SFC may only refuse a case by a quorum of two-thirds of its Justices, and through procedures that will be defined by statutory law.⁵¹

The dramatic growth of cases addressed to the SFC was already a preoccupation in the middle of the twentieth century. In 1963, the SFC created a device denominated “*Súmula* of the Predominant Jurisprudence of the Supreme Federal Court,” commonly called *Súmula*.⁵² The *Súmula* is

46. The Federal Constitution has 250 articles, divided into nine titles, which are:
 I—Fundamental Principles (articles 1–4);
 II—Fundamental Rights and Guarantees (articles 5–17);
 III—The Organization of the State (articles 18–43);
 IV—The Organization of Powers (articles 44–135);
 V—The Defense of the State and of the Democratic Institutions (articles 136–144);
 VI—Taxation and Budget (articles 145–169);
 VII—The Economic and Financial Order (articles 170–192);
 VIII—The Social Order (articles 193–232);
 IX—General Constitutional Provisions (articles 233–250).

Id.

47. C.F. art. 102.

48. This interlocutory appeal is called “agravo de instrumento.” Keith S. Rosenn translates this kind of interlocutory appeal as “bill of review.” Keith S. Rosenn, *Civil Procedure in Brazil*, 34 AMER. J. COMP. L. 487, 508 (1986).

49. *Id.*

50. C.F. amend. 45.

51. *Id.*

52. The Supreme Federal Court Internal Rules [Regimento Interno do Supreme Tribunal Federal] state that the Plenary shall have the power to deliberate upon inclusion, alteration, and cancellation of enouncements of the *Súmula* of the Predominant Jurisprudence of the Supreme Federal Court.

a digest of one-sentence-pronouncements of the judgments of the Court that states succinctly its interpretation of rules and of the Constitution.⁵³ The purpose of the *Súmula* is to state the rulings of the SFC on the most controversial questions over which the Court has already taken a firm position repeatedly.⁵⁴

The *Súmula* divulges the jurisprudence of the Court in a concise and punctual way to the juridical community, making it easier for judges and lawyers to be acquainted with the decisions. This procedure also indirectly discourages appeals that would eventually be denied. This concept was an innovation conceived by then Ministry of the SFC, Victor Nunes Leal.⁵⁵ It was considered revolutionary at that time because it established a compromise between the lack of the doctrine of *stare decisis* in the Brazilian system and the urgent need to expedite the proceedings before the Court in order to avoid delays and backlogs.⁵⁶ The *Súmula* becomes particularly important considering the similarity of many of the cases that overwhelm the SFC. The *Súmula* is designed to prevent the Court from having to repeatedly issue similar decisions, thereby saving time in applying the same decision in a batch of analogous cases. The *Súmula* is also a very helpful tool for lawyers and lower court judges because each announcement cites the leading case and the cases that followed it. This disburdens the task of researching precedents to understand the arguments and reasoning of previous decisions.⁵⁷ Even though the *Súmula* is not binding, it is persuasive and it is understood to be an instrument to rationalize internal proceedings and to further access to SFC jurisprudence.

Despite the efforts to expedite internal proceedings with this mechanism, the number of cases brought before the SFC increased sharply, producing inevitable backlogs and jamming the docket. The following table illustrates the number of cases filed in several years at the SFC since 1940:

R.I.S.T.F. art. 7, VII.

53. *Id.*

54. *Id.*

55. See Victor Nunes Leal, *Passado e Futuro da Súmula do STF [Past and Future of the Súmula]*, 145 REVISTA DO DIREITO ADMINISTRATIVO I (1981).

56. Justice José Paulo Sepúlveda Pertence, Remarks at the SFC Plenary Session (Aug. 28, 2003) (announcements of the *Súmula* were discussed) (on file with author).

57. It is important to underline that the *Súmula* is an instrument for repetitive suits, many of them against a government measure or policy. Each announcement of the *Súmula* mentions a list of precedents decided and the legislation involved in that matter.

TABLE I
SUPREME FEDERAL COURT OF BRAZIL⁵⁸

Year	Number of filings	Number of judgments	Year	Number of filings	Number of judgments	Year	Number of filings	Number of judgments
1940	2,419	1,807	1962	7,705	7,436	1984	16,386	17,780
1941	2,629	2,265	1963	8,216	6,881	1985	18,206	17,798
1942	2,496	2,447	1964	8,960	7,849	1986	22,514	22,158
1943	2,480	2,355	1965	8,456	6,241	1987	20,430	20,122
1944	2,584	2,321	1966	7,378	9,175	1988	21,328	16,313
1945	3,422	1,860	1967	7,614	7,879	1989	14,721	17,432
1946	2,415	1,819	1968	8,612	9,899	1990	18,564	16,449
1947	2,773	2,565	1969	8,023	9,954	1991	18,438	14,366
1948	2,729	2,988	1970	6,367	6,486	1992	27,447	18,236
1949	3,335	3,269	1971	5,921	6,407	1993	24,377	21,737
1950	3,091	3,371	1972	6,253	6,523	1994	24,295	28,221
1951	3,305	2,917	1973	7,093	8,049	1995	27,743	34,125
1952	3,956	4,197	1974	7,352	7,986	1996	28,134	30,829
1953	4,903	4,464	1975	8,775	9,083	1997	36,490	39,994
1954	4,710	3,933	1976	6,877	7,565	1998	52,636	51,307
1955	5,015	4,146	1977	7,072	7,947	1999	68,369	56,307
1956	6,556	4,940	1978	8,146	8,848	2000	105,307	86,138
1957	6,597	6,174	1979	8,277	10,051	2001	110,771	109,692
1958	7,114	7,302	1980	9,555	9,007	2002	160,453	83,097
1959	6,470	8,360	1981	12,494	13,371	2003	87,186	107,867
1960	6,504	5,747	1982	13,648	15,117	2004	83,667	101,690
1961	6,751	6,886	1983	14,668	15,260			

There are many possible reasons for this continuous upward trend. During the twentieth century, the Brazilian population increased ten-fold, from 17.4 million in 1901 to 170 million in 2000.⁵⁹ In the last decade, the excessive issuance of provisional measures by the Executive aiming to regulate controversial subject matters that affect significant parts of society, as well as the release of controversial economic plans, have also contributed to the escalating recourse to the judiciary.⁶⁰ Not rarely, the

58. Banco Nacional, *supra* note 1.

59. Instituto Brasileiro de Geografia e Estatísticas, *Estatísticas do Século XX [Statistics of the 20th Century]* (2003), available at <http://www.ibge.gov.br/home/presidencia/noticias/29092003/estatisticasecxhtml.shtml> (last visited Feb. 3, 2006).

60. Article 62 of the Federal Constitution of 1988 provides that “in important and urgent cases, the President of the Republic may adopt provisional measures with the force of law and shall submit them to the National Congress immediately.” C.F. art. 62. Provisional measures have been an important instrument of policy and programs of the Executive in controversial issues, which have provoked innumerable suits.

Public Advocacy⁶¹ uses the appeals system to procrastinate adverse judicial decisions, overloading the SFC with appeals on legal issues that have been decided already. An emblematic case of such intentional use of dilatory appeals by government bodies is the dispute over the inflation adjustment of the Severance-Pay Fund implemented through several governmental economic plans designed to control inflation from 1987 to 1991.⁶² This controversy raised thousands of individual lawsuits and is an example of what are called “mass cases” due to the number of people litigating the same question.⁶³ The main question was whether the reduction of the indices of monetary correction applied to the Severance-Pay Fund accounts by governmental economic plans issued to control inflation violated the constitutional principle of vested rights.⁶⁴ The SFC ruled that the Severance-Pay Fund accounts did not have a contractual basis and therefore rejected the argument of vested rights.⁶⁵ However, in analyzing each economic plan, the SFC partially upheld the lower court’s ruling that favored employees because other questions were related to legal matters and not constitutional issues.⁶⁶

Even after the SFC delivered the decision governing the litigation in August 2000, the Public Advocacy kept filing extraordinary appeals as well as interlocutory appeals, instead of applying the SFC ruling to its thousands of similar cases. As of January 2002, there were 112,365 suits about the mentioned subject matter out of 147,136 submitted to the SFC, which represented 83.16% of the docket.⁶⁷ Only after such procrastinatory

61. The Advocacy General of the Union is the institution which, either directly or through a subordinated agency, represents the Union and the federal government bodies judicially or extrajudicially. C.F. art. 131.

62. Those economic plans are commonly known as *Plano Bresser*, *Plano Verão*, *Plano Collor I*, and *Plano Collor II*.

63. To better understand the facts on those “mass cases” one should have in mind that the accumulation of repetitive cases develops in two stages: First, as a general rule, litigation starts before the first instance’s judges all over the country. Then, the losing party will appeal from the decision to a second instance’s court (state or federal court of appeals). After that, there is a possibility of appealing simultaneously to the Superior Court of Justice (legal matters) and to the SFC (constitutional matters). By the time a controversy arrives at the SFC, lower courts have already decided countless cases on the subject matter and, as a result, innumerable extraordinary appeals have been already filed. Second, after a final decision of the SFC has been rendered on the merits of the controversy, those cases that have been decided in a different way by the lower courts will still have to go all the way to the SFC to be reversed. Worse still, some losing litigators (especially the government, as the Severance-Pay Fund case exemplifies) appeal to the SFC even though they already know that there is a previous decision against their claim just for procrastinatory purposes.

64. C.F. art. 5. “The law shall not injure the vested right, the perfect juridical act and the *res judicata*.” *Id.*

65. Recurso Extraordinário [Extraordinary Appeal] n. 226.855-RS, R.T.J. 174/916.

66. *Id.*

67. See News of the Supreme Federal Court of January 7, 2002, *FGTS é o Assunto Mais*

maneuvers were fined considerably,⁶⁸ and the SFC, the General Advocacy of the Union and the Caixa Econômica Federal entered into an agreement in February 2002; did the Public Advocacy plead desistance of the appeals filed before the SFC and stop filing new appeals.⁶⁹ There were 34,387 requests of desistance filed in 2002, followed by 50,918 in 2003.⁷⁰ This situation illustrates how one mass case situation may congest the SFC docket unnecessarily.

In 2003, the SFC delivered 107,867 judgments,⁷¹ among which the extraordinary appeals totaled 43,054⁷² and the interlocutory appeals against the denial of admissibility of extraordinary appeals totaled 55,937.⁷³ These numbers show that 91.7% of all cases decided by the SFC in 2003 were related to extraordinary appellate jurisdiction, whereas the remaining cases contrastingly related to original jurisdiction. Indeed, the SFC's statistics show the titanic endeavor Brazil's highest judicial body faces daily with extraordinary appellate jurisdiction.

The costs of setting the SFC machinery in motion for repetitive cases are very high. Justices should be devoting their time to analyzing crucial national cases instead of repeating the effort of applying the same decision to similar cases, regardless whether "the principle of *stare decisis* is foreign to civil law judges."⁷⁴ If a system is not working properly, it should be reexamined. One should not underestimate the number of similar cases before the SFC; each appeal has to be reviewed and analyzed

Frequente No Supremo Tribunal Federal [Severance-Pay Fund is the Most Frequent Subject Matter in the Supreme Federal Court], at <http://www.stf.gov.br/noticias/imprensa/ultimas/ler.asp?CODIGO=17176&tip=UN>. The second most frequent controversy was about the review of pension benefits, with 15,420 lawsuits. *Id.*

68. When interlocutory appeal is manifestly inadmissible, the Code of Civil Procedure allows courts to condemn the appellant to pay the appellee a fine ranging from 1% to 10% of the value of the litigation. C.P.C. art. 557, § 3.

69. News of the Supreme Federal Court of February 11, 2003, *STF homologa desistência da CEF em 33 mil processos sobre correção do FGTS [Supreme Federal Court homologates desistance of Caixa Econômica Federal in 33,000 suits about adjustment of the Severance-Pay Fund]*, at <http://www.stf.gov.br/noticias/imprensa/ultimas/ler.asp?CODIGO=39031&tip=UN>. Caixa Econômica Federal is the governmental bank in charge of administering the severance-pay accounts.

70. Banco Nacional, *supra* note 1. Despite the fact that this statistic does not make express reference to the severance-pay fund cases, I attribute the decrease of filings in 2003 to the final settlement of this controversy only due to the previous years' statistics of request of desistance: fifty in 2002, and none in 2001. *Id.*

71. *Id.*

72. Banco Nacional de Dados do Poder Judiciário, STF, *Processos Registrados, Distribuídos e Julgados por Classe Processual [National Database of the Judicial Power, SFC, Cases Registered, Distributed and Judged by Procedural Class]*, at <http://www.stf.gov.br/bndpj/stf/ClasseProc.asp> (last visited Sept. 26, 2005).

73. *Id.*

74. MAURO CAPPELLETTI, *THE JUDICIAL PROCESS IN COMPARATIVE PERSPECTIVE* 140 (1989).

by the Court's staff to see if it is the same controversy and if the admissibility requirements are met. Although winning litigants count on a favorable ruling at the SFC, they must continue litigating the dilatory appeals filed by the opposing parties, who take advantage of the appellate system's structural malfunctioning in order to postpone compliance with their condemnation. Posner observes that "[t]he principal method of accommodating the caseload increase has been to expand the number of supporting personnel"⁷⁵ Indeed, the SFC constantly needs to increase personnel to handle all of the judicial proceedings and to expand facilities, which consequently requires a higher budget.

Despite the structural problems and adverse conditions within the judiciary, the SFC has responded to this enormous demand. It is accomplishing its institutional mission to safeguard the Constitution by using internal procedures to expedite proceedings at the court level. However, this structure no longer corresponds to Brazilian society's needs; it is not cost-effective and, more importantly, it causes distress and perplexity.

III. MODELS OF CONSTITUTIONAL ADJUDICATION

A. *Decentralized Model*

1. *United States*

Judicial review was first established in the United States in 1803 by the famous case *Marbury v. Madison*,⁷⁶ "in which the Supreme Court asserted that a federal court has power to refuse to give effect to congressional legislation if it is inconsistent with the court's interpretation of the Constitution."⁷⁷ Laurence Tribe explains that:

Marshall rested his defense of federal judicial review on the constitutionality of acts of Congress chiefly upon the following propositions. (1) "[A]ll those who have framed written constitutions contemplate them as forming the fundamental and paramount law of the nation, and consequently the theory of every such government must be, that an act of the legislature, repugnant to the constitution, is void." (2) "It is emphatically the province and duty of the judicial department to say what the law is. Those who apply the rule to

75. RICHARD A. POSNER, *THE FEDERAL COURTS CRISIS AND REFORM* 97 (1985).

76. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803).

77. LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 20 (1978).

particular cases, must of necessity expound and interpret that rule. If two laws conflict with each other, the courts must decide on the operation of each If then the courts are to regard the constitution; and the constitution is superior to any ordinary act of the legislature; the constitution, and not such ordinary act, must govern the case to which they both apply.” (3) “Those then who controvert the principle that the constitution is to be considered, in court, as a paramount law, are reduced to the necessity of maintaining that courts must close their eyes on the constitution, and see only the law. This doctrine . . . would declare, that if the legislature shall do what is expressly forbidden, such act, notwithstanding the express prohibition, is in reality effectual. It would be giving to the legislature a practical and real omnipotence, with the same breath which professes to restrict their powers within narrow limits.”⁷⁸

This model of constitutional review is known as decentralized or diffuse due to the fact that the task of interpreting the Constitution is given to any court.⁷⁹ It is also known as incidental, indirect, or concrete review because it requires that an actual litigation be brought before a court.⁸⁰ Constitutional adjudication is a very broad subject matter, so, for the purposes of this paper, I will focus on the institutional design and the efficiency of the United States Supreme Court’s appellate jurisdiction.

As defined in Article III of the United States Constitution, the Supreme Court has appellate jurisdiction, as to law and fact, under congressional regulation.⁸¹ The decisions of the United States Supreme Court have binding effect upon lower courts.⁸² The jurisdiction of the Supreme Court is discretionary, and therefore the Court decides which cases it will hear.⁸³

78. *Id.* at 21–22 (quoting *Marbury v. Madison*, 5 U.S. (1 Cranch) at 177–78).

79. MAURO CAPPELLETTI & WILLIAM COHEN, *COMPARATIVE CONSTITUTIONAL LAW* 73 (1978).

80. MAURO CAPPELLETTI, *JUDICIAL REVIEW IN THE CONTEMPORARY WORLD* 69–84 (1971).

81. U.S. CONST. art. 111, § 2.

82. *Hutto v. Davis*, 454 U.S. 370, 375 (1982) (“But unless we wish anarchy to prevail within the federal judicial system, a precedent of this Court must be followed by the lower federal courts no matter how misguided the judges of those courts may think it to be.”).

83. SUP. CT. R. 10.

Review on a writ of certiorari is not a matter of right, but of judicial discretion. A petition for a writ of certiorari will be granted only for compelling reasons. The following, although neither controlling nor fully measuring the Court’s discretion, indicate the character of the reasons the Court considers:

(a) a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter; has decided an important federal question in a way that conflicts with a decision by a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or

However, the discretionary jurisdiction on constitutional appellate review of the United States Supreme Court has not always been the case in the American judicial system. To better understand the United States Supreme Court's constitutional review, it is necessary to glance at its historical development. In the second half of the nineteenth century, the United States Supreme Court reviewed all appeals brought before it, but in Chief Justice Rehnquist's words, "such a mission became impossible for any one court to fulfill by the end of the nineteenth century. . . ."⁸⁴

The Judiciary Act of 1891 created the U.S. courts of appeals, which have jurisdiction over appeals from district and circuit courts, and introduced the *writ of certiorari*, lessening the workload of the United States Supreme Court.⁸⁵ Nevertheless, that legislation was not enough to control constant growth of the caseload. Some decades later, Congress responded to Chief Justice Taft's efforts to reform United States Supreme Court appellate jurisdiction by passing the Judiciary Act of 1925.⁸⁶ This statute reduced the number of mandatory appeals and broadened the Court's discretionary power to refuse review of lower courts' decisions by *writ of certiorari*.⁸⁷

From then on, the most significant reform of the United States Supreme Court's discretionary jurisdiction was the Supreme Court Case Selection Act of 1988, which eliminated all mandatory appellate jurisdiction except for appeals from three-judge panels.⁸⁸ All of these reforms concentrated on reducing the docket and ensured that vital and urgent constitutional controversies are adjudicated in a reasonable time, avoiding costly delays and crushing backlogs.

Other than entering the United States Supreme Court through direct appeals of decisions from three-judge district court panels granting or

sanctioned such a departure by a lower court, as to call for an exercise of this Court's supervisory power;

(b) a state court of last resort has decided an important federal question in a way that conflicts with the decision of another state court of last resort or of a United States court of appeals;

(c) a state court or a United States court of appeals has decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court.

Id.

84. Justice William H. Rehnquist, *The Changing Role of the Supreme Court*, 14 FLA. ST. U. L. REV. 1, 9 (1986).

85. Judiciary Act of 1891, 26 Stat. 826 (1891).

86. Judiciary Act of 1925, Pub. L. No. 415, 43 Stat. 936 (1925).

87. *Id.*

88. Supreme Court Case Selection Act of 1988, Pub. L. No. 100-352, 102 Stat. 662 (1988).

denying an injunction,⁸⁹ a case can be reviewed by the Supreme Court through certification.⁹⁰

Certification is a procedure in which a federal court of appeals asks the United States Supreme Court for instructions on a question of importance in a case pending before it.⁹¹ In this case, the United States Supreme Court may give binding instructions or require that the full record be sent up for decision of the entire matter in controversy.⁹² Certified questions are rarely brought before the United States Supreme Court, “it being recognized by the lower courts that the Supreme Court should determine which cases it will decide.”⁹³

The appellate jurisdiction of the United States Supreme Court is mainly discretionary and is exercised through the *writ of certiorari*. The certiorari doctrine is fundamental to the decentralized model of judicial review, as it permits that only paramount and capital cases reach the United States Supreme Court. There is much controversy and political consideration concerning which cases the Supreme Court actually selects. As Rule 10 of the Supreme Court states, “review on a writ of certiorari is not a matter of right, but of judicial discretion.”⁹⁴ This rule casts light on the reasons the Court might consider granting certiorari, nonetheless it asseverates that those reasons are “neither controlling nor fully measuring the Court's discretion.”⁹⁵ To grant a petition of certiorari, it is necessary that at least four Justices vote in favor.⁹⁶ The Supreme Court's decisions are taken in secrecy, and do not present denied petitions with any reasoning or explanation. The Court only states that the petition for review has been denied and does not give any further reason for the denial.⁹⁷ In cases of imperative public importance, the Supreme Court may grant certiorari before judgment is delivered by a United States Court of Appeals, as Rule 11 provides.⁹⁸

89. 28 U.S.C. § 1253 (1976).

90. *Id.* § 1254(3).

91. *Id.*

92. *Id.* § 1254.

93. GEOFFREY C. HAZARD, JR. & MICHELE TARUFFO, *AMERICAN CIVIL PROCEDURE* 185 (1993).

94. SUP. CT. R. 10

95. *Id.*

96. BOB WOODWARD & SCOTT ARMSTRONG, *THE BROTHERS 2* (1979) (“At least four of the nine Justices must vote to hear a case.”).

97. SUP. CT. R. 16.

98. SUP. CT. R. 11.

Certiorari to a United States Court of Appeals Before Judgment. A petition for a writ of certiorari to review a case pending in a United States court of appeals, before judgment is entered in that court, will be granted only upon a showing that the case is of such imperative

Many theories have been presented on the case selection criteria of the United States Supreme Court.⁹⁹ Arthur Hellman identifies four categories of reasons for the grant of review: intercourt conflicts, compelling interests of the federal government, doubtful recurring issues, and a heterogeneous group of reasons.¹⁰⁰ A group of scholars, led by Joseph Tanenhaus, conceived the “cue theory,”¹⁰¹ which suggests that the method of selection of certiorari petitions depends on the presence of “cues”: “(1) When the federal government seeks review. (2) When dissension has been indicated among the judges of the court immediately below, or between two or more courts and agencies in a given case. (3) When a civil liberties issue is present. (4) When an economic issue is present.”¹⁰² Perry formulates a

public importance as to justify deviation from normal appellate practice and to require immediate determination in this Court.

Id.

99. See generally SUSAN LOW BLOCH & THOMAS G. KRATTENMAKER, *SUPREME COURT POLITICS: THE INSTITUTION AND ITS PROCEDURES* (1994); DORIS MARIE PROVINE, *CASE SELECTION IN THE UNITED STATES SUPREME COURT* (1980); H.W. PERRY, JR., *DECIDING TO DECIDE, AGENDA SETTING IN THE UNITED STATES SUPREME COURT* 7 n.10 (1991) (providing the following list of studies on case selection: Lawrence Baum, *Decisions to Grant and Deny Hearing in the California Supreme Court: Patterns in Court and Individual Behaviour*, 16 SANTA CLARA L. REV. 713 (1976); Lawrence Baum, *Policy Goals in Judicial Gatekeeping: A Proximity Model of Discretionary Jurisdiction*, 21 AM. J. POL. SCI. 13 (1977); Lawrence Baum, *Judicial Demand-Screening and Decision on the Merits: A Second Look*, 7 AM. POL. Q. 1, 109 (1979); Saul Brenner, *The New Certiorari Game*, 41 J. POL. 649 (1979); Gregory A. Caldeira, *The United States Supreme Court and Criminal Cases, 1935-1976: Alternative Models of Agenda Building*, 11 BRIT. J. POL. SCI. 449 (1981); Gregory A. Caldeira & John R. Wright, *Organized Interests and Agenda Setting in the U.S. Supreme Court*, 82 AM. POL. SCI. REV. 1109 (1988); Peter Linzer, *The Meaning of Certiorari Denials*, 7 COL. L. REV. 1227 (1979); William P. McLaughlan, *An Exploratory Analysis of the Supreme Court's Caseload from 1880 to 1976*, 64 JUD. 32 (1980); Richard L. Pacelle, Jr., *The Supreme Court Agenda Across Time: Dynamics and Determinants of Change* (1985) (unpublished Ph.D. dissertation, Ohio State University); Jan Palmer, *An Econometric Analysis of the U.S. Supreme Court's Certiorari Decisions*, 39 PUB. CHOICE 387-98 (1982); Glendon Schubert, *The Certiorari Game, in QUANTITATIVE ANALYSIS OF JUDICIAL BEHAVIOR* 210-54 (Glendon Schubert ed., 1959); Glendon Schubert, *Policy Without Law: An Extension of the Certiorari Game*, 14 STAN. L. REV. 284 (1962); Donald Songer, *Concern for Policy Outputs as a Cue for Supreme Court Decisions on Certiorari*, 41 J. POL. 1185 (1979); Joseph Tanenhaus et al., *The Supreme Court's Certiorari Jurisdiction: Cue Theory, in JUDICIAL DECISION MAKING* 111-32 (Glendon Schubert ed., 1963); Stuart Teger and Douglas Kosinski, *The Cue Theory of Supreme Court Certiorari Jurisdiction: A Reconsideration*, 42 J. POL. 834 (1980); S. Sidney Ulmer et al., *The Decision to Grant or Deny Certiorari: Further Consideration of Cue Theory*, 6 L. SOC. REV. 637 (1972); S. Sidney Ulmer, *The Decision to Grant Certiorari as an Indicator to Decision 'On the Merits,'* 4 POLITY 429 (1972); S. Sydney Ulmer, *Selecting Cases for Supreme Court Review: An Underdog Model*, 72 AM. POL. SCI. REV. 902 (1978); S. Sydney Ulmer, *The Supreme Court's Certiorari Decisions: Conflict as a Predictive Variable*, 78 AM. POL. SCI. REV. 901 (1984).

100. Arthur D.Hellman, *Case Selection in the Burger Court: A Preliminary Inquiry*, 60 NOTRE DAME L. REV. 947, 1012 (1985).

101. See generally Joseph Tanenhaus, *The Supreme Court's Certiorari Jurisdiction: Cue Theory, in JUDICIAL DECISION MAKING* 111-32 (Glendon Schubert ed., 1963).

102. H.W. PERRY, JR., *DECIDING TO DECIDE, AGENDA SETTING IN THE UNITED STATES SUPREME*

model to define “when and how the political and legal natures of the justices interact”¹⁰³ in case selection. He contends that concerns about the outcome on the merits bring about an “outcome mode” or a “jurisprudential mode”:

briefly, if a justice cares strongly about the outcome of a case on the merits at the time of the cert. decision, then he will enter the outcome mode to decide whether or not to take the case. If, however, the justice does not feel particularly strongly about the outcome of a case on the merits, he enters the jurisprudential mode with all its attendant steps. The steps differ in the two modes. Oversimplifying at this point, when in the jurisprudential mode, the justice makes his decision based on legalistic, jurisprudential types of considerations such as whether or not there is a split in the federal circuit courts of appeals. In the outcome mode, while the justice does not ignore jurisprudential concerns, they do not dominate his decision process. Rather, it is dominated by strategic considerations related to the outcome of the case on the merits. Jurisprudential concerns play a rather different role in the calculus One should not assume that cases that trigger the outcome mode are necessarily those of great social import, ideologically laden, or with great public policy implications. Likewise, cases triggering the jurisprudential mode are not necessarily the ones that present only technical “legal” questions. *What triggers one mode or the other is simply the degree of concern about the outcome on the merits.*¹⁰⁴

Although there are many different theories on the factors the United States Supreme Court takes into consideration in order to grant or deny a petition for certiorari, most commentators agree “that the process is both legalistic and political.”¹⁰⁵ “Further, because different justices will care differently about the outcome of different cases, it will always be difficult to disentangle the factors that underlie decisions to grant or deny cert.”¹⁰⁶

COURT 117 (1991).

103. *Id.* at 274.

104. *Id.* at 274–75.

105. SUSAN LOW BLOCH & THOMAS G. KRATTENMAKER, SUPREME COURT POLITICS: THE INSTITUTION AND ITS PROCEDURES 372 (1994).

106. *Id.*

In addition to the power of controlling its own docket by certiorari, the Supreme Court may voluntarily, or *sua sponte*, ask the parties to reargue a case brought before it.¹⁰⁷ This power to reopen cases, and therefore select specific matters of contention, has brought criticism when used for policy making.¹⁰⁸ In a significant sense, the United States Supreme Court is a political institution where fundamental issues for the American society are argued and decided.

For civil law countries, the force of judicial precedent is one of the most outstanding and differentiating particularities of common law. This holds especially true in the United States. The doctrine of *stare decisis*—of standing by what has been decided—is paramount to understanding the stability and coherence of the common law system. The doctrine of judicial precedent requires that lower courts abide to their own previous rulings or to those of higher courts. Even though there is criticism of *stare decisis*,¹⁰⁹ it is very salutary from the point of view of judicial economy to prevent parties from appealing through all instances to eventually have their case decided with the same *ratio decidendi* applied in previous cases.

The United States Supreme Court safeguards its docket very strictly. In the past few years, it granted review on around one percent of the petitions considered in a one-term period,¹¹⁰ as the statistics below show:

107. Rosemary Krimbel, *Rehearing Sua Sponte in the U.S. Supreme Court: A Procedure for Judicial Policymaking*, 65 CHI.-KENT L. REV. 919 (1989).

108. *Id.*

109. See generally Evan H. Caminker, *Why Must Inferior Courts Obey Superior Court Precedents?*, 46 STAN. L. REV. 817 (1994).

110. Unlike the other countries analyzed in this paper, which follow the calendar year, the United States Supreme Court's judicial year starts in October and finishes in June of the next year. For example, the Supreme Court Term 2001 initiated in October 2001 finished in June 2002. *The Supreme Court, 2001 Term*, 116 HARV. L. REV. 453, 459–60 (2002).

TABLE 2
UNITED STATES SUPREME COURT¹¹¹

Term	Disposition of cases	Remaining on the docket	Number of cases granted review	Term	Disposition of cases	Remaining on the docket	Number of cases granted review
1950	1,202	119	106	1978	3,943	788	237
1951	1,207	146	113	1979	3,812	969	231
1952	1,278	151	115	1980	4,280	864	262
1953	1,293	160	88	1981	4,456	855	312
1954	1,352	205	120	1982	4,188	891	304

111. Those figures are based on the Harvard Law Review's annual statistical summary of the Supreme Court's Term. *The Supreme Court, 1950 Term*, 65 HARV. L. REV. 107, 179 (1951); *The Supreme Court, 1951 Term*, 66 HARV. L. REV. 89, 177 (1952); *The Supreme Court, 1952 Term*, 67 HARV. L. REV. 91, 169 (1953); *The Supreme Court, 1953 Term*, 68 HARV. L. REV. 105, 188 (1954); *The Supreme Court, 1954 Term*, 69 HARV. L. REV. 120, 202 (1955); *The Supreme Court, 1955 Term*, 70 HARV. L. REV. 95, 99 (1956); *The Supreme Court, 1956 Term*, 71 HARV. L. REV. 94, 97 (1957); *The Supreme Court, 1957 Term*, 72 HARV. L. REV. 98, 99 (1958); *The Supreme Court, 1958 Term*, 73 HARV. L. REV. 128, 129 (1959); *The Supreme Court, 1959 Term*, 74 HARV. L. REV. 97, 99 (1960); *The Supreme Court, 1960 Term*, 75 HARV. L. REV. 83, 85 (1961); *The Supreme Court, 1961 Term*, 76 HARV. L. REV. 78, 81 (1962); *The Supreme Court, 1962 Term*, 77 HARV. L. REV. 81, 83 (1963); *The Supreme Court, 1963 Term*, 78 HARV. L. REV. 179, 180 (1964); *The Supreme Court, 1964 Term*, 79 HARV. L. REV. 105, 106 (1965); *The Supreme Court, 1965 Term*, 80 HARV. L. REV. 125, 143 (1966); *The Supreme Court, 1966 Term*, 81 HARV. L. REV. 112, 127 (1967); *The Supreme Court, 1967 Term*, 82 HARV. L. REV. 95, 303 (1968); *The Supreme Court, 1968 Term*, 83 HARV. L. REV. 62, 282 (1969); *The Supreme Court, 1969 Term*, 84 HARV. L. REV. 32, 248 (1970); *The Supreme Court, 1970 Term*, 85 HARV. L. REV. 40, 346 (1971); *The Supreme Court, 1971 Term*, 86 HARV. L. REV. 52, 303 (1972); *The Supreme Court, 1972 Term*, 87 HARV. L. REV. 57, 306 (1973); *The Supreme Court, 1973 Term*, 88 HARV. L. REV. 43, 277 (1974); *The Supreme Court, 1974 Term*, 89 HARV. L. REV. 49, 278 (1975); *The Supreme Court, 1975 Term*, 90 HARV. L. REV. 58, 279 (1976); *The Supreme Court, 1976 Term*, 91 HARV. L. REV. 72, 298 (1977); *The Supreme Court, 1977 Term*, 92 HARV. L. REV. 57, 332 (1978); *The Supreme Court, 1978 Term*, 93 HARV. L. REV. 62, 278 (1979); *The Supreme Court, 1979 Term*, 94 HARV. L. REV. 77, 292 (1980); *The Supreme Court, 1980 Term*, 95 HARV. L. REV. 93, 342 (1981); *The Supreme Court, 1981 Term*, 96 HARV. L. REV. 304, 308 (1982); *The Supreme Court, 1982 Term*, 97 HARV. L. REV. 295, 299 (1983); *The Supreme Court, 1983 Term*, 98 HARV. L. REV. 247, 311 (1984); *The Supreme Court, 1984 Term*, 99 HARV. L. REV. 322, 326 (1985); *The Supreme Court, 1985 Term*, 100 HARV. L. REV. 304, 308 (1986); *The Supreme Court, 1986 Term*, 101 HARV. L. REV. 362, 366 (1987); *The Supreme Court, 1987 Term*, 102 HARV. L. REV. 143, 354 (1988); *The Supreme Court, 1988 Term*, 103 HARV. L. REV. 394, 398 (1989); *The Supreme Court, 1989 Term*, 104 HARV. L. REV. 359, 363 (1990); *The Supreme Court, 1990 Term*, 105 HARV. L. REV. 177, 423 (1991); *The Supreme Court, 1991 Term*, 106 HARV. L. REV. 163, 382 (1992); *The Supreme Court, 1992 Term*, 107 HARV. L. REV. 372, 376 (1993); *The Supreme Court, 1993 Term*, 108 HARV. L. REV. 139, 376 (1994); *The Supreme Court, 1994 Term*, 109 HARV. L. REV. 111, 344 (1995); *The Supreme Court, 1995 Term*, 110 HARV. L. REV. 367, 371 (1996); *The Supreme Court, 1996 Term*, 111 HARV. L. REV. 431, 435 (1997); *The Supreme Court, 1997 Term*, 112 HARV. L. REV. 355, 372-73 (1998); *The Supreme Court, 1998 Term*, 113 HARV. L. REV. 400, 406-07 (1999); *The Supreme Court, 1999 Term*, 114 HARV. L. REV. 390, 396-97 (2000); *The Supreme Court, 2000 Term*, 115 HARV. L. REV. 539, 545-46 (2001); *The Supreme Court, 2001 Term*, 116 HARV. L. REV. 453, 459-60 (2002); *The Supreme Court, 2002 Term*, 117 HARV. L. REV. 480, 486-87 (2003); *The Supreme Court, 2003 Term*, 118 HARV. L. REV. 497, 504-05 (2004); *The Supreme Court, 2004 Term*, 119 HARV. L. REV. 415, 425-26 (2005).

Term	Disposition of cases	Remaining on the docket	Number of cases granted review	Term	Disposition of cases	Remaining on the docket	Number of cases granted review
1955	1,630	219	139	1983	4,162	993	261
1956	1,670	351	208	1984	4,269	737	264
1957	1,765	225	143	1985	4,289	869	273
1958	1,763	281	140	1986	4,339	784	268
1959	1,787	356	177	1987	4,401	867	271
1960	1,911	385	111	1988	4,806	851	252
1961	2,142	428	142	1989	4,908	838	203
1962	2,324	473	210	1990	5,412	904	141
1963	2,401	367	177	1991	5,825	945	120
1964	2,180	482	138	1992	6,336	909	97
1965	2,683	591	178	1993	6,676	1111	99
1966	2,890	453	179	1994	7,132	964	93
1967	2,946	613	255	1995	6,611	954	105
1968	3,117	767	165	1996	6,687	915	87
1969	3,357	793	133	1997	6,718	974	87
1970	3,318	894	184	1998	7,015	1,068	81
1971	3,645	888	161	1999	7,374	1113	92
1972	3,748	892	154	2000	7,713	1,252	99
1973	3,876	1,203	183	2001	8,024	1,152	88
1974	3,847	821	174	2002	8,342	1,065	91
1975	3,806	955	172	2003	7,781	1,097	87
1976	4,006	724	169	2004	7,501	1,092	80
1977	3,854	850	160				

B. Centralized Model

The European model of judicial review was idealized by Hans Kelsen under his theory of the supremacy of the Constitution and the need of constitutional guarantee.¹¹² Norman Dorsen, Michael Rosenfeld, Andrés Sajó, and Susanne Baer explain that

with parliamentary democracy in mind, Kelsen argues that adherence to the requisite hierarchy emanating from the constitution requires a check on the laws passed by the legislature. That check must be provided by an independent institution; and since traditionally the judicial power in Europe was not sufficiently

112. ALLAN R. BREWER-CARIAS, *EL CONTROL CONCENTRADO DE LA CONSTITUCIONALIDAD DE LAS LEYES (ESTUDIO DE DERECHO COMPARADO)* [THE CONCENTRATED CONTROL OF CONSTITUTIONALITY OF LAWS (STUDY OF COMPARATIVE LAW)] 111–12 (1994).

independent from the other branches of government, ordinary judges could not be entrusted with the task. The institution recommended by Kelsen, and later developed throughout Europe and beyond, is the constitutional court, a specialized body made up of independent judges who do not ordinarily come from the ranks of the judiciary.¹¹³

This model is known as “centralized” because the power of controlling the constitutionality of laws is granted to one judicial organ generally referred to as the constitutional court, as opposed to the decentralized model, where any court may declare an act unconstitutional.¹¹⁴ Other than the structure of the judicial organ with constitutional adjudication power, it is important to note that in the European model:

There are three basic types of review jurisdiction: “abstract” review, concrete review, and the individual constitutional complaint procedure. Abstract review is “abstract” because the review of legislation takes place in the absence of litigation, in American parlance, in the absence of a “concrete” case or controversy. Concrete review is “concrete” because the review of legislation, or other public act, constitutes a separate stage in an ongoing judicial process (litigation in the ordinary courts). In individual complaints, a private individual alleges the violation of a constitutional right by a public act or governmental official, and requests redress from the court for this violation.¹¹⁵

Adopted in many European countries in accordance with their own singularities and circumstances, Kelsen’s systematization originated particular models of judicial review, such as the constitutional adjudication in Austria, Germany, Italy, and France.¹¹⁶

113. NORMAN DORSEN, MICHAEL ROSENFELD, ANDRÁS SAJÓ & SUSANNE BAER, *COMPARATIVE CONSTITUTIONALISM* 111 (2003).

114. *Id.* at 115.

115. *Id.* at 113–14.

116. *See generally* Louis Favoreu, *Constitutional Review in Europe, reprinted in* DORSEN, *supra* note 113. The centralized model of judicial review was implemented in several countries, including: Cyprus (1960), Turkey (1961), Portugal (1976 and 1983), Spain (1980), Belgium (1984), and Poland (1985). *Id.* Wojciech Sadurski explains that

[a]ll the post-Communist countries of Central and Eastern Europe (CEE) have adopted a model of judicial review which borrows more—much more—from the Western European tradition than from the American one. A composite picture of the system of judicial review of the CEE countries would highlight that it is exercised by specially established constitutional courts which exclusively exercise the power to make authoritative decisions about the unconstitutionality of laws, and whose decisions—taken after the laws have entered into

I. Austria

In 1920, Czechoslovakia and Austria were the first countries to establish a constitutional court inspired by the Kelsen model. Because the Czechoslovakian Constitutional Court did not hear any cases early on,¹¹⁷ the Austrian Constitutional Court is considered the oldest judicial institution exercising constitutional adjudication in the European model, even considering its functions were interrupted by the German occupation during World War II.¹¹⁸

The Constitutional Court is the only Austrian organ with the power of constitutional jurisdiction.¹¹⁹ It was created outside the ordinary judiciary and legislative branches in order to establish an independent and impartial institution for constitutional adjudication.¹²⁰ The Austrian Constitutional Court has the power to annul legislation through different procedures.¹²¹ The first of these procedures is preventive control.¹²² Though very rare, a federal or a provincial government may petition the Court to consider whether a bill's subject matter is under a federal or a provincial jurisdiction.¹²³ Concrete control, on the other hand, is exercised when any court of appeal, the Supreme Court or the Administrative Court, submit to the Constitutional Court a petition for review of a normative act that they have to apply in a case before them. Concrete control also may be initiated by the Constitutional Court itself (*ex-officio*), which is the mechanism most utilized for constitutional adjudication.¹²⁴ Another device is the abstract control of constitutionality of laws.¹²⁵ The federal government or one third of the members of a provincial assembly have standing to challenge a provincial law, whereas the provincial governments or one-third of the members of the National Council have standing to require a

force—are made in abstracto (not in connection with any particular litigation) and are final (that is, can be overridden only by constitutional amendment).

Wojciech Sadurski, *Legitimacy and Reasons of Constitutional Review After Communism*, in CONSTITUTIONAL JUSTICE, EAST AND WEST: DEMOCRATIC LEGITIMACY AND CONSTITUTIONAL COURTS IN POST-COMMUNIST EUROPE IN A COMPARATIVE PERSPECTIVE 163 (2002).

117. Stanley L. Paulson, *Constitutional Review in the United States and Austria: Notes on the Beginnings*, 16 *RATIO JURIS* 213, 224 n.3 (2003).

118. Favoreu, *supra* note 116, at 117 (2003).

119. Manfred Welan, *Constitutional Review and Legislation in Austria*, in CONSTITUTIONAL REVIEW AND LEGISLATION: AN INTERNATIONAL COMPARISON 63 (Christine Landfried ed., 1988).

120. *Id.*

121. *Id.*

122. *Id.* at 66.

123. *Id.* at 66–67.

124. *Id.*

125. *Id.*

review of a federal law.¹²⁶ Finally, individuals may file petitions arguing the unconstitutionality of a statute “if it claims to have been violated in its rights by the direct impact of legislation without the passing of an administrative or judicial decision.”¹²⁷ However, the Austrian Constitutional Court has admitted few such petitions.¹²⁸ No matter what kind of procedure issued, once a law is invalidated for its unconstitutionality, the decision of the Constitutional Court has binding effect on all courts and administrative authorities.¹²⁹

To control the caseload, Manfred Welan explains that “[t]he Constitutional Court itself advanced demands for an exoneration of the Court from its excessively high workload which were responded to by the ‘exoneration amendments’ of 1981 and 1984.”¹³⁰ The Austrian Constitutional Court has the power “to reject an appeal a limine if it considers its chances to be decided in favor of the plaintiff insufficient, as of 1984 it can reject an appeal on the grounds that no clarification of a constitutional legal question can be expected.”¹³¹ The statistics below show the caseload of the Austrian Constitutional Court. The number of backlogged cases for the year 2003 amounted to 1,159.¹³²

TABLE 3
AUSTRIAN CONSTITUTIONAL COURT¹³³

Year	Number of cases filed	Number of Judgments	Cases pending from prior term
1975	645	444	252
1980	838	609	1,133

126. *Id.* Welan explains that

[a]bstract control is rare: The Federal Government is empowered to contest the constitutionality of a Landes (provincial) law, every Landes government may contest a federal law, one third of the members of the National Council can petition the Constitutional Court review of federal laws, and one third of the members of a provincial assembly (Landtag) that of a Landes law, if the provincial Constitution includes a pertinent provision (as in the case of The Burgenland, Salzburg, Tirol, Vorarlberg and Vienna).

Id.

127. *Id.* at 67–68.

128. *Id.* at 68.

129. *Id.* at 69.

130. *Id.* at 79.

131. *Id.*

132. STATISTIK AUSTRIA STATISTISCHE JAHRBUCH ÖSTERREICHS 2005 [STATISTICAL YEARBOOK OF AUSTRIA 2005] 459–60, available at http://www.statistik.at/jahrbuch_2005/pdf/k35.pdf (last visited Feb. 3, 2006)

133. *Id.*

Year	Number of cases filed	Number of Judgments	Cases pending from prior term
1985	1,358	1,853	1,443
1990	4,554	2,252	976
1995	5,762	5,639	1,879
2000	2,789	2,902	1,742
2001	2,261	2,706	1,629
2002	2,569	2,594	1,884
2003	2,217	2,122	1,159

2. Germany

The German Federal Constitutional Court was created in 1949 and, unlike the Austrian model, is part of the judiciary.¹³⁴ Known as “the supreme guardian of the Constitution,”¹³⁵ the German Federal Constitutional Court’s jurisdiction is mainly based on abstract judicial review, diffuse judicial review and constitutional complaints.¹³⁶ As for the abstract judicial review procedures, the federal government, state governments, or one-third of the members of the *Bundestag*¹³⁷ may file a petition directly to the German Federal Constitutional Court challenging “the compatibility between a federal and a state law or between these laws and the Basic Law” without an actual dispute.¹³⁸ The concrete judicial review “arises out of an ordinary law suit, when a court is convinced that a federal or a state law, on the basis of which the case must be decided, is unconstitutional.”¹³⁹ In this particular procedure, whenever lower court judges conclude that a statute is incompatible with the Basic Law, they must certify the case to the Constitutional Court, which will decide whether the law is unconstitutional.¹⁴⁰ Established in 1969, the constitutional complaint “can be lodged by any person asserting a violation by a public authority of either basic rights or certain other

134. GRUNDGESETZ [GG] [Constitution] art. 92 (F.R.G.).

135. BREWER-CARIAS, *supra* note 112, at 71.

136. Wolfgang Zeidler, *The Federal Constitutional Court of the Federal Republic of Germany: Decisions on the Constitutionality of Legal Norms*, 62 NOTRE DAME L. REV. 504, 505–06 (1987).

137. *Bundestag* is the Lower House of the German Parliament.

138. Christine Landfried, *Constitutional Review and Legislation in the Federal Republic of Germany*, in CONSTITUTIONAL REVIEW AND LEGISLATION: AN INTERNATIONAL COMPARISON 152 (Christine Landfried ed., 1988).

139. *Id.*

140. Zeidler, *supra* note 136, at 505.

constitutional rights However, available legal recourse must be exhausted prior to any such review by the Federal Constitutional Court.”¹⁴¹ All decisions of the Constitutional Court, no matter which procedure is chosen, have binding effect.

The constitutional complaint is overwhelmingly the most utilized mechanism to access the constitutional jurisdiction and it is responsible for around ninety-five percent of all constitutional cases filed.¹⁴² Nevertheless, successful complaints reach around one percent of the outcomes.¹⁴³ For manifestly inappropriate complaints, that is to say, if there is an abuse of process, the Constitutional Court may require fees of up to 2,600 Euros.¹⁴⁴ The number of filings before the German Federal Constitutional Court is relatively stable, as statistics below demonstrate:

TABLE 4
THE GERMAN FEDERAL CONSTITUTIONAL COURT¹⁴⁵

Year	Number of Cases filed	Number of Judgments
1995	5,911	5,064
1996	5,246	5,194
1997	5,078	5,006
1998	4,783	4,999
1999	4,885	5,207
2000	4,831	5,241
2001	4,620	4,814
2002	4,692	4,715
2003	5,200	4,735
2004	5,589	5,612

141. *Id.* at 506.

142. Landfried, *supra* note 138.

143. *Id.*

144. Gesetz über das Bundesverfassungsgericht [Bundesverfassungsgerichtsgesetz] (BVerfG) [Law of the federal Constitutional Court], Mar. 12, 1951, BGBl.1 at 243, § 34, last amended by Gesetz, Dec. 15, 2004, BGBl.1 at 3396 (F.R.G.), available at <http://bundesrecht.juris.de/bverfgg/> (last visited Jan. 10, 2006).

145. Aufgaben, Verfahren und Organisation des Bundesverfassungsgerichts, Statistik für das Geschäftsjahr 2004 [Tasks, Procedures and Organization of the Federal Constitutional Court, Statistics for the Financial Year 2004], available at <http://www.bverfg.de/text/deutsch/organisation/statistik.2004/index.html> (last visited Jan. 20, 2005).

3. Italy

After World War II, the Italian Constitution of 1948¹⁴⁶ created the Italian Constitutional Court as an independent organ outside the judiciary in charge of balancing the other organs of the state.¹⁴⁷ As article 134 of the Italian Constitution states, the Constitutional Court has jurisdiction over

disputes concerning the constitutionality of laws and acts with the force of law adopted by states or regions; conflicts arisen over the allocation of powers between branches of government within the state, between the state and regions, and between regions; on accusations raised against the president in accordance with the constitution.¹⁴⁸

The Constitutional Court also passes judgment on the acceptance of abrogative referenda.¹⁴⁹

The Italian Constitutional Court jurisdiction combines abstract and concrete judicial review.¹⁵⁰ Unlike the German Federal Constitutional Court, the Italian Constitutional Court does not accept any individual appeals directly from any citizens nor from parliamentary groups.¹⁵¹ The direct judicial review is restricted to the government of the Republic and of the Regions. Article 127 of the Italian Constitution states:

The Government may submit the constitutional legitimacy of a regional law to the Constitutional Court within sixty days from its publication, when it deems that the regional law exceeds the competence of the Region.

146. Costituzione (COST.) art. 134 (Italy 1948). Even though the Italian Constitution created the Constitutional Court in 1949, the Court began its activities in 1956 only. See Michele Santoni & Francesco Zucchini, *Veto Players and the Constitutional Court: the Italian Case* 16 (2001), available at <http://polis.unipmn.it/epcs/papers/santoni.pdf>.

147. BREWER-CARIAS, *supra* note 112, at 121–22.

148. COST. art. 134.

149. Louis Favoreu, *supra* note 116, at 118. Article 75 of the Italian Constitution states:

A popular referendum shall be held to abrogate, totally or partially, a law or an act having the force of law, when requested by five hundred thousand electors or five regional councils. A referendum is not permitted in the case of tax, budget, amnesty and pardon laws, in authorization or ratification of international treaties. All citizens eligible to vote for the Chamber of deputies have the right to participate in referendums. The proposal subjected to referendum is approved if the majority of those with voting rights have voted and a majority of votes validly cast has been reached. The law establishes the procedures for conducting a referendum.

COST. art. 75.

150. Alessandro Pizzoruso, *Constitutional Review and Legislation in Italy*, in CONSTITUTIONAL AND LEGISLATION: AN INTERNATIONAL COMPARISON 114 (Christine Landfried ed., 1988).

151. *Id.*

A Region may submit the constitutional legitimacy of a State or regional law or measure having the force of law to the Constitutional Court within sixty days from its publication, when it deems that said law or measure infringes upon its competence.¹⁵²

The indirect or “certified” judicial review depends on the initiative of any ordinary judge who, “acting on his own initiative or on a motion from one of the parties,” suspends the judgment of a case brought before him in which there is a relevant or not manifestly unfounded constitutional challenge to a law or enactment of parliament having force of law, and sends this question to the Constitutional Court.¹⁵³ Ordinary judges may exercise constitutional adjudication of the normative acts which do not have force of law.¹⁵⁴ Indeed, the Italian system is concentrated in relation to statutes and acts with force of law, and it is diffuse in reference to lower hierarchy norms. When the Constitutional Court declares a law unconstitutional, its decision has binding effect.¹⁵⁵ If the Court rejects the argument of unconstitutionality, the decision is *inter partes*; therefore the same question can be raised again, but not by the same judge.

Although its jurisdiction embraces four different functions, the Italian Constitutional Court workload is predominately related to the constitutional validity of laws. As Alfonso Celotto explains, on a rough average the Italian Constitutional Court delivers 500 decisions per year, of which around eighty-five percent refer to constitutional judicial review.¹⁵⁶ About eighty percent of the Court’s total work load consists of indirect judicial review, while five percent is comprised of direct judicial review.¹⁵⁷ The following table shows the number of decisions issued by the Court:

152. COST. art. 127.

153. Pizzorusso, *supra* note 150, at 114–15.

154. Tania Groppi, *A Justica Constitucional em Itália* [*The Constitutional Justice in Italy*], SUB JUDICE 20/21, 71–77 (2002).

155. Pizzorusso, *supra* note 150, at 121.

156. ALFONSO CELOTTO, LA CORTE COSTITUZIONALE [THE CONSTITUTIONAL COURT] 51–52 (Il Mulino 2004).

157. *Id.*

TABLE 5
THE ITALIAN CONSTITUTIONAL COURT¹⁵⁸

Year	Number of Judgments	Year	Number of judgments	Year	Number of Judgments
1956	34	1972	224	1988	1165
1957	129	1973	189	1989	607
1958	83	1974	301	1990	583
1959	69	1975	251	1991	521
1960	75	1976	275	1992	499
1961	79	1977	168	1993	509
1962	127	1978	87	1994	493
1963	174	1979	156	1995	542
1964	120	1980	197	1996	437
1965	101	1981	205	1997	471
1966	130	1982	266	1998	471
1967	156	1983	377	1999	471
1968	143	1984	309	2000	592
1969	166	1985	387	2001	447
1970	205	1986	319	2002	536
1971	210	1987	641	2003	382

4. France

In France, the Constitutional Council is the organ in charge of constitutional review.¹⁵⁹ The name of this organ in itself, instead of “court” or “tribunal,” shows that the intention of the 1958 French Constitution drafters was to terminate the parliament hegemony while avoiding the establishment of a proper constitutional adjudication as other European countries were developing at that time.¹⁶⁰ As for its creation, the Constitutional Council reviewed formal aspects of laws, such as whether the legislative process was correct and whether the division of competences between the Parliament and the Executive was respected.¹⁶¹

158. *Id.*

159. Louis Favoreu, *The Constitutional Council and Parliament in France*, in CONSTITUTIONAL REVIEW AND LEGISLATION 88 (Christine Landfried ed., 1988).

160. Dominique Rousseau, *Do Conselho Constitucional ao Tribunal Constitucional?* [From the Constitutional Council to the Constitutional Tribunal?], in SUB JUDICE 20/21, 65–70 (2002).

161. *Id.*

In 1971, the Constitutional Council broadened its power of judicial review in the famous *Associations Law Decision*,¹⁶² by which it struck down a bill on the merits that it limited the freedom of association, and therefore assumed its role as “institutional guardian of fundamental rights against infringement by challenged legislation.”¹⁶³

Constitutional jurisdiction in France is *a priori* and in abstract, that is to say, judicial review is exercised over the text of bills before their promulgation.¹⁶⁴ In this system, once an enactment of Parliament is promulgated, it cannot be challenged. The French Constitution commands that “Institutional Acts, before their promulgation, and the rules of procedure of the parliamentary assemblies, before their entry into force, must be referred to the Constitutional Council, which shall rule on their conformity with the Constitution.”¹⁶⁵ As for ordinary statutes and international treaties, they are not under the mandatory jurisdiction of the Constitutional Council; those normative acts may or not be referred to the Constitutional Council before their promulgation.¹⁶⁶ In any case, once a request is submitted, “the Constitutional Council must rule within one month” or eight days “if the matter is urgent.”¹⁶⁷

If an international commitment is declared unconstitutional, authorization to ratify it can only be given after an amendment of the Constitution.¹⁶⁸ “When a bill is declared unconstitutional, it may not be promulgated nor enter into force, and the decision of the Constitutional Council is binding to all administrative or jurisdictional authorities.”¹⁶⁹ The standing for submitting a request before the Constitutional Council is limited to the President of the Republic, the Prime Minister, the President of the National Assembly, the President of the Senate, and sixty deputies or sixty senators.¹⁷⁰ Other than constitutional adjudication, the

162. CC decision no. 71-44DC, July 16, 1971, Rec. 29.

163. DORSEN, *supra* note 113, at 130.

164. La Constitution (CONST.) art. 61 (Fr. 1958).

165. CONST. art. 61.

166. *Id.* art. 61.

167. *Id.*

168. *Id.* art. 54.

169. BERNARD POUILLAIN, LA PRATIQUE FRANÇAISE DE LA JUSTICE CONSTITUTIONNELLE [THE FRENCH PRACTICE OF THE CONSTITUTIONAL JUSTICE] 27 (1990).

170. Marie-Claire Ponthoreau & Jacques Ziller, *The Experience of the French Conseil Constitutionnel: Political and Social Context and Current Legal-Theoretical Debates*, in CONSTITUTIONAL JUSTICE, EAST AND WEST, DEMOCRATIC LEGITIMACY AND CONSTITUTIONAL COURTS IN POST-COMMUNIST EUROPE IN A COMPARATIVE PERSPECTIVE 124–25 (Wojciech Sadurski ed., 2002). Another important development of the constitutional jurisdiction in France took place in 1974, when the standing for referring bills to the Constitutional Council was broadened to include sixty deputies or sixty senators. JOHN A. ROHR, FOUNDING REPUBLICS IN FRANCE AND AMERICA, A

Constitutional Council is in charge of ensuring the proper conduct of referendum proceedings¹⁷¹ and of presidential, deputy, and senatorial elections.¹⁷² The statistics below show decisions taken by the Constitutional Council, including those related to elections and referenda.

TABLE 6
THE FRENCH CONSTITUTIONAL COUNCIL¹⁷³

Year	Number of decisions	Year	Number of Decisions
1958	30	1982	30
1959	124	1983	33
1960	22	1984	23
1961	22	1985	28
1962	22	1986	65
1963	95	1987	26
1964	13	1988	126
1965	22	1989	36
1966	13	1990	27
1967	153	1991	28
1968	61	1992	40
1969	22	1993	823
1970	16	1994	38
1971	15	1995	75
1972	14	1996	66
1973	59	1997	153
1974	20	1998	324
1975	15	1999	32
1976	28	2000	43
1977	32	2001	45
1978	74	2002	173
1979	21	2003	49
1980	31	2004	49
1981	84		

STUDY IN CONSTITUTIONAL GOVERNANCE 143 (1995).

171. CONST. art. 60.

172. *Id.* arts. 58–59.

173. Les Cahiers du Conseil Constitutionnel [Books of the Constitutional Council] n° 18, 17 (2005), available at <http://www.conseil-constitutionnel.fr/Cahiers/cc18/tableau.pdf> (last visited Jan. 10, 2005).

IV. PRESENT POLITICAL SITUATION IN BRAZIL

The promulgation of the Federal Constitution of 1988 was a landmark in the consolidation of democracy in Brazil. After twenty years of military dictatorship, the National Constituent Assembly promulgated the Constitution to institute a democratic state “for the purpose of ensuring the exercise of social and individual rights, liberty, security, well-being, development, equality and justice as supreme values of a fraternal, pluralist and unprejudiced society, founded on social harmony and committed, in the internal and international orders, to the peaceful settlement of disputes.”¹⁷⁴ As the safeguard of the Federal Constitution, the SFC is one of the most relevant political institutions in Brazil and the escalating litigation reflects the active participation of society, particularly in defending fundamental rights and pleading for constitutional guarantees.

As democracy strengthens and legal reform heightens, an efficient judiciary is necessary to ensure the rule of law in changing times, while satisfactorily responding to public demand. An expeditious judiciary is also fundamental for enhancing economic development.¹⁷⁵ The Brazilian economist Armando Pinheiro measured the economic impact of the malfunctioning of the Brazilian judiciary and concluded that “for the [Brazilian] population in general, slowness is the biggest, if not the only, defect of the Brazilian judicial system.”¹⁷⁶ His research also suggests that “a significant improvement in the performance of the judiciary in . . . Brazil would result in increases of 13.7%, 10.4% and 9.4% respectively in levels of production, investment and employment.”¹⁷⁷

Pinheiro’s economic analysis of the judiciary asserts that “[t]he judiciary is one of the institutions whose importance for the proper functioning of a market economy, guaranteeing property rights and enforcing contracts, has only recently been fully recognised.”¹⁷⁸ The

174. C.F. pmb1.

175. Nelson Humberto Martinez, *Rule of Law and Economic Efficiency*, in JUSTICE DELAYED, JUDICIAL REFORM IN LATIN AMERICA 3–13 (Edmundo Jarquín & Fernando Carrillo eds., 1998). This article highlights the importance of effective judicial systems and legal order that not only guarantee respect for individual and collective rights and liberties, but that also ensure the success of the economic reforms in the countries of the regions. The lack of a solid and effective legal framework has a negative impact on investment, savings, and transaction costs, which makes judicial reform urgent. *Id.*

176. Armando Castelar Pinheiro, *Economics and Justice: Concepts and Empirical Evidence 7*, at http://www.ifb.com.br/english/documentos/castelarIngles17_10.pdf (last visited Jan. 7, 2006).

177. *Id.* at 2.

178. *Id.* at 1.

justification of judicial reform for improving development and business opportunities raises a lot of debate concerning political and ideological trends. Additionally, it raises serious doubts about the economical assessment of the situation. As Pinheiro points out:

[t]he empirical analysis of the impact of the judiciary on economic performance is rendered difficult by the lack of good proxies for the quality of the judiciary and by the fact that this quality varies little over a period of time in a given country. Nonetheless some work has been carried out in an attempt to quantify this influence by means of the analysis of cross-sections of countries based on the principle of conditional convergence, in which it is assumed that the quality of the judiciary affects the equilibrium of the income per capita of countries and, above all, the rate of increase of GDP per capita. In general, these studies prove the relevance of the good functioning of the judiciary to economic development, even though the limitations of this methodology should not be ignored.¹⁷⁹

Albeit an economic analysis of the judiciary may be desirable, or even accurate, the urgency to address the irrational and dilatory nature of the current system of decentralized judicial review prevents this Article from deepening the economic debate as it should prevent any rational criticism from straying far from the issue of judicial reform.

Whether judicial reform enhances economic development, it is a national consensus that the judicial system should be restructured to respond to the increasing litigation demands that accompany the democratization of Brazilian society after the Federal Constitution of 1988. The extraordinary appellate jurisdiction of the SFC, which is the focus of this paper, has proven to be irrational, slow, and costly. The challenging question now is what measures should be taken to improve its structure to achieve a steadfast and well-organized jurisdiction.

A. New Government's Interest in Reforming the Judiciary

Judges, politicians, scholars, attorneys, and society as a whole agree that some constitutional reform of the judiciary has to be implemented. Article 60 of the Brazilian Federal Constitution describes the constitutional amendment process.¹⁸⁰ Proposals to amend the Federal Constitution must be initiated by either one-third, or more, of the members

179. *Id.* at 2.

180. C.F. art. 60.

of the Chamber or the Federal Senate, the President of the Republic, or more than one-half of the Legislative Assemblies of the units of the Federation.¹⁸¹ Each of these Legislative Assemblies must express itself by the relative majority of its members.¹⁸² The proposal must be discussed and voted upon in each House of the National Congress.¹⁸³ The voting takes place in two separate readings and will be considered approved with three-fifths of the votes in each reading.¹⁸⁴

Despite the unanimous support for reforming the judiciary, an abysmal disaccord arose when it came to deciding upon the measures to be taken to improve the system. The National Congress has been discussing judiciary reform since 1992. The legislative proposal¹⁸⁵ for amending the Constitution regarding the judiciary initiated in the Chamber of the Deputies,¹⁸⁶ which passed a substitutive proposal that was remitted to the Federal Senate for discussion in June 2000.¹⁸⁷ With some amendments offered by the Commission of Constitution and Justice and by the Senate Plenary, reporting Senator, Bernardo Cabral, submitted the final proposal for deliberation of the Senate Plenary in the Session of December 4, 2002.¹⁸⁸ However, the then opposition, which is currently the leftist ruling party,¹⁸⁹ managed to postpone the proposal's consideration to the new legislative term, starting in February 2003, which would consist of a newly elected Chamber of Deputies and a two-thirds renovated Senate, as well as a new President of the Republic.¹⁹⁰

The new government introduced many changes in the political landscape. At the federal level, the Minister of Justice, Marcio Thomaz Bastos, announced the creation of a Secretariat of Judicial Reform directly subordinate to him.¹⁹¹ The Minister made clear that he wanted a radical

181. *Id.*

182. *Id.*

183. *Id.*

184. *Id.*

185. PEC 96/92. PEC is the abbreviation of "Proposta de Emenda à Constituição" (Constitutional Amending Proposal).

186. C.F. arts. 44–45. The Legislative Power is exercised by the National Congress, which is composed of the Chamber of Deputies and the Federal Senate. The Chamber of Deputies is composed of representatives of the people, elected, by the proportional system, in each state, territory and in the Federal District. *Id.*

187. PEC 29/2000.

188. Requerimento n.693, em 04/12/2002, para o adiamento da votação [Request no. 693 on Dec. 4, 2002, for postponement of vote]. See Tramição de Matérias (Proposições) [Status of Subject Matters (Bills)], available at http://www.senado.gov.br/sf/atividade/materia/detalhes.asp?p_cod_mate=44577.

189. Partido dos Trabalhadores–PT [Worker's Party].

190. In 2003, general elections were held in Brazil in the federal and state levels.

191. The National Secretariat of the Reform of the Judiciary aims to elaborate a new proposal for

reform in the justice administration and a radical review of the amendment proposed by the National Congress.¹⁹² On several occasions, he expressed his firm position against the binding effect of SFC's decisions. He declared that the *Súmula Vinculante* would immobilize the first instance judges and sterilize the judiciary.¹⁹³ He also said that this mechanism would implement the dictatorship of the SFC.¹⁹⁴ Indeed, the Minister of Justice considered judiciary reform one of the government's highest priorities while he opposed the existing proposal.

The creation of the Secretariat for Judicial Reform caused unease and tension between the legislature and the judiciary. The executive actions outraged the Congress' opposition parties because it disregarded the constitutional amendment proposal taking place in the Senate, undermining Congress' prerogatives to negotiate and legislate, not to mention all the work that had already been done, such as public addresses, amendments, and debates.

The judiciary disclaimed the fact that an unknown subordinate of an Executive Ministry would be in charge of such a crucial and intricate reform with members of the judiciary and Congress. The President of the SFC, Minister Maurício Corrêa, declared the creation of the Secretariat of Judiciary Reform "nonsense" and a "discourtesy,"¹⁹⁵ while the President of the Superior Labor Court declared it an "excrescence."¹⁹⁶ The lack of

the judiciary reform to send to the Congress. Decree 4.685/2003 defines the attributions of the Secretariat as:

I—to formulate, promote, supervise and coordinate the processes of modernization of the administration of the Brazilian justice, through articulation with the other federal bodies, the Judiciary Power, the Legislative Power, Public Prosecutors, State governments, international agencies and civil society organizations;

II—to orientate and coordinate actions towards the adoption of improvement measures of the judiciary's services provided to citizens;

III—propose measures and examine the Brazilian judiciary reform' proposals; and

IV—to direct, negotiate and coordinate studies related to the activities of reform of the Brazilian justice.

Decreto No. 4.685, de 29 de abril de 2003, D.O.U. de 30.04.2003 (Braz.).

192. Press Release of Ministry of Justice, *Criada a Secretaria de Reforma do Judiciário* [National Secretariat of Judicial reform is Created], Apr. 30, 2003, available at <http://www.mj.gov.br/noticias/2003/abril/RLS300403=serjud.htm>.

193. Press Release of Ministry of Justice, *Ministro Rejeita Súmula Vinculante em Audiência no Senado*, [Minister rejects binding "Súmula" in Public Audience at the Senate], Feb. 10, 2004, available at http://www.mj.gov.br/noticias/2004/Fevereiro/rls100204-ministro_rejeita_s%C3%BAmula_vinculan.htm (last visited Oct. 14, 2005).

194. *Id.*

195. Severino Gomes, *Maurício Corrêa volta a criticar duramente o governo* [Maurício Corrêa strongly criticizes the government again], CONSULTOR JURÍDICO, Oct. 16, 2003, available at <http://conjur.uol.com.br/textos/22289/> (last visited Oct. 14, 2005).

196. Luiz Orlando Carneiro, *Francisco Fausto: É uma Excrescência*, [Francisco Fausto: It is an

legitimacy of this Secretariat to promote any coordination was self-evident. As a result, instead of converging discussion and bringing solutions, this body exacerbated the existing fissures between the political powers.

Controlled by the government's party, the Chamber of Deputies, created a Commission for the Judiciary Reform in June 2003.¹⁹⁷ The Commission scheduled several public audiences with judges, scholars, and civil society.¹⁹⁸ This Commission manifested the government's intention of reinitiating all proceedings and deliberations over the subject matter.

Meanwhile, Lula's government had been pushing for congressional legislation on tax reform and pension reform, which both succeeded.¹⁹⁹ The present administration is definitely committed to implementing structural reforms in many areas of the Brazilian State. Despite all of the controversy and dissent, there is space and political will to materialize reforms. Therefore, this is the right time to discuss, explain, and prove the best solutions to optimize the judiciary. The key in addressing the major deficiency of the Brazilian judiciary—its delay in rendering final judicial decisions—lies within the SFC's extraordinary appellate jurisdiction.

V. NEWLY-ENACTED CONSTITUTIONAL AMENDMENT 45

For more than ten years, Congress discussed judiciary reform while promoting public hearings, presenting innumerable amendments to the original proposal, and listening to authorities and scholars of the judiciary as well as representatives of the Brazilian Bar Association and of public advocacy. At the end of 2004, the legislative proposal was finally voted

Excrescence], JORNAL DO BRASIL, in CLIPPING ELETRÔNICO DA ASSESSORIA DE COMUNICAÇÃO SOCIAL DO MINISTÉRIO DA JUSTIÇA [ELECTRONIC BULLETIN OF THE SOCIAL COMMUNICATION ADVISORY OF THE MINISTRY OF JUSTICE], Oct. 19, 2003, available at http://www.dpf.gov.br/DCS/clipping/outubro/CS%2019-10-2003%20_1_%20Edi_o_.htm#n17167 (last visited Oct. 14, 2005).

197. Regina Maria Groba Bandeira, Consultoria Legislativa da Câmara dos Deputados, Reforma do Judiciário-Aspectos Relevantes em Discussão no Congresso Nacional [Legislative Consultancy of the Chamber of the Deputies, Judiciary Reform—Relevant Aspects in Discussion in the National Congress] 11, Sept. 2003, available at <http://www.camara.gov.br/internet/diretoria/Conleg/estudios.asp> (last visited Jan. 10, 2006).

198. Agenda de Reuniões da Comissão Especial de Reforma do Judiciário da Câmara dos Deputados [Schedule of Meetings of the Special Commission for the Judiciary Reform of the Chamber of Deputies], available at <http://www2.camara.gov.br/comissoes/temporarias/especial/refjudic> (last visited Jan. 10, 2006).

199. After a meeting in February 2003, the newly inaugurated President of Brazil and the governors of all Brazilian states announced that tax reform and pension reform were priorities to the sustainable development of the country. See Carta de Brasília [Statement of Brasília], available at http://www.radiobras.gov.br/integras/03/integra_240203_1.htm (last visited Jan. 10, 2006).

and promulgated.²⁰⁰ In December 2004, Congress enacted Constitutional Amendment 45, bringing about several changes in the judiciary.²⁰¹

Constitutional Amendment 45, however, does not address the structural problems of the judiciary in-depth and does little to ensure a less time-consuming system. As far as it concerns the extraordinary appellate jurisdiction of the SFC, Constitutional Amendment 45 introduces three main points: the insertion of the doctrine of binding precedent, the creation of a requirement of general repercussion for the admission of extraordinary appeals, and the addition of a hypothesis of extraordinary appeal.²⁰²

A. *The Doctrine of Binding Precedent*

Constitutional Amendment 45 states that the SFC may, *ex officio*, or upon initiative by two-thirds of its members after reiterated decisions on the same matter, approve a *Súmula* with binding effect to all other judiciary bodies and the federal, state, and municipal public administration—it may also revise or cancel it as established by statutory law.²⁰³

The *Súmula* resolves the validity, interpretation, and efficacy of the rules which are the object of disagreement among judicial bodies and between these and the public administration that brings on serious juridical insecurity and the relevant multiplication of suits concerning identical issues.²⁰⁴ Known as *Súmula Vinculante*, this mechanism implements the doctrine of binding precedent specifically for SFC decisions.²⁰⁵ Constitutional Amendment 45 does not extend the *stare decisis* principle to any other court nor to indiscriminate rulings of the SFC.²⁰⁶

200. See Press Release of Agência Senado [Senate Press Agency], Congresso Promulga Reforma do Judiciário [Congress Promulgates Judicial Reform], Dec. 6, 2004, available at <http://www.senado.gov.br/agencia/verNoticia.aspx?codNoticia=42805¶metros=reforma+do+judiciario> (last visited Jan. 10, 2006).

201. C.F. amend 45.

202. *Id.* There are some superficial changes on the original jurisdiction and the abstract constitutional adjudication, but these changes are not subject of discussion in this paper because they function reasonably well.

203. *Id.*

204. Parecer nº 538, de 2002 da Comissão de Constituição, Justiça e Cidadania sobre a Proposta de Emenda à Constituição 29, de 2000 (nº 92/96, na Câmara dos Deputados), relator Senador Bernardo Cabral [Report number 538, year 2002, of the Commission of Constitution Justice and Citizenship about the Constitutional Amending Proposal 29, year 2000 (number 92/96, at the Chamber of Deputies), reporting Senator Bernardo Cabral].

205. C.F. amend 45, art. 103-A.

206. C.F. amend 45.

As can be observed from the different models of judicial review above, constitutional adjudication exercised by the highest judicial body or by a specialized court is assimilated with the concept of the binding effect of decisions.²⁰⁷ Even in Brazil, the binding effect of SFC decisions was not a novelty because it was implemented in the centralized judicial review jurisdiction. The open debate in the Brazilian political arena regarding the binding effect of the *Súmula* did not focus on the limitation of the legislative and executive by the judiciary, however. It focused on the relation between the power of ordinary judges and the SFC, the highest judicial body in the Brazil. One of the main arguments against the binding effect of the *Súmula* held that all judges should be independent to judge according to their consciousness and convictions and be able to diverge from the *Súmula* and plead its revocation.²⁰⁸ Should this argument hold true, then the question is: What are the costs of this freedom of consciousness among judges? And, most importantly, who is paying the price? The “right” of an ordinary judge to dissent from the *Súmula* is harmful to the party favored by the SFC ruling, be it a citizen, the government, or a corporation.²⁰⁹ It stimulates the opposite party to litigate for a right that will eventually be denied much later, causing false expectations and future frustration, and prolonging an already lost case. It also harms the judiciary, which ends up being discredited and distrusted because of inconsistent decisions and disregard of previous SFC rulings. The function of the judiciary is to settle controversies in society and not to serve as a venue for academic debates and judges’ repeated dissent. The

207. The only exception that could be argued is the *inter partes* effect when the Italian Constitutional Court rejects an argument of unconstitutionality. However, I see this provision as an observance of the presumption of constitutionality of laws and therefore, not as a reluctance to give the decisions a binding effect.

208. Evandro Lins e Silva, *Crime de Hermenêutica e Súmula Vinculante [Crime of Hermeneutics and Binding Súmula]*, available at <http://campus.fortunecity.com/clemson/493/jus/m05-011.htm> (last visited Oct. 14, 2005).

209. Pinheiro states that

[c]ompanies, individuals and judges themselves single out slowness as being the principal problem of Brazilian justice. Research carried out amongst companies by the Institute of Economic, Social and Political Studies of São Paulo (IDESP) shows that their lawsuits take 31, 38 and 46 months, on average, to reach a decision in the Labour, State and Federal courts. However, companies have an ambivalent relationship with the slowness of the judicial system. For the delay in obtaining a decision is not always prejudicial to companies: in the IDESP research, a quarter of them pointed out, for example, that slowness in labour lawsuits is beneficial to them. The other side of the coin in such a position is the fact that many of the case which reach the courts every year, thus contributing to its slowness, are not seeking to defend rights but to exploit this very slowness as a means of putting off fulfillment obligations.

Pinheiro, *supra* note 176, at 1–2.

independence of the judiciary should reflect a guarantee for the people and not a privilege of a judicial class.²¹⁰ In fact, this so-called “independence” proved a disservice not only to the parties in litigation but also to the entire society and democratic institutions.

Not surprisingly, the Brazilian Bar Association²¹¹ vehemently opposed the binding effect of the *Súmula*. It campaigned against this device claiming that the *Súmula* would immobilize the judiciary and the law.²¹² Nonetheless, one should keep in mind that lawyers benefit from the “judge’s right to dissent” regardless of the party they represent, because it increases litigation. The binding impact will affect demand for lawyers’ services by reducing litigation time. It is emblematic that the Minister of Justice, Mr. Bastos, a very successful lawyer who left private practice to join the current government, said that the binding effect would create “the dictatorship of the SFC in Brazil, because the *Súmula* would have more force than a statute.”²¹³ However, this is a rhetorical argument because the Constitution has more force than a statute, and the SFC, as a guardian of the Constitution, must interpret statutes in light of the Constitution, whether its decisions have binding effect or not. Disrespecting the constitutional interpretation given by the SFC undermines the basis of constitutionalism itself.

Apart from the sectarian interests of the Bar Association, the underlying question about the binding effect of the *Súmula* involved the struggle of power between the executive and the judiciary. The binding

210. Ellen Gracie Northfleet, *Ainda Sobre o Efeito Vinculante* [Still on the Binding Effect], in REVISTA DE INFORMAÇÃO [LEGISLATIVA LEGISLATIVE INFORMATION REVIEW] 133–34 (1996).

211. Ordem dos Advogados do Brasil (OAB).

212. The President of the Brazilian Bar Association, Rubens Approbato, declared in the Public Audience of the Special Commission of the Judiciary Reform of the Chamber of Deputies on July 9, 2003 that with the binding effect

we would not need judges anymore, since we would not need convincedness anymore. We finish with the intelligence, with the creativity, with the evolution of something living, which is called the law. The great scientific and juridical innovations in this country were born from the creativity and inconformism of repetitive decisions that not always are the fairest. Therefore, creating this kind of plastering of idea would not be ideal, because it plasters not only the judge, but also all of us. We, lawyers, are the ones who create the jurisprudence by means of our creativity and of our intelligence. We study the facts in relation to the juridical content and match these two things to present them, sometimes, in a new way, showing that it cannot be what has been done.

Câmara dos Deputados, Comissão de Reforma do Judiciário, Audiência Pública n.º 0945/03 [Chamber of Deputies, Commission of Reform of the Judiciary, Public Hearing no. 0945/03], at 12, available at <http://www.camara.gov.br/internet/Comissao/index/esp/reformadojudiciarioint090703.pdf> (last visited Oct. 14, 2005).

213. Denise Rothenburg, *Bastos Ataca “Ditadurá” do STF* [Bastos Attacks “Dictatorship” of SFC], CORREIO BRAZILIENSE, Feb. 11, 2004, available at <http://clipping.planejamento.gov.br/Noticias.asp?NOTCod=104980> (last visited Jan. 10, 2006).

effect, as Constitutional Amendment 45 establishes, applies not only to the judiciary, but also to the federal, state, and local governments. The government is the main client and one of the greatest beneficiaries of delayed justice. Let us consider the example of the Severance-Pay Fund. If a governmental policy provokes thousands of lawsuits by affected citizens, it would take years to have a final decision, with the likelihood that those responsible for the policy will not be in office anymore. Therefore, politicians benefit from the procrastination of executing an eventually unfavorable decision, not only because the real costs will be paid by their successors but also because the political setback and accountability involved in the SFC's ruling of unconstitutionality of a given governmental policy will be diluted or even innocuous as time passes. As for the government successors, they can easily blame the previous administration for an unconstitutional governmental policy and thus avoid taking personal responsibility for it.

It is true that the binding effect concentrates power in the SFC, but it does not necessarily restrain the independence of the judiciary. Before the binding effect, the SFC had to apply its decision to each of the thousands of identical cases, after deciding a constitutional controversy in one leading case. Therefore, it was "impossible to support that cases of this nature should continue congesting the judiciary and covering its several instances in the almost interminable succession of appeals at the parties disposition by the procedural legislation. No progress in legal thought will result from the judgment of those cases."²¹⁴ In addition, the costs to Brazilian society outweigh any justification for the argument because it would take ten or more years of litigation until a case is finally disposed of, causing perplexity and distrust about the judiciary.²¹⁵

By enacting Constitutional Amendment 45, Congress furnished the *Súmula* with a binding effect to promote stability and disburden the citizens from pleading their cases to the SFC in order to have its ruling applied. However, the binding effect of the *Súmula*, as established by Constitutional Amendment 45, is very limited and likely to be inefficient. It requires a minimum approval quorum of two-thirds of the SFC members and is limited to constitutional controversies that imply serious legal uncertainty and relevant multiplication of lawsuits of identical

214. Northfleet, *supra* note 210, at 133.

215. To use the mentioned Severance-Pay Fund controversy as an example, the several economic plans challenged were issued in 1987, 1989, 1990, and 1991. The SFC judgment was held in the year 2000, and the public advocacy pleaded desistance of cases in 2002.

questions.²¹⁶ As a result, controversies that do not have the potential to cause innumerable lawsuits will not have binding effect.

One may argue that the binding effect of the *Súmula* is unnecessary because the majority of the Brazilian judges comply with the decisions of the SFC. It is true that most judges follow the jurisprudence of the SFC. Nevertheless, without the binding effect, the Brazilian judicial system would encourage losing parties to litigate in an attempt to reverse the unfavorable decision despite the unlikelihood of success, or to postpone the execution of unfavorable rulings or statutes. In fact, without such a binding effect, the judiciary loses credibility and appears to promote delayed justice. Albeit limited, the binding effect is an advancement in the promotion of steadfast justice and legal safety.

B. General Repercussion for the Admission of Extraordinary Appeals

The second main point of Constitutional Amendment 45 is the insertion of a requirement of admissibility of the extraordinary appeal, in which the appellant must demonstrate the general repercussions of the constitutional controversy raised in his case, authorizing the SFC to refuse the extraordinary appeal by two-thirds of its members.²¹⁷ This new requirement is clearly inspired by the *writ of certiorari* of American law, by which the highest courts have discretionary power to render decisions only on cases involving legal questions of general importance.

With this new mechanism, the SFC will be able to refuse to review inconsequential cases by two-thirds of its members, with criteria that Congress shall regulate by an ordinary statute. Although inspired by the experience of the United States Supreme Court, which has been very successful in controlling its docket,²¹⁸ the Brazilian transplant contains substantial modifications that leave little to compare with its paradigm. The main purported objective of the device is to allow the SFC to exercise a discretionary rather than a mandatory judicial review by filtering which cases it will hear. The new system is, however, likely to become more complex and restrained since it will be regulated by statute.

216. C.F. amend. 45.

217. *Id.*

218. Even in the United States Supreme Court, the expansion of caseload can be noted: in the 2002 term, the Court disposed of 8,342 cases and 1,152 remained on the docket, whereas in the 1990 term, the Court disposed of 5,412 cases and 904 remained on the docket. *Statistics*, 117 HARV. L. REV. 486, n.h (2003) (“The total number of cases disposed of by the Court is the highest since the *Harvard Law Review* began compiling these statistics during the 1948 Term.”). *Id.* For more information on the increase in the workload of the United States Supreme Court, see POSNER, *supra* note 75, at 74–75.

This requirement for admission of extraordinary appeals revives a previous “relevant federal issue” mechanism,²¹⁹ by which the SFC, due to its increasingly growing caseload, filtered the cases brought before it during the period between 1975 and 1988 based on the relevance of the federal controversy.²²⁰ Because this earlier mechanism was implemented during the military dictatorship,²²¹ it has been argued that discretionary jurisdiction based on the “general repercussion of the constitutional controversy” is an undemocratic and highly restrictive instrument because it prevents citizens from having access to the SFC.²²² Despite the era in which it was implemented, this mechanism of a relevant federal issue was designed by a commission of Justices of the SFC to cope with an overly burdensome caseload, not by any authoritarian guidance.²²³

Nevertheless, the requirement of “general repercussion of the constitutional controversy” for the admissibility of extraordinary appeals, as the Constitutional Amendment 45 establishes, is not an advancement that promotes steadfast justice and legal safety. Despite its admirable intentions of imposing a relevance test onto extraordinary appeals, this mechanism does not address the core problem of the caseload of the SFC, which has a docket of approximately 100,000 cases a year.²²⁴ In fact, the opposite effect will be obtained: because it requires the full Court to deliberate on whether to hear a case, this mechanism will burden the SFC instead of expediting the proceedings. Then, if the case is to be admitted, there must be another session in order to deliberate on the merits of the case. If the SFC has to decide a case, it is more efficient to do it fully without having a preliminary session on admissibility, which will only delay final decisions. Furthermore, it is important to note that repetitive

219. For more detailed historical information, see Nilson Vital Naves, *Panorama dos Problemas no Poder Judiciário e suas Causas—O Supremo, o Superior e a Reforma* [*Panorama of the Problems in the Judiciary Power and its Causes—The Supreme Court, the Superior Court and the Reform*], REVISTA CEJ n.13 (2001).

220. This mechanism was abolished with the advent of the Federal Constitution of 1988 due to the creation of the Superior Court of Justice, with jurisdiction on federal questions.

221. The right-wing military dictatorship in Brazil lasted from 1964 to 1984. See John P. Dickenson & Marshall C. Caitlin, *Brazil*, MICROSOFT ENCARTA ONLINE ENCYCLOPEDIA 2005, http://encarta.msn.com/text_761554342_1/Brazil.html (last visited Oct. 14, 2005).

222. See OAB: controle externo e quarenta deveriam ter âmbito ampliado [OAB: external control and quarantine should have their ambit extended] (Mar. 12, 2004), available at <http://www.oab.org.br/noticia.asp?id=1632> (last visited Oct. 14, 2005).

223. Justice Carlos Velloso, Speech at his Inauguration as President of the SFC (May 27, 1999), at <http://gemini.stf.gov.br/netahtml/discursos/posseVelloso.html> (last visited Oct. 14, 2005).

224. See *supra* note 58 and accompanying table. As seen in the table on the docket of the SFC, 105,307 cases were presented before the Court in 2000, 110,771 in 2001, reaching 160,543 filings in 2002, with a decrease in 2003 to 87,077 cases. Banco Nacional, *supra* note 1.

cases are analyzed by Justices' staff and summarily disposed of by the Justices. As a matter of fact, the insertion of this new requirement of "general repercussion of the constitutional controversy" for the admissibility of extraordinary appeals further complicates the procedures before the SFC instead of rationalizing them.

In addition, distinct from the American model, the SFC will not have full discretion on the decision-making process of refusing a case. Statutory law shall regulate how the SFC will proceed—probably inserting more requirements and procedures, which will overburden the Court with increasing complexity and foster delays.

C. Additional Hypothesis of Extraordinary Appeal

Surprisingly, Constitutional Amendment 45 adds one item to the existing three extraordinary bases for subject matter jurisdiction of the SFC. It provides that the SFC has jurisdiction to judge, on extraordinary appeal, cases decided in a sole or last instance, when the decision appealed declares valid a local law challenged against a federal law. This inclusion is based on the rationale that a dispute between a local law and federal law is a constitutional question since it is a conflict between members of the federation.²²⁵

Nevertheless, I believe this to be a minor theme that need not be included among the attributions of the SFC. The Amendment encumbers the SFC with an extra jurisdictional basis that is not fundamental for the interests of the nation. Indeed, the augmentation of grounds of admissibility of extraordinary appeals is inconsistent with rationalizing and decreasing the number of cases brought before the SFC. The SFC should be judging the most important national cases, not minor disputes between municipal and federal law.

VI. OTHER PROPOSALS TO REFORM THE BRAZILIAN SUPREME FEDERAL COURT

A. Constitutional Court

In response to the current deficiencies of the Brazilian system, an increasing number of jurists have advocated abolishing the United States-inspired decentralized judicial review in favor of a European-inspired constitutional court in which only one court is authorized to adjudicate

225. Bandeira, *supra* note 197, at 7.

constitutional matters,²²⁶ like the German or Austrian Constitutional Court. It is not surprising that this idea has been so widely explored by scholars: the European model of constitutional adjudication is rapidly expanding throughout the world.²²⁷ The dockets of those courts are very impressive. In 2002, the Austrian Constitutional Court received 2,569 cases,²²⁸ and the German Federal Constitutional Court received 4,692 filings.²²⁹ In fact, a constitutional court as the unique organ lodged with power of declaring an enactment of Congress unconstitutional permits the important issues to be adjudicated within a reasonable amount of time.

Polletti advocates transforming the SFC into a constitutional court whose decisions would have a binding effect, on the grounds that there has been a growing tendency of centralized judicial review in the Brazilian mixed system and some preoccupation about legal certainty.²³⁰ In his proposal, the argument of unconstitutionality raised in concrete disputes can only be certified to the constitutional court by courts of appeals, which would have the power to certify or defer the case to the constitutional court.

Remodeling the SFC into a constitutional court in the European model is a very appealing proposal because centralization would improve legal certainty and reliability. Lessig characterizes the centralized and decentralized judicial review systems by the determinateness of the rules produced.

For the cost of indeterminacy is magnified by decentralized judicial review: The more decentralized the system for applying rules, the more costly is any amount of indeterminacy. Costly, in just the sense that multiplying the rule appliers within a relatively

226. Ronaldo Rebello de Brito Polletti, Corte Constitucional Brasileira [Brazilian Constitutional Court], available at http://www.unb.br/fd/colunas_Prof/ronaldo_poletti/poletti_18.htm (last visited Oct. 14, 2005); Paulo San Martin, Presidente do STJ Pedu Corte Constitucional [President of the STJ asks for Constitutional Court], AGENCIA ESTADO, Dec. 17, 2001, available at <http://www.estadao.com.br/agestado/noticias/2001/set/17/280.htm> (last visited Oct. 14, 2005); *Advogados Aprovam Criação de Corte Constitucional* [Lawyers Approve Creation of Constitutional Court], REVISTA CONSULTOR JURÍDICO, Nov. 15, 2002, available at <http://conjur.uol.com.br/textos/14932/> (last visited Oct. 14, 2005); *OAB Apóia Sugestão de Mudança no Perfil do STF* [OAB Supports Suggestion of Profile Change of the SFC], REVISTA CONSULTOR JURÍDICO, Sept. 18, 2001, available at <http://conjur.uol.com.br/textos/6623/> (last visited Oct. 14, 2005).

227. Acknowledging the expansion of the European model of constitutional adjudication, see John E. Ferejohn, *Constitutional Review in the Global Context*, 6 N.Y.U. J. LEGIS. & PUB. POL'Y 49 (2002–2003).

228. See *supra* note 133 and accompanying table.

229. See *supra* note 145 and accompanying table.

230. See Polletti, *supra* note 226.

indeterminate legal culture will increase the incidence of inconsistency. And while for some issues, inconsistency will not much matter—for example, the inconsistency between two Fourth Amendment judgments of ‘reasonableness’—for some matters, inconsistency will be quite significant. In particular, when determining whether a law of Congress is constitutional, inconsistency among federal courts can be quite significant.²³¹

Even though there has been some tendency to concentrate judicial review at the SFC, and the problem of legal uncertainty has been addressed, the option of extinguishing the American model of decentralized judicial review seems unfeasible in Brazil’s current political and legal culture. As shown above, there has already been a lot of resistance to giving binding effect to the SFC rulings, owing to consensus about judges’ independence. Eradicating all judicial review power from judges outside the SFC is very unlikely to be accepted, not only by the juridical community but also by the population in general. Indeed, centralizing judicial review exclusively at the SFC would be a very reasonable proposal were it not so counter to Brazil’s current social and political context.

B. Stay of Proceedings

I defend giving the SFC power to issue provisional measures to stay the proceedings of identical cases in lower courts when the constitutional controversy has already been presented before the SFC. This is an efficient mechanism to apply when there is a multiplication of relevant lawsuits of identical concern, and has just been implemented by the SFC, although in a very limited ambit. The federal law 10,259 created small claims courts in the federal jurisdiction.²³² This statute established the possibility of cases originating in the federal small claims courts to be brought directly to the SFC by extraordinary appeal.²³³ It also provided the SFC with powers to establish the proceedings to judge such extraordinary appeals.²³⁴ In December 2003, the SFC amended its Internal Rules to adopt the proceedings for the filing of extraordinary appeals that originated in

231. Lawrence Lessig, *Translating Federalism: United States v. Lopez*, 1995 SUP. CT. REV. 125 (1996).

232. Decreto No. 10.259, de 12 de julio de 2001, D.O.U. de 12.7.2001.

233. *Id.*

234. *Id.*

federal small claims courts.²³⁵ The new rule states that the reporter may grant, *ex officio* or by request, a provisional measure to stay the proceedings until the SFC delivers its judgment on the subject matter.²³⁶ As a matter of fact, this procedure rationalizes in advance the possibility of a steep increase in the caseload with extraordinary appeals coming from the federal small claims courts.

One may argue that this mechanism could limit the full defense of the parties involved in the stayed cases. However, the SFC's Internal Rules clarify that once a stay of proceedings in the circumstances explained is granted, people who are not parties to the case before the SFC may file a brief on the constitutional controversy within thirty days.²³⁷ Therefore, it grants the possibility for others to manifest their arguments and positions to the SFC by ensuring that whoever wants to present a written reasoning may do so.

I advocate that this measure be extended to all extraordinary appeals, not only to those of federal small claims courts. It will rationalize the proceedings of the SFC by preventing repetitive lawsuits from reaching the SFC and piling up its docket with the same constitutional questions. Moreover, it will benefit the parties involved in identical cases by reducing the costs of their litigation. Mostly, it will reduce the delay in delivering final decisions of relevant cases because it contains a special and expedited procedure which places them in the docket with preference over all other cases, except habeas corpus lawsuits involving prisoners and writ of mandamus.²³⁸ Indeed, the extension of the possibility to stay the proceedings of identical cases in lower courts when the constitutional controversy has already been presented before the SFC will bring a crushing docket under control and reduce both the costs and the time of litigation.

VII. CONCLUSION

The study of the different models of judicial review disclosed the remarkable difference in the caseloads of the Brazilian SFC and the courts analyzed. The Brazilian SFC is by far the most overloaded court of all. In 2002, SFC's filings reached the alarming figure of 160,453, while in the

235. Emenda Regimental no. 12 [Internal Rules Amendment no. 12], D.J.U. de 17.12.2003.

236. Appeals are distributed to the justices, who are then called the "reporter" of each case that is assigned to him or her.

237. See Emenda Regimental no. 12, *supra* note 235.

238. *Id.*

United States Supreme Court, cases on the docket amounted to 9,406.²³⁹ As for Austria and Germany, the amount of filings before their respective Constitutional Courts attained 2,569 and 4,692 in 2002.²⁴⁰ In Italy, 536 decisions were rendered in the same year.²⁴¹ In the French Constitutional Council, the caseload for 2002 is emblematically low, amounting to 173 cases only, due to the restricted standing for request of constitutional review.²⁴² As a matter of fact, the contrast is striking. What mechanisms, if any, can be used to improve the Brazilian decentralized judicial review?

To create an effective judiciary and disencumber the SFC of its immense number of claims, which overload the docket and which are irrelevant to such a pivotal institution for the safeguard of democracy, it is necessary to reform the decentralized judicial review in Brazil. Even though the American decentralized judicial review system is aimed at solving disputes *inter partes*, it is in fact exercised at the United States Supreme Court level mainly to solve objective disputes about the constitutionality of laws that concern not only the particular litigants, but society in general. As United States Chief Justice Vinson said:

To remain effective, the Supreme Court must continue to decide only those cases which present questions whose resolution will have immediate importance far beyond the particular facts and parties involved. Those of you whose petitions for certiorari are granted by the Supreme Court will know, therefore, that you are, in a sense, prosecuting or defending class actions; that you represent not only your clients, but tremendously important principles, upon which are based the plans, hopes and aspirations of a great many people throughout the country.²⁴³

Therefore, the decentralized judicial review exercised in “mass cases” in Brazil should not be regarded as individual case adjudication, with each single litigant making it all the way to the SFC as if it were a particular litigation. Instead, it should be viewed as an abstract judicial review deciding constitutional principles and rights that will be applied to litigants.²⁴⁴

239. *The Supreme Court 2002 Term*, 117 HARV. L. REV. 480 (2003).

240. See *supra* notes 133 and 145 and accompanying table.

241. See *supra* note 158 and accompanying table.

242. See *supra* note 173 and accompanying table.

243. Address of Chief Justice Vinson before the American Bar Association, Sept. 7, 1949, 69 S. Ct. v, vi, in H.W. PERRY, JR., *supra* note 102, at 36.

244. Gilmar Ferreira Mendes, Remarks at the Study Group of Constitutional Law at the University of Brasilia (July 4, 2003).

Constitutional Amendment 45 is superficial and clearly inefficient at improving the functioning of the SFC. It seems rather contradictory that, given the mentioned need to diminish the SFC caseload, Constitutional Amendment 45 adds a new hypothesis of admissibility to the extraordinary appellate jurisdiction, that is to say, when the decision appealed declares valid a local law challenged against a federal law. This competence should be assigned to the Superior Court of Justice, which has jurisdiction over federal law disputes. What we can learn from this is that there exists a legal culture to take litigation up to the highest level. There are many reasons for it, such as stronger power at the federal level, as opposed to state level, and trust in the SFC as the organ that will render justice. Regardless the reasons, the present structure does not correspond to Brazilian society's needs any longer, it is not cost-effective and more importantly causes distress and perplexity to all involved. Moreover, the creation of a requirement of general repercussion for the admission of extraordinary appeals, as it is currently designed by Constitutional Amendment 45, aggravates the entanglement of judicial proceedings and therefore supports delay and slowness of the judiciary.

Therefore, it is necessary to change the current system by implementing functional and pragmatic mechanisms accordingly. The binding effect of the *Súmula* and stay of proceedings mechanism, as proven in this paper, are the best solutions to improve the decentralized judicial review and to make the judiciary system more effective in Brazil.