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The Legal Nature of the Legislative Process

By

Luis Otavio Barroso da Graca

A dissertation submitted in partial satisfaction of the

requirements for the degree of

Doctor of the Science of Law – Juris Scientiae Doctor (J.S.D.)

in the

Graduate Division

of the

University of California, Berkeley

Committee in charge:

Professor Jonathan S. Gould, Chair

Professor David S. Grewal

Professor Abhay Aneja

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Abstract

The Legal Nature of the Legislative Process

By

Luis Otavio Barroso da Graca

Doctor of the Science of Law – Juris Scientiae Doctor (J.S.D.)

University of California, Berkeley

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In this text, I argue that the legislative process has a legal nature, as opposed to its more apparent political facet, and that breaches of procedural lawmaking rules are incompatible with such a characterization. To defend such a viewpoint, I approach the topic in three parts.

The first part addresses legislatures' procedural rules' force of law, navigating through U.S. and Brazilian cases. Against views that take legislative procedural rules as non-mandatory and merely coordinating tools, I develop my argument upon Hans Kelsen's and H.L.A. Hart's theorizations and state that these provisions belong to (hard) law. Hence, though legal interpretation challenges may blur the distinction between the political and legal facets, I affirm that legislative procedures have the force of law and, as such, are binding.

The second part deals with justification and overseeing mechanisms. I argue that there are several reasons why lawmakers should abide by the legislative procedural rules. First, it is a matter of the rule of law, meaning that the participants in the lawmaking process have the right to play according to the pertinent provisions. Second, compliance with the established procedures safeguards participation and the flow of diverse opinions and, thus, democratic representativeness. Third, rules' observance fosters transparency, shedding light on a bill and its motives. Finally, I state that compliance with procedural rules should result from enforcing tools managed by legislators and third parties, such as non-partisan officers in legislatures and, under some restraints, the judiciary.

The third part addresses a specific situation: the enactment of executive decrees, provisional measures, directives, or anything similar, with the force of law, to address emergencies. I defend that the misuse or abuse of these expedited lawmaking instruments is incompatible with the legal nature of the legislative process. First, I analyze the ancient Roman Republic's approach to the circumvention of serious menaces and the theories of John Locke, Carl Schmitt, and Santi Romano in this regard. Then, I assess how governments in Brazil, Italy, and the United States usually take advantage of those instruments not to address threats but to bypass the burdens of ordinary legislative procedures. To avoid such an outcome, I argue that legislatures should enhance their oversight capacity under emergencies or pressing situations while simultaneously providing the judiciary with more specific reviewing standards.

To Elizabeth, Ana Luísa, and Luís Felipe.

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Preface

This text argues that the legislative process has a legal nature. On the one hand, people usually think of the political facet of such a process, focusing on the struggles among different groups and parties around the content of constitutional amendments, codes, statutes, etc. On the other hand, they will generally not pay much attention to the rules that establish how the lawmaking process shall move on. From my experience of more than twenty years as a drafter and advisor in a legislature, together with my academic background, my perception is that even lawyers, law schools, and scholarship in law fall short of approaching parliamentary procedures as a legal issue, save possibly for problems concerning a few commands with constitutional status. Whenever a dispute arises regarding the application of provisions that curb legislatures' works, it will most likely be seen as something that solely concerns politicians, constituents (if they happen to pay attention to such a thing), journalists, or political scientists. In its turn, the law community will undoubtedly care for interpreting the laws that the legislative passes but will hardly care for breaches of the rules that frame chambers' business. I think that such an approach is inappropriate. In my opinion, the law community should look toward legislatures through the lens of the legal nature of the legislative process. To defend such a viewpoint, I address the topic in three parts, summarized as follows.

The first part tackles legislatures' procedural rules' force of law, navigating through U.S. and Brazilian cases. The nature of legislative processes is twofold: political and legal. On the one hand, their political side refers to the broad discretion under which lawmakers can set guidelines for social relations and delineate public policies. Conversely, legislative houses' regulations frame lawmaking according to their provisions. However, sticking to procedural rules may raise the costs in the legislative arena. Hence, groups and key players within legislatures usually attempt to bypass steps to obtain an outcome that would otherwise not follow should compliance with due process be in place. Such a maneuver cannot stand in the face of legality. Against views that take legislative procedural rules as non-mandatory and merely coordinating tools, I argue that these provisions belong to (hard) law as any other legal branch. My argument develops upon Hans Kelsen's and H.L.A. Hart's characterizations of the law. Upon Kelsen's, I defend that lawmaking rules derive their authority from superior norms, with a constitution as the ultimate source, and encompass a sanctioning scheme. For the skeptics, I state that Hart's theory offers a suitable alternative. Indeed, part of the procedural provisions corresponds to what he features as secondary rules, like the U.S. Presentment Clause. The remaining portion, detailing legislatures' business, amounts to primary rules according to the

recognized authoritative sources. Though legal interpretation challenges may blur the distinction between the political and legal facets, legislative procedures have the force of law and, as such, are binding.

The second part deals with justification and overseeing mechanisms. There are several reasons why lawmakers should abide by the legislative procedural rules. First, it is a matter of the rule of law, meaning that the participants in the lawmaking process have the right to play according to the pertinent provisions. Second, compliance with the stated procedures safeguards participation and the flow of diverse opinions and, thus, democratic representativeness. Finally (and third), rules' observance fosters transparency, shedding light on a bill and its motives. Now, compliance with procedural rules shall result from enforcing tools managed by legislators and third parties. Through self-discipline and mechanisms as points of order and internal appeals, lawmakers may stick to the rules governing their business. Additionally, legislatures shall count on non-partisan officers whose points of view may constrain rule breaking. To support pressures, these officers shall rely on free speech guarantees outside and inside parliaments, avoiding undue disciplinary actions. Finally, the judicial venue shall be open to challenges against wrong procedural maneuvers. To prevent accusations of partisanship, courts shall be cautious. Firstly, they shall base their decisions on the applicable rules, including legislatures' internal regulations, instead of broad principles. Secondly, they shall display some deference to the legislature. Thirdly, precluding standards shall bar challenges whose purpose would be striking down statutes that have not complied with infra-constitutional procedural rules. Finally, the judiciary shall only admit as a plaintiff an agent who could challenge undue procedures in the legislature where they occurred. Typically, such an agent will be a member of this legislature.

At last, the third part addresses a specific situation: the enactment of executive decrees, provisional measures, directives, or anything similar, with the force of law, to address emergencies. The text states that the misuse or abuse of these expedited lawmaking instruments is incompatible with the legal nature of the legislative process. According to historical or theoretical perspectives, states shall count on ways to circumvent threats without the need to wait for time-consuming deliberation procedures. In the ancient Roman Republic, there was a clear separation between the regular and the extraordinary regimes, and the latter's task, with broad but legally limited powers, was to reestablish the conditions under which the former could operate. In the modern theories of John Locke, Carl Schmitt, and Santi Romano, there is no such distinction, and the task lies on the head of the executive, who can act with wide and legally unrestrained discretion. Present societies somehow adopt a mix between the ancient Roman approach and these theories, attributing to the executive, under certain legal frames, the capacity to adopt extraordinary measures

with the force of law to deal with exceptional circumstances. The problem, however, is that governments usually use such instruments not to address threats but to bypass the burdens of ordinary legislative procedures, as the cases of Brazil, Italy, and the United States demonstrate. Such a pattern may compromise the due process of lawmaking and, as such, fairness among legislators. In order to avoid such an outcome, legislatures should enhance their oversight capacity under emergencies or pressing situations while simultaneously providing the judiciary with more specific reviewing standards.

As the summaries indicate, the research that led to this text was done from a comparative perspective and benefited from constitutional theory, lawmaking procedures, jurisprudence, and political science. As much as possible, I tried to explore legislative affairs in the United States and other countries. However, due to my personal experience in the Brazilian Congress, resorting heavily to cases from Brazil was inescapable. Still, I expect my conclusions to be of interest wherever similar questions arise.

Acknowledgments

Several people and institutions supported the research that led to this work. I want to express my gratitude to all of them.

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Finally, I cannot help but thank my friends and family, especially my beloved wife, Elizabeth, for their invaluable support. I benefited from it in multiple ways.

Concerning the opinions and mistakes in this work, I am solely responsible for them.

Part I
The Legality in Legislatures

1. Introduction

In December 2017, the U.S. Congress passed a tax law that purportedly "vastly favors the rich at the expense of everyone else."[1] The legal piece could be the result of electoral and legislative struggles that naturally led to it. Whether the novel legislation benefits or not the better-off in detriment of the rest of the American population, this discussion depends on considerations about economics, public finance, and theories of justice, all suitable for the political realm under broad and distinct perspectives. Such a perspective is one side of the coin. The other one refers to alleged flaws in legislative procedures, forcing hurried assessment of the matter "without holding a single evidentiary hearing, through a parliamentary maneuver that dispensed with the need for any bipartisan support and the threat of a filibuster in the Senate."[2] According to such an analysis, sticking to the appropriate procedural rules would probably have led to a different outcome.[3]

The 2017 tax law case illustrates that the legislative process is not only a matter of politics but also of legality. On the one hand, a legislature is a locus where representatives usually decide issues based on convenience and opportunity with broad discretion.[4] As such, they make choices regarding public policies according to their preferences and those of their constituents.[5] On the other hand, the legislative

[1] Stephen Gardbaum, *Due Process of Lawmaking Revisited*, 21 UNIVERSITY OF PENNSYLVANIA JOURNAL OF CONSTITUTIONAL LAW 1, 6 (2018).

[2] *Id.* at 5.

[3] *See id.* at 5–6.

[4] As we shall see, legislative outcomes result from discretionary decisions taken by the legislators. When referring to 'convenience' and 'opportunity', I am importing them from Brazilian Administrative Law, which uses these terms to characterize administrative discretion. *See* MARÇAL JUSTEN FILHO, CURSO DE DIREITO ADMINISTRATIVO [ADMINISTRATIVE LAW COURSE] 173, 180 (5th ed. 2010); HELY LOPES MEIRELLES, DIREITO ADMINISTRATIVO BRASILEIRO [BRAZILIAN ADMINISTRATIVE LAW] 102, 151 (22nd ed. 1990).

[5] *See* Jeremy Waldron, *Principles of Legislation*, *in* THE LEAST EXAMINED BRANCH 15, 28 (Richard W. Bauman & Tsvi Kahana eds., 2006); Suzanne Dovi, *Political Representation*, THE STANFORD ENCYCLOPEDIA OF PHILOSOPHY (Edward N. Zalta ed., Fall 2018 ed.),

process operates according to procedural rules, setting out what can and cannot happen in the legislature. Even though such regulations may sometimes be unclear or broken, they still rule out legislation's creation or modification. It is this facet that constitutes a discussion about the "legality in legislatures."

Stressing the legal facet of legislative procedures turns relevant in light of opinions or doctrines that, explicitly or implicitly, feature them as soft law at most.[6] Possibly, according to these views, constitutional lawmaking rules, such as the Bicameral and Presentment Clause, stating that a bill shall pass both Congress houses and, "before it become a law, be presented to the President of the United States,"[7] would be binding. However, parliaments' own internal rules would not have the same characteristic. Instead, they would only offer possible, but not mandatory, routes for coordinating the legislature's environment, with no enforcing mechanisms or, at most, mild ones. From this standpoint, legislators could freely bypass due procedures if political contingencies demanded such a course of action. Notwithstanding, the problem is that path deviations in lawmaking are not neutral, referring to the substance of statutes or other normative pieces, as the 2017 U.S. tax law case indicates.

The legislative process consists of procedures leading to the approval of a bill or a decision by a parliament (in the sense of a legislative body, as I use the term in this text).[8] As long as a collective body is involved, respecting the rules governing such procedures is essential to prevent a powerful group of lawmakers or critical actors, such as chambers' presidents or speakers, from obtaining an undue advantage or outcome. There is nothing to complain about if such a group wins a political dispute abiding by the procedural rules (assuming these rules are fair). More generally, given a specific framework, any legislator may adopt strategies having in

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https://plato.stanford.edu/archives/fall2018/entries/political-representation/ (last visited Nov. 2, 2021).

[6] For instance, theories that implicitly take legislative procedural rules, especially legislatures' internal provisions, as soft law, in my view, are the U.S. political question doctrine and the Brazilian *interna corporis* acts, relating to the legislature's internal affairs. According to the latter, "the procedures based on the Congress's own provisions amount to political issues and, consequently, are immune from judicial examination," Luís Otávio Barroso da Graça, *Judicial Review of the Legislative Process in Brazil*, 7 U.C.L. JOURNAL OF LAW AND JURISPRUDENCE 55, 56 (2018).

[7] U.S. CONST. art. I, § 7, cl. 2.

[8] *See* Graça, *supra* note 6, at 58–61.

mind the outcomes that may result from one or another path.[9] "Members who know the rules have the potential to shape legislation to their ends and become key figures in their party and in coalitions trying to pass, modify, or defeat legislation."[10] Reversely, although there shall be some flexibility,[11] what cannot be allowed is distorting or breaking the rules according to an envisaged end. Such a movement pushes discussions and voting sessions in parliaments away from the rule of law.[12]

To defend that legality must also frame lawmaking, this article goes as follows. In section 2, I address the political side of the coin. First, I tackle the legislature's role in the creation of legal instruments as an expression of state powers. Then, I depict the legislative process as a locus where conflict over distinct views and interests lives together with cooperative efforts to build solutions for social problems. Additionally, I describe how these solutions equate to policies and norms, guiding private activities and organizing public ones, including funding and budgeting decisions. Finally, developing upon the U.S. political question doctrine, I stress how legislators deal with broad discretion regarding lawmaking's content, a feature that I deem of the utmost importance toward the characterization of the other side of the coin: the legal one.

The legality of legislation is the object of section 3. While legislators, in conflictual or cooperative ways, cope with an ample spectrum of choices to produce orientation to the citizenry and provide the public sector with managerial tools, the legislative business is limited. The restrictions are the procedural rules, which have a legal nature. To defend this point, I will resort to two of the most influential articulations concerning positive law: those proposed by H.L.A. Hart and Hans Kelsen. The latter depicts the law as orders backed by sanctions in a system where the provisions' validity is grounded on a superior norm, with a constitution as the ultimate source of authority. I argue that a parliament's rules, be they constitutional, statutory, or internal, present the same features that Kelsen identifies in legal instruments.

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[9] *Compare with* WILLIAM N. ESKRIDGE JR., ABBE R. GLICK & VICTORIA F. NOURSE, STATUTES, REGULATION, AND INTERPRETATION 33–53 (2014) (describing key lawmakers' behavior during the Civil Rights Act of 1964 passage in the U.S. Congress).

[10] WALTER J. OLESZEK ET AL., CONGRESSIONAL PROCEDURES AND THE POLICY PROCESS 15 (11th ed. 2020).

[11] *See* KENNETH A. SHEPSLE, RULE BREAKING AND POLITICAL IMAGINATION 23 (2017).

[12] *See* Graça, *supra* note 6, at 58–61.

Yet, about legislatures, I concede that someone may feel uneasy in identifying sanctions as elements as meaningful as they are to other areas, such as criminal law. As an alternative, I assess Hart's theory, which does not rely on coercion. For him, a parcel of legal provisions – secondary rules – refers to how the other parcel – primary rules – is created, modified, or adjudicated. A secondary rule performs empowerment and coordinating roles that are socially acknowledged. As such, a statute has the force of law as long as passed under procedures recognized as authoritative. Non-compliance to such steps would not trigger sanctions but simply imply the statute's nullity.

For a skeptical about fitting lawmaking provisions into Kelsen's model, I state that Hart's serves the purpose with a remark. On my account, only a few of them, such as the Bicameral and Presentment Clause of the U.S. Constitution, qualify as secondary rules. Society at large may not be aware of the bulk of parliaments' internal norms, and it is hardly the case that anyone would deem a statute void as a consequence of a breach of a less known procedure. Still, these provisions constitute primary rules whose legal status is conferred upon them by the recognized sources or, in other words, the secondary rules. Summing up, under Kelsen's or Hart's approach, legislative procedural norms have the force of law (or hard law) and, as such, shall be binding.

The contrast between the political and legal facets of the legislative process matters for clarifying which type of oversight may be appropriate before a controversy. On the one hand, political choices embedded in the legislation may be the object of constitutionality control. On the other, enforcing tools shall apply to legal breaches. Concededly, however, discerning one strand from the other might be challenging on concrete occasions.

In section 4, I tackle factors or situations that may blur the distinctions between the two sides of lawmaking, or make less clear when illegality occurs in legislatures. I start with interpretational issues associated with textual meaning, gaps, and doubtful facts to which legal provisions refer. On the same token, I also speculate on uncertainties arising from scrutinizing authors' intentions. I move on to address two specificities: bounded versus discretionary acts; and procedure versus substance. In the first case, legislation, including lawmaking rules, may leave more or fewer options for its addressees. As such, a provision may clearly identify solely one required conduct, offer more than one alternative, or be vague. Before choices or vagueness, legal interpretation may resemble politics, though the limits over the former are way more numerous than those restraining the latter. Concerning the comparison between procedure and substance, opaqueness may result from unavoidable broad considerations on values, such as "free speech," impacting

democratic processes in general and legislative proceedings in particular. I close the section with a brief description of how close an imaginative interpretation of lawmaking rules may be to rule breaking, turning the distinction between legal and illegal behavior confusing in legislatures.

Finally, I shall say a few words about the methodology used to produce this text. I basically relied on a comparative approach, navigating through concrete cases in Brazil and the United States. These actual events, along with ones not mentioned here, not only triggered my reflections but also served as illustrations to some of the arguments. Although the examples came solely from the two countries, my will is that my reasoning might make sense generally. Indeed, I suspect my conclusions could apply to any representative democracy operating under the rule of law and the classical separation of powers model.

2. The political nature of the legislative process

The political nature of the legislative process is its mostly known facet. Undoubtedly, the legislative process belongs to politics, regardless of how one invokes such a concept.[13] The pertaining is so evident that it allows us to refer to legislators as politicians and their institutionalized factions as political parties. Additionally, politics encompasses the definition of guiding policies.[14] This is precisely what the legislative process offers by enacting norms (without excluding other forms of human relationships).[15] Finally, a remarkable characteristic of politics is the numerous ways someone may address an issue. In other words, politics is about choices or discretionary decisions.[16] So is the process of lawmaking.[17]

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[13] For different accounts of politics, *see generally* RODERICK P. HART ET AL., POLITICAL KEYWORDS: USING LANGUAGE THAT USES US 21–41, 56 (2005); IAIN MACKENZIE, POLITICS: KEY CONCEPTS IN PHILOSOPHY 1–20 (2009); CEES VAN DER EIJK, THE ESSENCE OF POLITICS 9–24 (2018); Tony Burns, *What is Politics? Robinson Crusoe, Deep Ecology and Immanuel Kant*, 20 POLITICS 93 (2000).

[14] *See* Burns, *supra* note 13, at 97.

[15] *See* MACKENZIE, *supra* note 13, at 12.

[16] *See* VAN DER EIJK, *supra* note 13, at 69; Note, *Political Questions, Public Rights, and Sovereign Immunity*, 130 HARVARD LAW REVIEW 723, 727–729 (2016).

[17] *See* Jonathan S. Gould, *The Law of Legislative Representation*, 107 VIRGINIA LAW REVIEW 765, 767, 785, 787 (2021); Taisuke Kamata, *Adjudication and the Governing Process: Political*

2.1.Legislative function and separation of powers

The legislative process fits well in accounts of politics attached to concepts such as state, public administration, power, or authority.[18] Passing bills in parliaments embodies the same sort of notions. In its classical version, the state's management is divided among three powers, one of which is in charge of approving the general guidelines that will authoritatively bind every state's subject. That is one of the legislative branch's duties.[19]

The legislature encompasses part of the power that rules over a democratic society. Though the ultimate will reside in the people, the capacity to translate this will into norms or actions is entrusted to agents with the governing authority. On the one hand, these agents deal with foreign affairs, public security, civil services, and the administration of justice. On the other, they formulate the laws for all public and private activities or relations. In the latter case, they perform a legislative function as an expression of the society's powers upon its subjects. Accordingly, "[t]he legislative power is that which has a right to direct how the force of the commonwealth shall be employed for preserving the community and the members of it."[20]

This directing potency, however, is not boundless. First, it has to conform to superior values or norms, such as the public good, natural law, or a constitution.[21] Second, it must be separate from the other governmental functions. In both cases, the purpose is to avoid arbitrariness regarding the enunciated rules or their enforcement. Should things be different, people would be in jeopardy. After all, the authorities could not feel pressed to produce fair laws as long as they could simply exempt themselves from compliance.[22] Separation of powers, then, comes into place.

Questions and Legislative Discretion, 53 LAW AND CONTEMPORARY PROBLEMS 181, 181, 185, 194 (1990); Note, *supra* note 16, at 738.

[18] *See* VAN DER EIJK, *supra* note 13, at 10–12; Burns, *supra* note 13, at 93.

[19] *See* JOHN LOCKE, TWO TREATISES OF GOVERNMENT 188–194 (Thomas I. Cook ed., 1947) (Second Treatise, ch. XI, §§ 134-142); CHARLES DE SECONDAT, BARON DE MONTESQUIEU, THE SPIRIT OF THE LAWS 156–159 (Anne M. Cohler, Basia Carolyn Miller, & Harold Samuel Stone trans., 1989).

[20] LOCKE, *supra* note 19, at 194 (Second Treatise, ch. XII, § 143).

[21] *See id.* at 183–184. Obviously, a constitution itself may be the result of the legislative function. In this case, the boundaries will be given by values or the natural law.

[22] *See id.* at 189.

The legislative function must not confuse itself with enforcing governmental powers. That is a fundamental statement for the preservation of a citizen's liberty.[23] One is entitled to do whatever the law permits; simultaneously, a person cannot be constrained to do what the law does not demand.[24] Thus, limits must be set to restrict governmental actions affecting their addressees.[25] However, relying solely on an authority's judgment may not be recommendable. After all, "it has eternally been observed that any man who has power is led to abuse it . . . ."[26] The modern political arrangement tries to overcome this problem by placing distinct governing attributions in different hands so that "power must check power."[27]

In the classical scheme, each official instance finds its boundaries in the other's competencies. In the case of lawmaking, the executive and judicial functions may counterbalance its alleged ascendancy in the political realm as the "supreme power,"[28] one that has "ultimate authority" in governing.[29] Even though restrained by values, and constitutional provisions, such precedence would result from the legislature's "more extensive" powers, "less susceptible of precise limits."[30] The separation of powers design then establishes that other public agents shall correct for legislators' deviations while applying the law. Of course, on the same token, the legislative branch shall also impose barriers to prevent other officials from abusing their powers.

Though ingenious, the separation of powers arrangement faces challenges in concrete life. The oversight of one political branch over the other generates tensions among their officials. How far may a president go in exercising statutory attributions passed by Congress?[31] In which situations and under which restrictions might

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[23] *See* CHARLES DE SECONDAT, BARON DE MONTESQUIEU, *supra* note 19, at 155.

[24] *See id.*

[25] *See id.* at 157.

[26] *Id.* at 155.

[27] *Id.* at 155–156.

[28] LOCKE, *supra* note 19, at 188, 196–197 (Second Treatise, ch. XI, § 134, and ch. XIII, § 149).

[29] Alex Tuckness, *Locke's Political Philosophy*, THE STANFORD ENCYCLOPEDIA OF PHILOSOPHY (Winter 2020 ed.), https://plato.stanford.edu/archives/win2020/entries/locke-political/ (last visited Jun. 14, 2022).

[30] THE FEDERALIST NO. 48, at 310 (James Madison) (Isaac Kramnick ed., 1987).

[31] *See* WILLIAM G. HOWELL, POWER WITHOUT PERSUASION: THE POLITICS OF DIRECT PRESIDENTIAL ACTION 23 (2015).

Congress impeach and convict authorities?[32] Can a judge strike down legislation?[33] Does the judiciary have any role in the oversight of lawmaking procedures?[34] In these situations, checks and balances are in place, but the extent to which they operate is contentious.

Issues involving judicial checks on the legislative branch may be particularly troublesome. For instance, one may argue that stating that "Congress has authority under the Constitution to exercise discretion subject to judicial second-guessing is to destroy the separation of powers."[35] Whether or not such an argument holds in a specific society, examining how the oversight over the legislature should work in light of the legislative process's dual nature (political and legal) is necessary. The judgment may be more favorable to the argument if the rationale solely considers lawmaking's political facet, where discretion plays a decisive role. Reversely, the conclusion might be less supportive, or not at all, if a particular case's details highlight the legality of lawmaking.

2.2.Conflict and cooperation

Other accounts emphasize how collectivities engage in conflict or cooperation to solve problems.[36] This perspective may be the domain of a union or an association, but it certainly encompasses what goes on in parliaments. In these forums, the

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[32] *See generally* THE FEDERALIST NO. 45 (Alexander Hamilton); Jeremy D. Bailey, *Constitutionalism, Conflict, and Consent: Jefferson on the Impeachment Power*, 70 REV POL 572 (2008); Keith E. Whittington, When Does Abuse of Power Justify Impeachment? (Feb. 11, 2022) (unpublished manuscript) (on file with the Kadish Center for Morality, Law & Public Affairs, Berkeley Law).

[33] *See generally* Marbury v. Madison, 5 U.S. 137 (1803) (establishing the possibility of judicial review of the legislation in the United States); Jeremy Waldron, *The Core of the Case Against Judicial Review*, 115 THE YALE LAW JOURNAL 1346 (2006).

[34] *See generally* JOHN HART ELY, DEMOCRACY AND DISTRUST (1980) (defending procedural judicial review for the sake of participation in the democratic process); Graça, *supra* note 6; Ittai Bar-Siman-Tov, Separating Law-Making from Sausage-Making: The Case for Judicial Review of the Legislative Process (2011) (Doctor of the Science of Law thesis, Columbia University) (on file with Columbia University Libraries).

[35] Note, *supra* note 16, at 738.

[36] *See* MACKENZIE, *supra* note 13, at 5–6; VAN DER EIJK, *supra* note 13, at 10–12; Burns, *supra* note 13, at 93.

outcomes derive not only from collective deliberations marked by disagreement[37] but also from cooperative efforts to reach a common ground.[38] Thus, no matter the definition of politics, the legislative process finds its space there.

2.2.1. Conflict

One remarkable feature of the legislative process, as one of the manifestations of politics, is its contentious nature. The legislation deals with diverse conceptions of justice.[39] Purporting an Aristotelian view, under which someone is entitled to something according to her ability to make the best use of it,[40] may lead to a kind of social organization way distinct from that resulting from a utilitarian conception prescribing that a community's goal shall be the maximization of overall happiness.[41] Still, another political arrangement may result under a Rawlsian perspective, focusing on the precedence of basic rights and liberties and the admittance of socio-economic inequalities under two conditions: "fair equality of opportunity"; and "to the greatest expected benefit to the least advantaged."[42] Distinct views of justice may be the source of fundamental disagreements in a polity and, consequently, in legislatures.

Conflicts in lawmaking derive not only from conceptions of justice but also from political struggles regarding society's day-to-day affairs. "Legislation is a controversial business,"[43] all the more so when diverging and often opposing interests populate the public arena. For instance, gun control is the cause of fierce disagreement between those who advocate for a ban on firearms and those who claim

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[37] Waldron, *supra* note 5, at 16, 23, 26.

[38] *Cf.* EDMUND BURKE, SELECT WORKS OF EDMUND BURKE: A NEW IMPRINT OF THE PAYNE EDITION 11 (Francis Canavan ed., 1999).

[39] Waldron, *supra* note 5, at 26.

[40] *See* ARISTOTLE, POLITICS 112–114 (Ernest Barker & R. F. Stalley eds., 1995) (bk. III, ch. 12). *See also* MICHAEL J. SANDEL, JUSTICE 186–188 (1st ed. 2009).

[41] *See, e.g.*, JEREMY BENTHAM, AN INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION 1–7 (1948) (ch. 1, "Of the Principle of Utility"). See also SANDEL, *supra* note 40, at 34.

[42] JOHN RAWLS, A THEORY OF JUSTICE 72 (rev. ed. 1999).

[43] Waldron, *supra* note 5, at 17.

the constitutional right to bear guns in the United States.[44] Similarly, discussions on abortion de-criminalization haunt parliaments (and the judiciary) worldwide.[45] Such clashes arise from the complexity and plurality of modern democratic societies. Indeed, even in the same country, people have different origins, religions, and educational and cultural backgrounds. They also have distinct aspirations concerning their private lives and the evolution of the society to which they belong.[46] All these differences push forward disputes concerning public policies and the law. In addition, widespread propaganda, the dissemination of fake news, and enhanced information bias on the internet or social media reinforce the phenomenon.[47] Inevitably, the legislative forum mirrors the struggles rooted in social diversity.[48]

Lawmaking's contentious feature is even more salient in the face of agenda disputes. The legislative process is limited in time and the number of politicians involved. Naturally, not all interests find support among representatives, at least in sufficient terms for a desired bill's approval.[49] "Agenda-setting" thus appears as a core question, the "conflict of conflicts."[50] The case is even more noticeable in light

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[44] *See generally* U.S. CONST. amend. II; Annie Karni & Emily Cochrane, *The Senate Moved a Step Closer to Passing a Bipartisan Gun Safety Bill*, N.Y. TIMES (Jun. 23, 2022), https://www.nytimes.com/2022/06/23/us/politics/senate-gun-control-bill.html? (last visited Jun. 23, 2022); Adam Liptak, *The Supreme Court Strikes Down a New York Law Limiting Guns in Public*, N.Y. TIMES (Jun. 23, 2022), https://www.nytimes.com/2022/06/23/us/supreme-court-ny-open-carry-gun-law.html (last visited Feb. 25, 2023).

[45] *See generally* Mike DeBonis & Rachel Roubein, *Senate Blocks Bill to Codify Right to Abortion*, THE WASHINGTON POST (May 11, 2022), https://www.washingtonpost.com/politics/2022/05/11/abortion-senate-vote/ (last visited Jun. 23, 2022); Nathalia Passarinho, *Por Que Congresso e STF Caminham para Lados Opostos na Discussão sobre Aborto no Brasil* [*Why Congress and STF Go in Opposite Directions Concerning Abortion in Brazil*], B.B.C. NEWS BRASIL (Jun. 13, 2018), https://www.bbc.com/portuguese/brasil-44458907 (last visited Jun. 23, 2022).

[46] *Cf.* Waldron, *supra* note 5, at 25 (referring to "diversity of interests in society," and "heterogeneity of opinions").

[47] *See* Donley Studlar, *E. E. Schattschneider, The Semi-Sovereign People: A Realist's View of Democracy in America*, *in* THE OXFORD HANDBOOK OF CLASSICS IN PUBLIC POLICY AND ADMINISTRATION 123, 129 (Martin Lodge, Edward C. Page, & Steven J. Balla eds., 2015).

[48] *Cf.* VAN DER EIJK, *supra* note 13, at 13 (quoting Meindert Fennema, *Tussen Vierde en Vijfde Macht*, *in* HET POLITICOLOGEN-DEBAT: WAT IS POLITIEK? 17, 25 (Meindert Fennema & Ries van der Wouden eds., 1982).)

[49] Studlar, *supra* note 47, at 124.

[50] E. E. SCHATTSCHNEIDER, THE SEMISOVEREIGN PEOPLE 68 (1st ed. 1960); Studlar, *supra* note 47, at 123.

of the prominence of the better-off.[51] Undoubtedly, politics is an expensive, specialized, and time-consuming activity.[52] Electoral campaigns, political advertisement, and lobbying demand substantial financial resources. Moreover, all these tasks require knowledge of law, economics, political science, data analysis, public management, and the like. Finally, the time necessary to perform them is hardly available to an ordinary citizen. Summing up, the intrinsically restrained political space is even smaller for the bulk of the population, put aside in the fight for the legislative agenda.

2.2.2. Cooperation

Although the legislative process, as an expression of the political realm, is remarkably contentious, conflicts are not the sole elements through which the business works. Cooperation among different individuals or groups also plays a significant role.[53] The cooperative aspect is so relevant that Edmund Burke, in his "Speech to the Electors of Bristol," stated that "Parliament is not a Congress of Ambassadors from different and hostile interests . . . ; but Parliament is a deliberative Assembly of one Nation, with one Interest, that of the whole . . . ."[54] Maybe Burke's remark was more a desire than a description. Still, lawmaking surely counts on joint efforts from divergent or rival factions.

A case involving firearms regulation at the federal level in the United States illustrates the point. As previously stated, the matter has been the object of substantial disagreement between gun supporters, primarily represented by the Republicans, and those advocating a more restrictive policy, defended mainly by the Democrats.[55] The conflict has been sharply divisive, with the formers able to impose a durable legislative gridlock on the issue.[56] Notwithstanding, on June 23, 2022, after a deal between both parties (or, at least, part of the Republicans) in the aftermath of

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[51] *See* SCHATTSCHNEIDER, *supra* note 50, at 35; Studlar, *supra* note 47, at 124.

[52] *Cf. generally* Citizens United v. Federal Election Commission, 558 U.S. 310 (2010) (dealing with corporate independent expenses in electoral campaigns); Buckley v. Valeo, 424 U.S. 1 (1976) (dealing with limits to electoral campaigns' expenditure).

[53] *See* MACKENZIE, *supra* note 13, at 5.

[54] BURKE, *supra* note 38, at 11.

[55] *See* Karni and Cochrane, *supra* note 44.

[56] *See id.*

massive shooting episodes, the Senate passed a bill imposing restraints on access to firearms.[57] Cooperation made its way in this case.

Cooperative efforts in politics, generally, and in a legislature, in particular, are not only necessary for overcoming a specific impasse but also for guaranteeing "a just and stable society of free and equal citizens,"[58] at least according to Rawls's political liberalism. In his words, "the fundamental idea of justice as fairness . . . is that of society as a fair system of cooperation over time, from one generation to the next."[59] Even though people have profound disagreements about religion, morality, and ideology, they might collaborate with each other for the sake of the public interest.[60] Such a possibility arises when citizens and legislators debate on "fair terms"[61] with "a spirit of openness to argument and consideration"[62] or "equal concern and respect."[63]

Praising cooperation does not mean addressing lawmaking's political nature naively. Clearly, demands for collaboration resorting to the common good may serve concealed purposes. Politicians often invoke aims such as the country's greatness or the people's well-being to pass legislation they support. Maybe the novel legal text advances the population at large, but it may also benefit solely restricted groups, perhaps those prevailing in political disputes,[64] such as the upper classes.[65] The legislative business surely claims cooperative attitudes, but it is necessary to scrutinize the arguments raised.

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[57] *See id.*

[58] JOHN RAWLS, POLITICAL LIBERALISM 4 (Expanded ed. 2005).

[59] *Id.* at 15.

[60] *See* MACKENZIE, *supra* note 13, at 5; VAN DER EIJK, *supra* note 13, at 59.

[61] RAWLS, *supra* note 58, at 16.

[62] Waldron, *supra* note 5, at 27.

[63] RONALD DWORKIN, TAKING RIGHTS SERIOUSLY 180 (1978).

[64] *Cf.* VAN DER EIJK, *supra* note 13, at 59 (quoting J.D.B. MILLER, THE NATURE OF POLITICS 60 (1962): "politicians . . . habitually equate the general interest or common good with what suits them and the people around them.").

[65] *See* SCHATTSCHNEIDER, *supra* note 50, at 35.

2.3.Policies: guidelines, standards of conduct

At least in one approach, what primarily characterizes a political activity is establishing a policy.[66] Obviously, policies do not need to go through legislative procedures to be taken as such. For instance, internal policies may regulate a company's employees' interactions. However, the legislative branch will probably come to one's mind when she thinks of social policies, civil rights policies, and so on. These policies refer to standards of conduct that guide or bind the general citizenry or the public service. In other words, they refer to the norms approved by legislatures. Therefore, if politics is about "what policy ought to be adopted"[67] or "ways in which we are governed by norms,"[68] the lawmaking process cannot but only be remarkably political.

2.3.1. Guidelines and control

Legislation orients human interactions within a society. Generally, rights and obligations are the objects of statutes passed by legislative bodies. One can only be constrained to do or not to do what is publicly announced in a statement approved by elected representatives.[69] On the one hand, this maxim constitutes a guarantee for any citizen. Its origins go back as far as the 1215 Magna Carta or even before,[70] with

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[66] *See* Burns, *supra* note 13, at 97.

[67] *Id.* at 95.

[68] MACKENZIE, *supra* note 13, at 9.

[69] *See* LOCKE, *supra* note 19, at 188 (Second Treatise, ch. XI, § 134); CHARLES DE SECONDAT, BARON DE MONTESQUIEU, *supra* note 19, at 155, 159 (pt. 2, bk. 11, ch. 3). *See also* CONSTITUIÇÃO FEDERAL DE 1988 [C.F. 1988] [1988 FEDERAL CONSTITUTION] art. 5, II (Braz.), https://www.planalto.gov.br/ccivil_03/constituicao/constituicao.htm (last visited Jan. 20, 2024), *translated in* CONSTITUTION OF THE FEDERATIVE REPUBLIC OF BRAZIL, (2022), https://www.stf.jus.br/arquivo/cms/legislacaoConstituicao/anexo/Brazil_Federal_Constitution_EC_125.pdf (last visited Sep. 14, 2022) (henceforth, references to the this translated version of the Brazilian Constitution are omitted except where clearly stated).

[70] *See* Ricardo Regis Laraia, A Dupla Face do Princípio da Legalidade [The Double Face of the Principle of Legality] 28–29 (2008) (tese de Doutorado em Direito, Pontifícia Universidade Católica de São Paulo, Brasil [Doctor of the Science of Law thesis, Pontifical Catholic University of São Paulo, Brazil]), https://tede2.pucsp.br/bitstream/handle/8232/1/Ricardo%20Regis%20Laraia.pdf (last visited Oct. 16, 2022).

further developments resulting from modern political progress, including the American and French revolutions and the settlement of twentieth-century international governance.[71] Through it, one can determine her conduct in light of foreseeable consequences established by the law. For instance, she can rest assured that she may move around within her community as she wishes if no limitation applies. Alternatively, she knows what to do if she needs to abide by any lawful restriction. Lawmaking, described in this perspective, is a political activity that provides people with guidelines.[72]

On the other hand, some may prefer to stress the binding character of the legislation in lieu of its orientating feature. Arguably, the design of statutes broadly encompasses punishing schemes, which require enforcing mechanisms. For example, fines are imposed on those who do not pay taxes, imprisonment may result from crimes, and civil or political restrictions may apply due to wrong conduct. The purpose of such an apparatus is to either force people to do what they otherwise would not or prevent them from behaving in an undesirable manner. In many circumstances, citizens may largely support coercion against disapproved actions such as murder. On other occasions, law and order enforcement may reflect more of a dominant strategy than a widespread sense of justice. For instance, repression of labor unions and industrial action may result from society's wealthiest layers' attempt to keep the rest of the population under check. In conclusion, lawmaking as a political activity also shows the characteristics of an instrument of control.

2.3.2. State organization, public policies

Political decisions through the legislative process also relate to the state's organization. Typically, a part of the legislation, generically referred to as Administrative Law, defines governmental agencies' structures, competencies, and means through which they operate. Furthermore, it regulates how these agencies deal with private actors, either citizens or companies. For instance, on the one hand, statutes rule how the government hires civil servants or selects contractors. On the other, they establish procedures according to which officials may demand something

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[71] *See id.* at 30–33, 59–60.

[72] *Cf.* H.L.A. HART, THE CONCEPT OF LAW 124 (Penelope A. Bulloch & Joseph Raz eds., 2d ed. 1994) ("If it were not possible to communicate general standards of conduct, . . . nothing that we now recognize as law could exist.").

or people might request a service or benefit. Summing up, definitions concerning the state's management also characterize the legislation's political nature.

Relatedly, public policies' design is also associated with the legislature. From a minimalist perspective, the polity shall offer its citizens a safe space to live peacefully and strive.[73] As such, the state shall promote inland security, administer the justice system, and protect the country against invaders. Therefore, lawmaking shall provide society with the legal framework to comply with these duties. Yet, more is usually required. The political community discusses how to rule the economic environment and implement social services. In the first case, it legislates over fiscal and monetary policies and specific sectors, such as agriculture, industry, energy, and telecommunications. In the second one, concern refers to providing education, health care, public transport, pension rights, and social assistance. More recently, debates regarding environmental protection and future generations' rights have fulfilled the legislative forum too. Thus, public policy regulation is also a feature of lawmaking's political facet.

2.3.3. Funding and budgeting

Parliaments deal with another highly political topic linked to the state organization and public policies: governmental funding. The public sector can finance its activities in different ways. First, it may directly transact in the market via state-owned companies and profit from them. Second, it may collect taxes from those under its jurisdiction. Third, it may borrow money from financial institutions or issue public bonds. Although the funding issue heavily depends on the executive branch's regulations, it is up to legislative bodies to draw the general lines to implement these possibilities. For instance, legislators may fix a public debt cap or define taxable events, such as income, consumption, and estate ownership. Particularly in the case of tax law, rules given exclusively by elected representatives derive from the citizens' fundamental guarantees referred to in previous lines. Accordingly, there can be "no taxation without representation." Via taxation or otherwise, political struggles about governmental funding are a matter of legislative decision-making.

Finally, the other side of funding is budgeting, or how the political realm distributes resources so that the government can perform its duties or support public

[73] *See* THOMAS HOBBES, ON THE CITIZEN 73 (Richard Tuck & Michael Silverthorne eds., 1998) (ch. V, no. 9).

policies. Once again, definitions regarding this matter depend on legislatures. As a principle, appropriations must be passed by the legislative branch before state agencies may spend money. The reason for that is twofold. First, since a higher expenditure level requires more funding, typically through taxes or public indebtedness, budgetary decisions must be subject to elected representatives' scrutiny as a corollary of the no-taxation-without-representation principle. Second, because governmental organs and programs are widely a matter for the legislative business, so must be the means on which they count to operate. The public budget, then, projects its political nature over lawmaking.

2.4.Discretion

At last, politics involves a significant degree of discretion, and so does the legislative process. That is lawmaking's most crucial feature toward characterizing the other side of the coin: parliamentary procedures' legal nature. As I shall state, the room for discretion in applying procedural rules in legislatures is as limited as enforcing any law in other contexts. Reversely, that is not the case when the focus rests on the outcomes of parliaments' work. Politicians deal with diverse approaches to one matter, even considering that constitutions may restrict these approaches. Among constitutional options, they may freely choose, according to their sense of opportunity and convenience, the ones that fit mostly their preferences, their constituent's expectations, their parties' or superiors' agendas, and the interests of pressure groups with whom they relate.[74] Summing up, politicians, in general, and legislators, in particular, count with broad discretion.[75] That is an essential attribute of the legislative process in the realm of politics.

In the United States, taking discretion as a remarkable feature in political affairs has been central in the relationship between the judiciary and the other branches. The subject is addressed under the political question doctrine, rooted in *Marbury v. Madison* (1803).[76] While fixing judicial review competencies, the decision also indicated limits to adjudication according to two ways public agents, in the executive or the legislative, can perform their duties. On the one hand, these agents are bound by the law. In this case, their actions or omissions shall follow what is legally prescribed. As such, a restrained margin is left for the agents. If a provision

[74] *See* Gould, *supra* note 17, at 767, 776, 787–788.

[75] *See* Kamata, *supra* note 17, at 181, 194–195; Note, *supra* note 16, at 728–729.

[76] *Marbury*, 5 U.S. 137 (1803).

states that an official must do "X" or "Y" when a specific event happens, it is not up to her to evaluate whether she should do "W." The only possibility is for her to do "X" or "Y." Situations may even exist where she has no margin at all, as in *Marbury*. On the other hand, there may be instances where any course of action is allowed. In such cases, the public agent "is invested with certain political powers, in the exercise of which he is to use his own discretion, and is accountable only to his country in his political character, and to his own conscience."[77]

Before proceeding, it is worth recapitulating *Marbury* for the sake of clarification. In 1801, outgoing President John Adams nominated William Marbury and other individuals as Justices of the Peace of the District of Columbia. After Senate's approval, the President signed their commissions. However, the documents were not delivered to them before the incoming President, Thomas Jefferson, from the opposing party, took office. The then-new Secretary of State, James Madison, withheld the commissions so the appointees could not take on their posts. The Supreme Court assessed the case in light of the nature of administrative acts. For the court, "[t]he commission being signed, the subsequent duty of the secretary of state [was] prescribed by law,"[78] and that duty was "to be strictly pursued"[79] since "the appointment was not revocable."[80] Instead, "[t]he power of nominating to the senate, and the power of appointing the person nominated, are political powers, to be exercised by the President according to his own discretion."[81] Though these passages do not mention the legislative branch, they obviously encompass Congress, as further case law and doctrine make it clear.[82] The point was the depiction of politics as a realm where decision-makers, including legislators, have broad discretion as opposed to an environment in which legal boundaries are much more restrictive.[83]

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[77] *Id.* at 165–166. The quote refers to powers invested in the President of the Republic.

[78] *Id.* at 158.

[79] *Id.*

[80] *Id.* at 162.

[81] *Id.* at 167. The Supreme Court found Madison's conduct to be unlawful but stated it could not oblige him to deliver the commissions because the statute granting it competence to do so was unconstitutional.

[82] *See* ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 140–162 (6th ed. 2019).

[83] *See id.* at 141; Kamata, *supra* note 17.

Baker v. Carr (1962) also offers elements linking broad discretion to the political nature of the legislative business.[84] Such a case is worth examining because, allegedly, it is where the U.S. Supreme Court "most ambitiously, and authoritatively," defined the political question doctrine.[85] The lawsuit referred to electoral apportionment in Tennessee.[86] The plaintiffs claimed that the state legislature had been avoiding adjusting the electoral districts for roughly sixty years.[87] As a result, representation would not reflect variations in population numbers, exaggeratedly favoring less populous localities.[88] The court upheld this thesis in the face of the Equal Protection Clause (U.S. Const. amend. XIV, § 1, cl. 2).[89] At this point, the purpose is not to address the court's reasoning but to identify an essential element in the characterization of political issues. Among six situations listed in *Baker*'s leading opinion, each sufficient to deem something as belonging to the political realm (according to the opinion), I regard "the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion" as the central feature. I believe it is the one closest to the approach in *Marbury*.

With such remarks, I do not mean that the judiciary should disregard the other five items in *Baker*'s list. Concrete relations are way distant from theory. Accordingly, when courts scrutinize decisions from the other branches, there may be situations where prudence shall play a role for the sake of equilibrium among the powers.[90] Therefore, depending on the circumstances, judges may feel pressed to defer to politicians due to: "a lack of judicially discoverable and manageable standards for resolving" a case; or the fear of "expressing lack of the respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question."[91] These

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[84] *See* Baker v. Carr, 369 U.S. 186 (1962).

[85] Jesse H. Choper, *The Political Question Doctrine: Suggested Criteria*, 54 DUKE LAW JOURNAL 1457, 1458 (2005).

[86] *See Baker*, *supra* note 84.

[87] *See id.*

[88] *See id.*

[89] *See id.*

[90] *See* Rachel E. Barkow, *More Supreme than Court? The Fall of the Political Question Doctrine and the Rise of Judicial Supremacy*, 102 COLUMBIA LAW REVIEW 237, 262–263, 265 (2002); Note, *supra* note 16, at 725.

[91] *Baker*, *supra* note 84, at 710.

reasons may be compelling, but they result from a concrete assessment of the judiciary's delicate position before the executive, the legislative, or the citizenry. They do not relate to the inherent discretion of political processes. In my view, not even "a textually demonstrable constitutional commitment of the issue to a coordinate political department,"[92] the first of the causes for deference listed in *Baker* and undoubtedly not one deriving from prudence. Indeed, a provision committing a matter to a governmental authority may limit the options or leave none at all, as was the case before Secretary James Madison in *Marbury*.[93]

Still in the context of the U.S. political question doctrine, Congress's approach to temporal limits related to the ratification of constitutional amendments offers an example of broad discretion in legislative procedures. Pursuant to U.S. Const. art. V, "[t]he Congress, whenever two thirds of both houses shall deem it necessary, shall propose amendments to this Constitution, or, on the application of the legislatures of two thirds of the several states, shall call a convention for proposing amendments." Proposals, "in either case, shall be valid . . . when ratified by the legislatures of three fourths of the several states, or by conventions in three fourths thereof, as the one or the other mode of ratification may be proposed by the Congress."[94] Since the provision states nothing about the ratification deadline, the federal legislature would be free to decide upon the matter. That was the Supreme Court's position in *Coleman v. Miller* (1939).[95] In that case, among other issues, a challenge was that too much time (around thirteen years) had passed until Kansas's legislature approved the 1924 Child Labor Amendment,[96] whose purpose was to allow Congress "to limit, regulate, and prohibit the labor of persons under eighteen years of age."[97] In the court's view, absent legal criteria,[98] only Congress could determine "whether by lapse of time its proposal of the amendment had lost its vitality prior to the required ratifications."[99]

Stating that a core feature of the legislative process's political nature is broad discretion does not mean that lawmaking is always boundless. Some may see limits

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[92] *Id.*

[93] *Marbury*, 5 U.S. 137, 158 (1803).

[94] U.S. CONST. art. V.

[95] Coleman v. Miller, 307 U.S. 433 (1939).

[96] H.J. Res. 184, 68th Cong. (1924). *See Coleman*, *supra* note 95, at 451.

[97] H.J. Res. 184, *supra* note 96; *Coleman*, *supra* note 95, at 435 (footnote 1).

[98] *See Coleman*, *supra* note 95, at 453.

[99] *Id.* at 456.

even in a situation like the one in *Coleman*. Dissenting from the majority, two justices held that "more than a reasonable time had elapsed."[100] They supported their divergence on the Supreme Court's reasoning in *Dillon v. Gloss* (1921).[101] In this case, one of the controversies related to the seven-year period Congress had fixed for the ratification of the Eighteenth Amendment,[102] banning alcoholic beverage manufacture and commerce in the United States. A petitioner in custody under a statute based on such an amendment alleged, among other things, that Congress could not have imposed the time limit. He argued that such a "limitation tended to destroy any deliberation by the States and to enable the faction which was pressing for ratification of the amendment to urge immediate indeliberate action."[103] The court refused such an argument and, as in *Coleman*, affirmed that Congress had "a wide range of power" in the matter.[104] Nevertheless, it also stated "that the ratification must be within some reasonable time after the proposal"[105] since both measures (proposal and ratification) cannot be "treated as unrelated acts but as succeeding steps."[106] For the *Dillon* court, Congress's discretion for deciding on the ratification deadline was broad but not procedurally unlimited.[107]

The decision in *Dillon* and the dissent in *Coleman* point toward the twofold nature of lawmaking. On the one side, the legislative process is political in the sense that it creates or modifies public policies and the law. On the other, it is itself bounded by the legal procedural framework. [108] The discussions and voting sessions in parliaments or related forums are themselves the object of norms. The establishment of which rules frame legislative procedures is a matter of politics.

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[100] *Id.* at 473. Justice Butler, dissenting, joined by Justice McReynolds.

[101] Dillon v. Gloss, 256 U.S. (1921).

[102] *See id.* at 371.

[103] *Id.* at 369–371.

[104] *Id.* at 373.

[105] *Id.* at 375.

[106] *Id.* at 374.

[107] Obviously, *Coleman* overruled *Dillon* on this regard.

[108] The characterization is better described as a "spectrum," a continuum. Some cases may be more political, others may be more legal, and many will be in-between. About the "spectrum," *see* Barkow, *supra* note 90, at 242.

Once such rules are settled and before they are appropriately modified, they bind the legislature.[109] In this sense, lawmaking is also a matter of legality.

3. The legality of legislation[110]

Lawmaking procedures do not belong solely to politics but also to the law. This statement may seem obvious at first glance: one may think that legislative processes are related to the law since they produce legal texts. However, my focus is not on the outcome but on the procedures themselves. Procedural rules bind lawmaking,[111] and even majorities shall comply with them.

3.1. Majorities' interest in the legality of legislation

Stating that legislative majorities shall abide by parliaments' internal regulations may sound weird. Two sorts of questions may arise. First, why would the majority be bound to previously stated procedures if they can modify them at any moment? Second, isn't it evident that, if a rule exists, those subject to it shall (or must) obey it?

3.1.1. Legitimacy

The first question embodies the notion that any resolution adopted by more than half of a decision-making body is unquestionable.[112] For instance, suppose five

[109] *But see* Michael B. Miller, *The Justiciability of Legislative Rules and the "Political" Political Question Doctrine*, 78 CALIFORNIA LAW REVIEW 1341, 1342 (1990) (stating legislative rules' "non-binding quality within the legislature").

[110] This label is owed to Berkeley Law Professor David Singh Grewal.

[111] *See* Ittai Bar-Siman-Tov, *Lawmakers as Lawbreakers*, 52 WILLIAM AND MARY LAW REVIEW 805, 811 (2010).

[112] *Cf.* Frederick Schauer, *Legislatures as Rule-Followers*, *in* THE LEAST EXAMINED BRANCH 468, 469 (Richard W. Bauman & Tsvi Kahana eds., 2006) ("If the institution with the power to make law also holds the power to change it, then there appears little to prevent the lawmaking power, conceived broadly, from changing the law to suit its desires of the moment.").

friends want to go somewhere together during the weekend but still need to define where they will head. As there are five distinct opinions, they debate how they shall decide. By majority, they stipulate that each of them can defend her choice before they reach an agreement. After the first one speaks, two others get convinced and join her, forming a coalition in favor of the first option and voting for it. The remaining friends complain, arguing there was a breach in the settled procedure. In reply, the winners say that the complaint is pointless because the new deciding method was not the result of an authoritarian move but of the same majoritarian will that had fixed the previous one. In other words, they state that the majority could modify ongoing proceedings the same way it was entitled to establish them in the first place.

In case the previous example seems too simplistic, suppose now that the same five friends want to travel every weekend. To make things easier for them, they agree by a majority to the following. A designed person is responsible for buying non-refundable, thus cheaper, transport tickets for all of them. For that, the same person shall monthly collect money from the others in advance. They shall meet every Wednesday at noon at the same place to deliberate where to go. Finally, the assigned one shall immediately purchase the tickets after more than half of them agree on a destination. The group starts traveling together according to these rules, but one day a breach occurs. For any reason, three friends, including the one in charge of acquiring the tickets, meet on a Tuesday without previous notice and decide where to go by two votes. Under this result, the finance manager buys the tickets. The two absent ones repudiate the situation as soon as they know what happened. Nonetheless, the others allege that they were three when they met and, as such, had the authority to establish new rules, like when the majority settled the original ones.

Though the justifications may sound reasonable, the way the procedural modifications occurred in both instances are troublesome. Even in the first case, a more straightforward one, the bypassed friends could argue that they had a right to present and defend their preferences before a decision. After all, the others could change their minds in light of unforeseen options or reasoning. In opposition, the winners could articulate that their relatively informal decision-making procedure did not preclude the losers from saying something even after the majority had manifested its will. Such a counterargument, however, would not hold in the second example. Since the tickets are non-refundable, reverting their purchase would not be feasible. Additionally, the procedural shift barred proper debate about where the group would go in a much more impacting manner. First, the modification altered the settled time for the meeting. Indeed, the reunion was to take place on a Wednesday but occurred the day before. Second, the innovation modified the voting method. Instead of at

least three agreeing on a destination, the change settled that a majority before a quorum equal to more than half of them sufficed. In other words, provided that three were present, two could solve the issue on behalf of all. Plainly, opting for another meeting day and a quorum is not a problem per se. The question, though, refers to how the novel rules were adopted.

Abiding by procedural rules is a matter of legitimacy in collective decision-making. "[M]embers of Congress and citizens generally accept legislative decisions when they believe the decisions have been approved according to orderly and fair procedures."[113] As the cases of the friends demonstrate, there shall be at least a minimum set of norms according to which participants in a deliberative process may deem it fair. Two of these essential rules refer to the place and time defining where and when people shall gather.[114] That is why legislative bodies operate in fixed venues and within known dates. For instance, in Brazil, "[t]he National Congress shall meet each year in the Federal Capital, from February 2 to July 17 and from August 1 to December 22."[115] It is hard to believe that a party would consider as legitimate a resolution from an assembly gathering in a location or moment distinct from the previously established without notice or change through the appropriate means, as in the friends' second example. If a group conceals a decisive deliberation from others, the bypassed members may reasonably argue that the outcome results from fraud and, as such, is not fair or legitimate.

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[113] OLESZEK ET AL., *supra* note 10, at 9.

[114] Maybe the quorum should also be on the list, though I do not think it is as impacting as the place and time. Indeed, situations are in which legislative houses approve bills without the required quorum. This may happen when different parties agree on a matter, the voting session starts with a minimal number of legislators, and no one asks for quorum verification by the time of the approval. *See* REGIMENTO COMUM DO CONGRESSO NACIONAL [R.C.C.N.] [JOINT REGULATIONS OF THE NATIONAL CONGRESS] art. 29, para. 2 (Braz.), https://www25.senado.leg.br/documents/59501/97171143/RCCN.pdf/ (last visited Apr. 19, 2024); REGIMENTO INTERNO DA CÂMARA DOS DEPUTADOS [R.I.C.D.] [INTERNAL REGULATIONS OF THE CHAMBER OF DEPUTIES] art. 185, para. 4 (Braz.), https://www2.camara.leg.br/atividade-legislativa/legislacao/regimento-interno-da-camara-dos-deputados/ (last visited Oct. 27, 2022); REGIMENTO INTERNO DO SENADO FEDERAL [R.I.S.F.] [INTERNAL REGULATIONS OF THE FEDERAL SENATE] art. 293, VIII (Braz.), https://www25.senado.leg.br/documents/12427/45868/RISF+2018+Volume+1.pdf/cd5769c8-46c5-4c8a-9af7-99be436b89c4 (last visited Mar. 12, 2022). *But cf.* Adrian Vermeule, *The Constitutional Law of Congressional Procedure*, 71 THE UNIVERSITY OF CHICAGO LAW REVIEW 361, 404 (2004) (associating lack of quorum to "loss of legitimacy," and "deliberative deficit").

[115] C.F. 1988, *supra* note 69, art. 57 (Braz.).

Even majorities or supermajorities[116] shall abide by internal provisions because keeping deliberative processes' legitimacy shall be in their interest. If bypassing minorities becomes the pattern, procedural rules cease to be a credible instrument of coordination.[117] At first, the majoritarian group may not care about this, as long as it may keep a quorum to reach a decision it pursues. However, groups change over time, which is also true in the legislative context. Indeed, elections modify legislatures' compositions, and majorities' configurations may vary according to daily business. A bill may count on the support of a specific majoritarian group of legislators, whereas another proposal may attract the defense of a different one. External factors such as the executive's pressures or the government's popular approval level may also influence swing majorities' moves. Since "today's majority might well be tomorrow's minority,"[118] sticking to the procedural rules may function as a kind of safeguard for the sake of the collective body's decisions in the long run.[119]

3.1.2. Lawmaking rules as (soft) law?

The second question, whether it is evident or not that, if a rule exists, those subject to it shall (or must) obey it, is appealing in the face of opinions disputing the legislative process's legal nature.[120] In *Coleman*, about amendments to the U.S. Constitution, concurring justices opined that "[t]he process itself is 'political' in its

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[116] If the case refers to a majority or supermajority, it depends on rule-changing requirements.

[117] *Cf.* SHEPSLE, *supra* note 11, at 54 (quoting a Republican U.S. senator remarking that there are no rules when the majority does not follow them).

[118] Jonathan S. Gould, *Law Within Congress*, 129 THE YALE LAW JOURNAL 1946, 1958 (2020).

[119] *See id.* at 2026.

[120] Elizabeth Garret says that "Congress will use a statute [framework legislation, in this case] when the internal procedural change is an integral part of a larger package that must be adopted simultaneously and contains some parts that must be enacted with legal effect." In other words, she states that such statute is "part of a deal that must be adopted as a package and that includes some provisions that must have the force of law." As such, "the statutory form could be seen as a signal that Congress is adopting something with legal effect to be treated by courts just like other laws," though she acknowledges that case law actually sees the enforcement of those provisions as "nonjusticiable political questions." Elizabeth Garrett, *Conditions for Framework Legislation*, *in* THE LEAST EXAMINED BRANCH 294, 297, 308, 319 (Richard W. Bauman & Tsvi Kahana eds., 1 ed. 2006). From her point of view, I assume that she would not consider non-statutory internal rules as (hard) law.

entirety."[121] Similarly, one scholar "examines the nature of procedural rules in form and in enforcement, stressing the political nature of these rules and their nonbinding quality within the legislature."[122] In the same work, he affirms that "[r]ecognition of the political nature of legislative rules changes the analysis of their justiciability."[123] As such, according to him, "courts should avoid considering legislative rules because by doing so, they turn those rules into something they are not: enforceable norms."[124] Further, he states that "[i]n the hands of Congress, legislative rules of procedure are not rules. They merely provide rough guidelines for the conduct of the legislative process, quickly tossed aside when the political exigencies of the moment so demand."[125] Likewise, others mention that parliaments' internal provisions would be comparable to soft law, consisting of statements with the capacity to influence behavior but with no force of (hard) law.[126] Finally, another writer explains that, according to these views, "the legislator is not considered a legal actor,"[127] and, consequently, "law-making is not a matter of legal theory."[128] He challenges such a conclusion.[129] In the following lines, so do I.

3.2. Hart and Kelsen

Affirming that legislative procedural rules also pertain to the legal realm demands recapitulating what the law is. To do so, I do not need to address principles beforehand, such as in a discussion about natural law.[130] As I shall address elsewhere, a debate regarding substantive aspects and the finality of legislative

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[121] *Coleman*, 307 U.S. 433, 459 (1939).

[122] Miller, *supra* note 109, at 1341–1342.

[123] *Id.* at 1364–1365.

[124] *Id.*

[125] *Id.* at 1374.

[126] *See* Jacob E. Gersen & Eric A Posner, *Soft Law: Lessons from Congressional Practice*, 61 STANFORD LAW REVIEW 573, 577, 582 (2018).

[127] Luc J. Wintgens, *Legisprudence as a New Theory of Legislation*, 19 RATIO JURIS 1, 5 (2006).

[128] *Id.*

[129] *See id.*

[130] For natural law, *see, e.g.*, Andrei Marmor & Alexander Sarch, *The Nature of Law*, THE STANFORD ENCYCLOPEDIA OF PHILOSOPHY (Edward N. Zalta ed., Fall 2019 ed.), https://plato.stanford.edu/archives/fall2019/entries/lawphil-nature/ (last visited Nov. 11, 2021).

processes may have a role in legal interpretation or application. Still, the lawmaking process's detailing is a matter of positive regulations in the first place. Some figure in constitutions, and I guess no one would dispute their legal character. Others are the object of a legislature's standing orders or internal provisions, and their nature is disputable. My purpose is to scrutinize if this particular set of guides presents the same features generally associated with statutes or codes pursuant to positivist accounts of the law. To do so, let me take two of the most influential ones, Hart's and Kelsen's theorizations.

3.2.1. Hart

Hart depicts the legal system in terms of primary and secondary rules. Primary rules state what their subjects "are required to do or abstain from" doing.[131] In their turn, secondary rules govern how the primary ones are created, modified, or enforced.[132] "Rules of the first type impose duties."[133] Instead, "rules of the second type confer powers."[134] These ones may be rules of recognition, attributing authority to legal sources;[135] rules of change, stating how and by whom the law may be altered;[136] or rules of adjudication, referring to the application of the law in concrete situations.[137] Clearly, determining which provision regulates a case and specifying its consequences is a way of saying what the law is. In other words, adjudication is a source of the law.[138] The same is true about legislative changes via repealing old norms or approving new ones.[139] Thus, the rule of recognition contains the two other species of secondary rules.

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[131] HART, *supra* note 72, at 81.

[132] *See id.* at 94.

[133] *Id.* at 81.

[134] *Id.*

[135] *See id.* at 94.

[136] *See id.* at 95–96.

[137] *See id.* at 96–97.

[138] *See id.*

[139] *See id.*

In Hart's view, the law is a set of provisions taken as valid by the rule of recognition.[140] As previously mentioned, such a rule acknowledges a legal source as authoritative. However, more needs to be said. The rule of recognition is not merely an enunciation but corresponds to social practice.[141] For instance, a constitution states that what a legislative body passes is part of the law. Additionally, the society governed by this constitution accepts such a command. In this case, the custom of taking a statute passed by parliament as valid (in some systems, with presidential or royal consent) is core for the characterization of the legal system as such. The situation would be the opposite if the same society disregarded an old document establishing that a deity's orders were the law. These orders may well have been a legal source in ancient times. Notwithstanding, disuse may have withdrawn any normativity from them, at least out of the moral or religious realms. In this society, conferring legal authority upon parliament but not on the deity is a rule of recognition. For Hart, then, stating that a provision belongs to the law depends solely on social facts (the recognition) and does not rely on a sanctioning scheme.[142]

3.2.2. Kelsen

Kelsen's perspective, though also positivist, is different. For him, the law is a system of norms defined as follows:[143] (a) an ought, a prescription regulating human behavior; (b) which may be forcefully imposed by the juridical community against the will of the subject, if necessary, according to organized and socially immanent (as opposed to transcendental or spiritual) sanctions; (c) and whose validity is given by a superior norm.[144] Under such a scheme, each legal provision is supported by a

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[140] *See id.* at 103.

[141] *See id.* at 103, 111.

[142] *Cf. id.* at 79 (stating that rules of recognition "cannot, without absurdity, be construed as orders backed by threats").

[143] *See* HANS KELSEN, TEORIA PURA DO DIREITO [PURE THEORY OF LAW] 33–37 (João Baptista Machado tran., 7th ed. 2006) (on the whole characterization).

[144] *See* HANS KELSEN, INTRODUCTION TO THE PROBLEMS OF LEGAL THEORY 63–64 (Bonnie Litschewski Paulson & Stanley L. Paulson trans., 1992) (on letter "c"). Holmes's Realism also stresses the role of sanctions in the law's characterization. However, his identification of the law with "[t]he prophecies of what the courts will do in fact" would probably leave legislative procedural rules outside the legal realm where the judiciary keeps away from the legislature's internal affairs. *See* Oliver W. Holmes, *The Path of the Law*, 10 HARVARD LAW REVIEW 457, 458, 461 (1897).

superior norm. For instance, a governmental agency may fix rules pursuant to commands given by the executive branch's head. In their turn, these commands may result from guidelines found in a statute passed by a parliament. The ultimate positive source of validity is the constitution, which extracts its authority from a hypothetical "basic norm."[145] The "basic norm" is presupposed and amounts to the simple statement: "the original constitution is to be obeyed."[146] Thus, Kelsen's account stresses the law's coercive aspect and how it extracts its validity not from practice but from an idealized hierarchy.[147]

Legal rules that do not specify sanctions may exist, but, as Kelsen clarifies, this fact does not modify the law's characterization as a coercive order.[148] Under his perspective, these norms, "non-autonomous" ones, can only belong to the legal realm if they are, one way or another, linked to a provision stating a sanction.[149] A statement prescribing an official's duty with no immediately associated punishment for non-compliance would be "juridically irrelevant" if a form of coercion could not be found elsewhere in the legal order.[150] Accordingly, it would be hardly possible to refer to the prescription as a duty at all. The situation could amount to an obligation in reference to an inner sentiment on the part of a provision's addressee. In the example of an official's duty, to speak in legal terms, it should be possible to impose on a deviant agent a penalty like a warning, suspension, or dismissal, even if the provision stating the duty does not itself allude to these sanctions. Under Kelsen's account, legal orders necessarily provide for means of coercion.

The meaning of a specified punishment is twofold. On the one hand, it constitutes a deserved retribution, a form by which society fosters justice. There is a general feeling that ending a person's life is wrong. Hence, if a citizen unlawfully

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[145] KELSEN, *supra* note 144, at 63–64.

[146] Leslie Green & Thomas Adams, *Legal Positivism*, THE STANFORD ENCYCLOPEDIA OF PHILOSOPHY (Edward N. Zalta ed., Winter 2019 ed.), https://plato.stanford.edu/archives/win2019/entries/legal-positivism/ (last visited Nov. 8, 2021).

[147] For me, Kelsen's basic norm also embodies a kind of Hart's rule of recognition if it is seen as something accepted, as a matter of fact, not simply as a presupposition.

[148] *See* KELSEN, *supra* note 143, at 56. *See also* JOHN AUSTIN, THE PROVINCE OF JURISPRUDENCE DETERMINED 24 (1832) (talking about "imperfect laws," those "which wants a sanction," Austin says that "in England, laws professedly imperative are always . . . perfect or obligatory. . . . And, if no specific sanction be annexed to a given law, a sanction is supplied by the courts of justice . . . .").

[149] *See* KELSEN, *supra* note 143, at 60–65.

[150] *See id.* at 58.

kills another, a reprimand should follow, like deprivation of liberty. In a sense, the purpose is to provide not only those directly affected by the murder but also the whole community with the comforting sensation of an appropriate response. On the other hand, the idea is to motivate others not to do the same. In this case, the message takes the form of a negative incentive. In the face of unwelcome consequences, the expectation is that people think carefully before doing a wrong. These approaches may be the most common ones for legal sanctions.

Nonetheless, the legal order may also operate through mechanisms purporting signification other than harm applied to someone. As an alternative to punishments, the law may contain provisions defining rewards to be granted for those acting appropriately.[151] Instead of avoiding an undesired behavior, the aim is to induce one regarded as positive. In tax law, from the traditional point of view, taxpayers may want to avoid a fine applying after a deadline. Alternatively, they may feel interested in paying in advance to benefit from a reduction in the due amount, should the legal system provide for such a discount. In the case of an official's duties, establishing financial grants for good performance may substitute for administrative penalties. In these optional ways, the legal system is not imposing damages (in the sense that non-compliance does not affect someone's previous situation) but offering prizes as incentives for appreciated conduct.

One way or another, the law's coercive feature in Kelsen's design is always present. The conclusion is evident before classic sanctions. Putting a murderer in jail is clearly coercion. The same is true about dismissing an official who does not do the assigned tasks. Yet, the conclusion also holds in the face of positive incentives. After all, the sign, positive or negative, is just a matter of perspective. Whether a taxpayer pays a fine or misses a discount because she does not abide by the deadline, she forcefully disburses more than she would in case of compliance. From a similar vantage point, denying a public agent a financial award due to laziness deprives her of an extra amount in her paycheck. Thus, the case may be blurring regarding the characterization of the sanctioning scheme, even more so considering the several legal provisions that are non-autonomous. However, in Kelsen's model, enforcing

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[151] *Cf.* AUSTIN, *supra* note 148, at 9 (stating that some authors treat reward, not only punishment, as a sanction, though he does not agree with it: "[b]y some celebrated writers [by Locke, Bentham, and, I think, Paley], the term sanction, or enforcement of obedience, is applied to conditional good as well as to conditional evil: to reward as well as to punishment. But, with all my habitual veneration for the names of Locke and Bentham, I think that this extension of the term is pregnant with confusion and perplexity.").

obedience to the rules is always possible regardless of the perspective toward the available incentives.

3.3. Legislative procedures as (hard) law under Hart's and Kelsen's accounts

3.3.1. Under Kelsen's

Legislative procedural rules fit well in Hart's and Kelsen's accounts of a legal order. Take the Kelsenian one first. Lawmaking norms prescribe how the business in parliaments shall work. In this sense, they are the oughts delineating the conduct of legislators. Moreover, such provisions are either enshrined in or grounded on a constitution as in any law branch. For instance, Article I of the U.S. Constitution contains some of these provisions, and Congress's internal guidelines derive their validity from the clause according to which "Each House may determine the rules of its proceedings."[152] In Brazil, the Constitution extensively deals with congressional issues[153] and also vests power in the Senate and the Chamber of Deputies for each one "to elaborate its internal regulations."[154] Then, there is no doubt that lawmaking rules present two of the law's features in Kelsen's description: they set the oughts whose ultimate source of validity is the constitution (or the basic norm, more precisely). Yet, it remains to examine whether they constitute a coercive system.

One may state that legislative procedures do not provide for sanctions. Should it be the case, those procedures would not be law under Kelsen's approach. Nevertheless, there certainly are sanctions in the lawmaking process. In the U.S., each House of Congress may "punish its members for disorderly behavior, and, with the concurrence of two thirds, expel a member."[155] In Brazil, "[a]buse of the prerogatives ensured to a congress member or the gaining of undue advantages, in addition to the cases defined in the internal regulations, is incompatible with parliamentary decorum," and a deputy or a senator whose conduct be considered

[152] U.S. CONST. art. I, § 5.

[153] C.F. 1988, *supra* note 69, arts. 44 to 69 (Braz.).

[154] C.F. 1988, *supra* note 69, arts. 51, III, and 52, XII (Braz.).

[155] U.S. CONST. art. I, § 5.

indecorous “shall lose office.”[156] These are prominent examples of coercive provisions in the legislative business, maybe more related to personal posture. However, not all situations are as eloquent as these ones.

The legislative process’s characterization as a coercive order may not be straightforward in the face of numerous non-autonomous provisions, those with no apparent link to any sanction. Still, it is possible to identify how the outcomes resulting from non-compliance with the procedures may instigate legislators to abide by the rules. For instance, there may be a deadline for amending a bill, and missing it may impede further attempts to alter the initial proposal should a legislator be interested in doing so.[157] There may be a time slot during which a politician may speak on the floor, and her speech may be interrupted in case of time abuse.[158] Also, the internal regulations may specify a quorum for a voting session, which may not proceed absent the minimal number of legislators.[159] The examples are countless. For assessing these procedures, it does not matter if the enforcing mechanism does not look like a punishment. As previously stated, it suffices that it amounts to an incentive, regardless of its perception as negative or positive. The problem is typically not the absence of enforceability but situations when the legislators in charge of enforcing the rules (a house speaker or president, a session chair) do not abide by them. Yet, there are ways of assuring compliance, even in these cases, through solutions such as empowering non-partisan actors within the legislature or, under strict conditions, the judiciary’s oversight.[160]

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[156] C.F. 1988, *supra* note 69, art. 55, II, and para. 1 (Braz.).

[157] *See*, *e.g.*, RESOLUÇÃO DO CONGRESSO NACIONAL NO. 1, DE 2006 [R.C.N. 1/2006] [NATIONAL CONGRESS RESOLUTION No. 1, 2006] art. 82, III (Braz.), https://www2.camara.leg.br/legin/fed/rescon/2006/resolucao-1-22-dezembro-2006-548706-normaatualizada-pl.html (last visited Mar. 3, 2022) (stating that lawmakers can only propose amendments to the federal budget bill from October 1st to October 20th).

[158] *See, e.g.,* The Nomination of Ketanji Brown Jackson to be an Associate Justice of the Supreme Court of the United States (Day 3), COMMITTEE ON THE JUDICIARY (U.S. SENATE) 06:26:10-06:29:03 (2022), https://www.judiciary.senate.gov/meetings/the-nomination-of-ketanji-brown-jackson-to-be-an-associate-justice-of-the-supreme-court-of-the-united-states-day-3 (last visited Apr. 26, 2022) (Sen. Dick Durbin [D.-Ill.], chairman, interrupting Sen. Ted Cruz [R.-Tex.]).

[159] *Cf.* OLESZEK ET AL., *supra* note 10, at 200 (referring to the U.S. House of Representatives).

[160] *See infra* Part II.

3.3.2. Kelsen's in the face of Hart's

One may still be uneasy about fitting legislative procedures into the Kelsenian model. After all, she may see lawmaking much more as a matter of coordination or cooperation than enforceability.[161] This criticism is natural regarding Kelsen's approach, which may well be circumvented by Hart's, which does not rest upon sanctions. Indeed, Hart states that "there are important classes of law where this analogy with orders backed by threats altogether fails, since they perform a quite different social function."[162] One of these classes refers to the legislative process, which could be hardly compared to criminal law, maybe the legal branch where the relation between commands and coercion is most evident.[163] Passing a statute disregarding a rule of change or recognition that empowers the majority to do so would not amount to a punishable behavior but to a cause for nullity.[164] In other words, the statute could be declared void, and this declaration would not resemble a sanction applicable to a bad-behaving agent.[165]

Although a statute's nullity may not be as compelling as a criminal penalty, the perspective that a procedural failure may generate serious political consequences may function as a significant drive in a legislature.[166] The situation may be more pressing than mere "psychological factors as disappointment of the hope that a transaction will be valid."[167] A concrete case illustrates the point. In Brazil, pursuant to the country's Fiscal Responsibility Law (*Lei de Responsabilidade Fiscal*),[168] a budget directives law shall annually state fiscal targets with which the federal

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[161] *Cf.* Miller, *supra* note 109, at 1342, 1364–1365 (stating that legislative procedures are non-binding or non-enforceable).

[162] HART, *supra* note 72, at 27.

[163] *See id.*

[164] *See id.* at 34.

[165] *See id.*

[166] *Cf.* Schauer, *supra* note 112, at 477–478 ("A police officer who knowingly violates a clear constitutional command is personally liable for damages, but a legislator who does the same thing, apart from the sanction of invalidity of the legislation, is accountable solely to the electorate.").

[167] HART, *supra* note 72, at 33.

[168] LEI COMPLEMENTAR NO. 101, DE 2000 [L.C. 101/2000] [SUPPLEMENTARY LAW NO. 101, 2000] (Braz.), http://www.planalto.gov.br/ccivil_03/leis/lcp/lcp101.htm (last visited Mar. 21, 2022).

government must comply.[169] At the end of 2014,[170] it was clear that the federal government could not accomplish that year's fixed primary result (the difference between non-financial revenues and expenses). For the President of the Republic not to be held accountable for it, Congress should pass a statute altering the target for the 2014 primary result.[171] As there were only a few days left before Congress went on recess,[172] legislators wondered if they could hurry things up.[173] Eventually, such an attempt could be seen as clashing with specific constitutional rules about the budgetary process.[174] If such an understanding prevailed, the statute could be struck down for unconstitutionality under a challenge before the Supreme Federal Court,[175] setting aside the new fiscal target and maintaining the original one. Such an outcome would render the executive politically fragile since non-compliance with budgetary targets, according to Brazilian legislation, may be interpreted as a cause for the

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[169] *See id.* art. 4, para. 1.

[170] In Brazil, the fiscal year coincides with the civil year (January 1 to December 31). *See* LEI NO. 4320, DE 1964 [L. 4320/1964] [LAW NO. 4320, 1964] art. 34 (Braz.), https://www.planalto.gov.br/ccivil_03/leis/l4320.htm (last visited Feb. 15, 2023).

[171] *Cf. Projeto de Lei do Congresso Nacional No. 36, de 2014*, CONGRESSO NACIONAL [*P.L.N. 36/2014*] [*National Congress Bill No. 36, 2014*, NATIONAL CONGRESS], https://www.congressonacional.leg.br/materias/pesquisa/-/materia/118860 (last visited Mar. 2, 2023) (click on "Texto inicial" for the original version submitted by the executive branch).

[172] *Cf.* C.F. 1988 art. 57 (Braz.), *translated in* CONSTITUTION OF THE FEDERATIVE REPUBLIC OF BRAZIL, *supra* note 69 ("The National Congress shall meet each year in the Federal Capital, from February 2 to July 17 and from August 1 to December 22.").

[173] *See, e.g.*, DIÁRIO DO SENADO FEDERAL, Ano LXIX, No. 186, 14.11.2014 [D.S.F. 186/2014] [GAZETTE OF THE FEDERAL SENATE, Year LXIX, No. 186, Nov. 14, 2014] 40 (Braz.), https://legis.senado.leg.br/diarios/ver/19196?sequencia=40 (last visited Mar. 2, 2023) (reproducing *Mensagem* No. 375 [Message No. 375], a presidential request for the bill's urgent consideration).

[174] *See* C.F. 1988, *supra* note 69, art. 166 (Braz.).

[175] For the court's competence, *see id*. art. 102, I, "a" (Braz.).

President's impeachment.[176] Thus, fearing the statute's nullity and consequences, government supporters in Congress passed it through the regular procedure.[177]

3.3.3. Under Hart's

If such an example is still non-convincing about a general coercive feature of lawmaking regulations, Hart's model offers a good alternative for characterizing them as law. The parcel of a legislature's norms corresponding to rules of change (or recognition, more broadly) obviously belongs to the legal sphere under Hart's scheme.[178] This parcel, however, is a very limited one in my view. As far as I can see, it solely includes those provisions according to which legislation is acknowledged as enacted. In other words, it just encompasses specific procedures conferring authority on determined agents to perform them. Article I, section 1, of the U.S. Constitution, stating that "[a]ll legislative powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives,"[179] is one of these provisions. Another one is section 7 of the same article, declaring that every bill shall pass "the House of Representatives and the Senate" and, "before it become a law, be presented to the President of the United States."[180] Not only in American society but in any democracy, these are the sort of legislative provisions that people may acknowledge as rules of change or

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[176] *See id.* arts. 85, VI and VII, and 86, para. 1, II (Braz.); LEI NO. 1079, DE 1950 [L. 1079/1950] [LAW NO. 1079, 1950] art. 10 (Braz.), https://www.planalto.gov.br/ccivil_03/leis/l1079.htm (last visited Apr. 13, 2024). See also *Deputados Federais Questionam Projeto de Lei sobre Alteração da L.D.O.*, SUPREMO TRIBUNAL FEDERAL [*Federal Deputies question Bill Altering the Budget Directives Law*, FEDERAL SUPREME COURT], https://portal.stf.jus.br/noticias/verNoticiaDetalhe.asp?idConteudo=280714&ori=1 (last visited Mar. 2, 2023).

[177] *Cf. P.L.N. 36/2014*, *supra* note 171 (for the passed law, click on "Lei nº 13.053 de 15/12/2014"). *Cf. also* DIÁRIO DO SENADO FEDERAL, Ano LXIX, No. 187, 15.11.2014 [D.S.F. 187/2014] [GAZETTE OF THE FEDERAL SENATE, Year LXIX, No. 187, Nov. 15, 2014] 608 (Braz.), https://legis.senado.leg.br/diarios/ver/19202?sequencia=608 (last visited Mar. 2, 2023) (reproducing *Mensagem* No. 376 [Message No. 376], a presidential withdrawal from the previous request for the bill's urgent consideration).

[178] *See* HART, *supra* note 72, at 95–96; Gould, *supra* note 118, at 1960.

[179] U.S. CONST. art. I, § 1.

[180] U.S. CONST. art. I, § 7.

recognition. Yet, lawmaking demands many more regulations, way beyond these few ones. Fortunately, Hart's approach is still useful for characterizing them as law.

The bulk of parliament's own norms can be encompassed by what Hart calls primary rules. Provisions regulating the daily legislative business can hardly be said to be of the same type as those empowering elected bodies to approve novel laws. For instance, the Standing Rules of the U.S. Senate entitle its members to raise a question of order "at any stage of the proceedings, except when the Senate is voting or ascertaining the presence of a quorum."[181] Concerning legislation enactment, such a provision does not play a role comparable to one that vests powers in both Congress houses. Society is undoubtedly aware of the latter but may completely ignore the former's existence. Yet, this specific ignorance does not influence the characterization of the legal system. Indeed, this social fact does not impact the legality of the statement about the right to raise points of order in the U.S. Senate and the corresponding duty of responding adequately to the request. For those relying on provisions alike (in other words, for senators), these rules organize the working place through duties and rights, just like those belonging to the civil procedure or administrative law. Furthermore, such legislative rules are valid since no one denies that a constitutional assembly or the legislature itself can enact them. In other words, they pass the rule of recognition test. For these reasons, it is possible to affirm that the generality of lawmaking procedural norms constitutes primary rules and, as such, has a legal nature under Hart's theory.

4. Blurred distinctions

Compliance with norms is not an easy task. Law is not like Mathematics, which follows strict logic.[182] Generally, there are problems related to interpretation.[183] Consequently, countless readings may exist for the same rule, leading to different results.[184] Reversely, there may be gaps since the law cannot

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[181] STANDING RULES OF THE SENATE r. XX(1), S. DOC. NO. 113-18 (2013), https://www.rules.senate.gov/imo/media/doc/CDOC-113sdoc18.pdf (last visited Jan. 5, 2023).

[182] *Cf.* HART, *supra* note 72, at 128 (stating that there is no such a thing as "'mechanical' jurisprudence").

[183] *See* SHEPSLE, *supra* note 11, at 60; Wintgens, *supra* note 127, at 20–21.

[184] *See* MAURO CAPPELLETTI, JUÍZES LEGISLADORES? [LEGISLATOR JUDGES?] 22 (Carlos Alberto Alvaro de Oliveira tran., 1993).

account for all situations, potentially infinite ones.[185] Sometimes, in the legislative arena, "imagination" or "rule breaking" may show up to unlock the process or advance a group's agenda.[186] These issues challenge the lawmaking process's adhesion to procedural rules.

4.1.Interpretation

Written legislative procedures are subject to interpretation as any legal text. Through legislation, lawmakers try to foresee real-life circumstances and delineate appropriate guidelines for people's conduct as well as responses in case of deviation.[187] In the aftermath of the French Revolution, the expectation was that codification could provide citizens with a straightforward recipe for daily affairs.[188] However, it soon became evident that a code's capacity to offer a secure path along with someone could be sure she was rightly acting was much more limited than previously imagined.[189] That was so for some reason.

4.1.1. Texts' meanings

First, even the signification of a single word may be the subject of disagreement. For instance, "communism" is a concept that embodies the notions of "common ownership of the means of production"[190] and of "a society in which each person should contribute according to their ability and receive according to their

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[185] *See id.* at 20.

[186] *See* SHEPSLE, *supra* note 11.

[187] *Cf.* HART, *supra* note 72, at 124 (referring to "general standards of conduct").

[188] *See* MIGUEL REALE, LIÇÕES PRELIMINARES DE DIREITO [LAW PRELIMINARY LESSONS] 313 (1973).

[189] *Cf.* HART, *supra* note 72, at 126, 128 (mentioning the "uncertainties as to the form of behaviour required" and stating that "human legislators can have no such knowledge of all the possible combinations of circumstances which the future may bring"); REALE, *supra* note 188, at 313 (referring to "shortcomings and gaps") (the translation is mine).

[190] KARL MARX, CRITIQUE OF THE GOTHA PROGRAMME 18 (2001), https://ebookcentral.proquest.com/lib/berkeley-ebooks/detail.action?docID=3008482 (last visited Feb. 15, 2023).

need."[191] However, for many, it serves as a label for anything other than a far-right position.[192] Clearly, the meaning of "communism" is much more complex than that of "book," but even a reference to books may raise questions about whether a pamphlet belongs to the same category.[193] Furthermore, words typically do not show up in isolation. They articulate with others, and what they convey may vary according to this interaction, as in the case of "donkey" in the phrases: "this donkey is a valuable animal;" and "someone is a donkey." Still, different meanings may result from distinct situations, as when a person says she loves "football:" her passion will probably refer to diverse sports depending on in which part of the world she is.[194] Summing up, arguing about words' conceptions is inherent to interpreting any text. The same applies to legal provisions,[195] including those referring to legislative procedures.

Different textual readings point toward diverse procedural routes and outcomes. For instance, in the United States, both Congress houses must "pass a bill in identical form,"[196] presenting it to the President of the Republic.[197] In the event different versions of the same bill result, there must be an agreement between the chambers, and one way of achieving it is through a joint House-Senate conference report. Basically, anything identically approved by both houses must remain in

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[191] Jonathan Wolff & David Leopold, *Karl Marx*, THE STANFORD ENCYCLOPEDIA OF PHILOSOPHY (Spring 2021 ed.), https://plato.stanford.edu/archives/spr2021/entries/marx/ (last visited Aug. 18, 2022) (at section 5.3, "Communism and 'Justice'").

[192] *See* Ed Kilgore, *Do Republicans Know What Communism Is?*, INTELLIGENCER (2022), https://nymag.com/intelligencer/article/do-republicans-know-what-communism-is.html (last visited Aug. 18, 2022); Francisco Fernandes Ladeira, *Bolsonarismo e o "vírus comunista"* [*Bolsonarism and the "communist virus"*], OBSERVATÓRIO DA IMPRENSA [PRESS OBSERVATORY] (2020), https://www.observatoriodaimprensa.com.br/conjuntura-politica/bolsonarismo-e-o-virus-comunista/ (last visited Aug. 18, 2022).

[193] *See* RONALD DWORKIN, LAW'S EMPIRE 45 (1986).

[194] *See* Jeremy Waldron, *Can There Be a Democratic Jurisprudence?*, 58 EMORY LAW JOURNAL 675, 675–676 (2009).

[195] *See, e.g,* Church of the Holy Trinity v. United States, 143 U.S. 457 (1892) (discussing if a ban on the importation of foreigners "to perform labor or service of any kind" would include religious activities); United Steelworkers v. Weber, 443 U.S. 193 (1979) (discussing if the Civil Rights Act of 1964 prohibition on employment discrimination based on race would bar a private corporation from hiring through affirmative actions benefiting black people).

[196] SHEPSLE, *supra* note 11, at 73–74.

[197] *See* U.S. CONST. art. I, § 7.

place.[198] In addition, the document "cannot include topics appearing in" either version.[199] Finally, before divergences between correlated matters, the conferring committee must reach a compromise "within the scope of the differences."[200] The problem is reaching a consensual solution when "the different content reflects entirely different approaches to the issue at hand."[201] For instance, in an environment protection act, the House's option may be empowering a governmental agency to enforce safeguarding measures, while the Senate's choice may be "the implementation of a carbon tax."[202] Thus, what would be "the scope of the differences in this case, and what would a compromise look like?"[203] The answer to these questions depends on the interpretation of the legislative proposal under consideration and of the procedural rule.[204] The alternatives may result in strikingly distinct versions of a bill.

4.1.2. Gaps

Second, written provisions cannot comprise solutions for all situations. The early codifiers thought legislation could offer perfect and neutral guidance.[205] From their perspective, if fact "X1" happened, statutes or codes would contain the appropriate solution. In other words, they thought lawmakers could imagine all future cases and write down how citizens, administrators, or adjudicators should deal with them. Neutrality would obtain from ignorance concerning who would be involved in each predicted situation.[206] As such, anyone falling within the ambit of the fact "X1" would be treated according to the legal pre-determined prescription.

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[198] *See* SHEPSLE, *supra* note 11, at 77.

[199] *Id.* at 78.

[200] *Id.*

[201] *Id.*

[202] *Id.*

[203] *Id.*

[204] *See id.* at 79.

[205] *See* REALE, *supra* note 188, at 313–314.

[206] *Cf.* i*d.* at 313–314 (mentioning "the equality of all before the law" and that "the privileges and prerogatives of the nobility and the clergy disappeared so that only the law could be revealed through the general will") (the translation is mine).

The problem is that no one can perfectly define all future scenarios.[207] As such, legislation is full of gaps.[208] It may occur that fact "X1" actually happen, and, in this case, its legal approach would be given. Nevertheless, a slightly different case, "X2," may also show up, and it may be doubtful whether the codified solution for "X1" would be appropriate.[209] Not to mention novel situations for which even similar descriptions cannot be found in written norms.[210] It is unavoidable, then, that some subjectivity plays a role while filling gaps to address concrete problems.

Politics in Brazil offers another instance of interpretational issues, particularly related to a gap. The following case deals with reducing the criminal age (the age at which someone can be held criminally liable),[211] defined in the Constitution (as eighteen years of age).[212] In the country, constitutional amendment proposals follow legislative procedures in Congress.[213] One of the procedural rules states: "The matter dealt with in a proposal of Amendment that is rejected or considered impaired shall not be the subject of **another proposal** in the same legislative session [February 2 to December 22]."[214] On June 30, 2015, the Chamber of Deputies defeated one such proposal whose objective was to reduce the criminal age. However, that house passed a different version of the same proposal the following day. Considering the mentioned rule, was the approval valid or not? What was the meaning of "another proposal?" Did it encompass a different version of the same proposal, leading to the approval's invalidity? Called to decide upon the issue, the Brazilian Federal Supreme Court (S.T.F.)[215] stated that the different version did not amount to "another

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[207] *See* HART, *supra* note 72, at 126, 128; REALE, *supra* note 188, at 313.

[208] *See* HART, *supra* note 72, at 126, 128; REALE, *supra* note 188, at 313.

[209] *Cf.* REALE, *supra* note 188, at 336 (referring to "extensive interpretation") (the translation is mine). *See, e.g.,* ROBERT A. KATZMANN, JUDGING STATUTES 81–90 (2014) (discussing "whether parents who prevailed in disputes with their school systems over the educational placements of their disabled children were entitled to reimbursement for costs associated with hiring expert witnesses and consultants who aided them in the litigation" under a legal provision "authorizing a court to award 'reasonable attorneys' fees'").

[210] *See* REALE, *supra* note 188, at 334–337.

[211] The same example was offered in a Constitutional Theory unpublished essay during the 2016-2017 L.L.M. (Master of Laws) program at University College London.

[212] *See* C.F. 1988, *supra* note 69, art. 228 (Braz.).

[213] *See id.* art. 60.

[214] *Id.* art. 60, para. 5, combined with art. 57, *translated in* CONSTITUTION OF THE FEDERATIVE REPUBLIC OF BRAZIL, *supra* note 69 (emphasis added).

[215] S.T.F. is the acronym for the court's name in Portuguese, *Supremo Tribunal Federal*.

proposal" and upheld the Chamber's decision.[216] Another interpretation would have buried the congressional discussion on the criminal age in 2015.[217]

4.1.3. Doubtful facts

Third, there are circumstances in which the relation between facts and legal provisions is well established, but it is uncertain which foreseen event occurred. In this situation, rules "x" and "y" apply, respectively, to facts "X" and "Y." The interpreter is before one of these facts but is unsure whether "X" or "Y" happened. For instance, in a soccer match, the referee may not know whether a foul was inside or outside the penalty area. In the first case, the game's rules state a penalty kick should follow, a situation where scoring is likely since the ball is placed very close to the goal and no one can help the goalkeeper. In the second, the rules indicate that the case would be that of a free kick. In this situation, scoring chances are more modest because players forming a barrier could stay between the ball and the goal. Moving from sports to the law, an accident where close relatives die almost simultaneously may raise questions regarding hereditary succession. In such a case, establishing who inherits what may depend, according to the legislation, on knowing the deceases' order, which may be uncertain.[218] Similarly, legal punishments for a perpetrator may be strikingly different depending on whether a crime was intentional or not,[219] and such a distinction may be extremely blurry. As in the cases of

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[216] S.T.F., Mandado de Segurança [M.S.] No. 33697, Relator: Ministro [Min.] Gilmar Mendes (decisão monocrática), 15.2.2017, DIÁRIO DA JUSTIÇA ELETRÔNICO [D.J.E.] No. 33, 20.2.2017 (publicação), [Federal Supreme Court, Writ of Mandamus No. 33697, Rapporteur: Justice Gilmar Mendes (monocratic decision), Feb. 15, 2017, ELECTRONIC JUDICIARY GAZETTE No. 33, Feb. 20, 2017 (publication)] 97-100 (Braz.), https://www.stf.jus.br/arquivo/djEletronico/DJE_20170217_033.pdf (last visited Nov. 16, 2021).

[217] After passing in the Chamber of Deputies, the constitutional amendment proposal followed to the Senate. In December 2022, it was archived, at the end of the 2019-2022 legislative term, pursuant to the R.I.S.F. art. 332, para. 1. *See Proposta de Emenda à Constituição No. 115, de 2015*, SENADO FEDERAL [*Proposal of Amendment to the Constitution No. 115, 2015*, FEDERAL SENATE], http://www25.senado.leg.br/web/atividade/materias/-/materia/122817 (last visited Feb. 16, 2023).

[218] CÓDIGO CIVIL [C.C.] [CIVIL CODE] arts. 8, 1829-1844 (Braz.), https://www.planalto.gov.br/ccivil_03/leis/2002/l10406compilada.htm (last visited Feb. 27, 2023).

[219] *See, e.g.*, CÓDIGO PENAL [C.P.] [CRIMINAL CODE] art. 18, II, parágrafo único [sole paragraph] (Braz.), https://www.planalto.gov.br/ccivil_03/decreto-lei/del2848compilado.htm (last visited

significations and gaps, doubt about the facts also diverts legal texts from the ancient promises of unequivocal guidance.

4.1.4. Authors' intentions and the execution of the Brazilian federal budget

Finally, a norm's meaning varies according to the importance interpreters attribute to an author's intention or purpose and how they try to retrieve these elements. Relatedly, two questions promptly arise. Is the only legitimate reading that of the writer? If so, is it possible to access such a reading? Suppose a country's President signs an executive order. Formally, she is the document's author, but it may reasonably be that she only provided the general guidelines for a drafter. In this case, should someone look for the drafter's intention? Possibly not since it would hardly be seen as authoritative. The President's guidelines could be valuable for interpreting the order, but there could be no available record of them or at least part of them. Should an order's addressee then ask the President about a specific reading? Would it be feasible? Highly unlikely.

Similar inquiries are even more intriguing in the case of legislative pieces, including parliaments' internal rules, because these texts result from a collective enterprise. Who or what would then be authoritative sources for interpretation? Maybe a house's report containing the majority's vantage point at "the last relevant legislative decision."[220] This solution sounds appealing but involves the same kind of interrogation. After all, the majority is itself a group, registered manifestations may not reveal everything (sometimes they conceal something), and other opinions, such as the losers', may influence the outcome.[221] Thus, an alternative could be sticking to the legal text, as the sole legitimate product of an individual or collective will,[222] in light of the law system and its goals and principles,[223] maybe resorting to

Feb. 27, 2023) ("Except in the cases expressed by law, no one can be punished for a fact foreseen as a crime, except when he commits it intentionally.").

[220] Victoria F. Nourse, *A Decision Theory of Statutory Interpretation: Legislative History by the Rules*, 122 THE YALE LAW JOURNAL 70, 76–77 (2012). About the minority's opinion, the author states that "one should never cite loser's history as an authoritative source of textual meaning." *Id.*

[221] *See* JEREMY WALDRON, LAW AND DISAGREEMENT 138, 141 (Reprinted ed. 2004).

[222] *See id.* at 144–145.

[223] *See* DWORKIN, *supra* note 193, at 51–53, 57, 58–59; DWORKIN, *supra* note 63, at 105–108; REALE, *supra* note 188, at 328.

other sources, such as the lawmaking history, as supporting tools.[224] One way or another, discovering intents or purposes either from authors or the legal realm, as itself a non-straightforward task, adds further uncertainty to legal interpretation.

An extreme commitment to the authors' intentions may lead to solutions that seem at odds with a republican form of government. On the one hand, the search for the lawmakers' intentions may be justifiable in the light of arguments stressing their legitimacy as elected representatives.[225] On the other, the *res publica* demands that state affairs be impersonal for the sake of the public interest.[226] These two aspects are not necessarily opposed to one another. Indeed, it is expected that politicians speak and act on behalf of their constituents and achieve the common good through decisional procedures enabling diverse points of view aggregation.[227] In the face of this reasoning, is attributing to a specific author the sole power to say how a piece of legislation should be applied reasonable?

The execution of federal budget earmarks in Brazil sheds light on the proposed question. Yearly, the President of the Republic submits a bill with public agencies' appropriations to Congress.[228] All federal deputies and senators then have the opportunity to change the initial document through amendments according to a comprehensive set of constitutional, statutory, and congressional rules.[229] Along with group initiatives, each legislator can offer 25 amendments suggesting appropriations for specific governmental actions.[230] The basics of the regulations

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[224] *See* WILLIAM N. ESKRIDGE JR., JAMES J. BRUDNEY & JOSH CHAFETZ, LEGISLATION AND STATUTORY INTERPRETATION 205 (3d ed. 2022).

[225] *Cf. id.* at 188 (describing intentionalism).

[226] *See* PHILIP PETTIT, REPUBLICANISM: A THEORY OF FREEDOM AND GOVERNMENT 284 (1999).

[227] "A legislature is impotent . . . unless there is a rule for aggregating or combining the votes of its members." WALDRON, *supra* note 221, at 143.

[228] *See* C.F. 1988, *supra* note 69, art. 165 (Braz.); ATO DAS DISPOSIÇÕES CONSTITUCIONAIS TRANSITÓRIAS [A.D.C.T.] [TEMPORARY CONSTITUTIONAL PROVISIONS ACT] art. 35, para. 2, III (Braz.), https://www.planalto.gov.br/ccivil_03/constituicao/constituicao.htm#adct (last visited Apr. 19, 2024), *translated in* CONSTITUTION OF THE FEDERATIVE REPUBLIC OF BRAZIL, (2020), http://www.stf.jus.br/arquivo/cms/legislacaoConstituicao/anexo/brazil_federal_constitution.pdf (last visited Nov. 16, 2021) (henceforth, references to the this translated version of the Brazilian Constitution are omitted except where clearly stated).

[229] *See* C.F. 1988, *supra* note 69, art. 166 (Braz.). *See also* R.C.N. 1/2006, *supra* note 157, (Braz.) (regulating the budgetary legislative process in the Brazilian National Congress).

[230] *See* R.C.N. 1/2006, *supra* note 157, arts. 44, 46, and 49 (Braz.).

state that each amendment only refers to one action,[231] and the authors count on equal financial amounts.[232] Thus, a senator can propose any distribution of the fixed individual value among 25 specific actions. The same applies to the remaining 80 senators or 513 federal deputies. All the amendments go through voting reunions at the joint budget committee and, finally, a joint session of both full houses.[233] Theoretically, rejection on the merits may occur, but it seldom happens under a non-written tradition. Due to a tacit agreement among the legislators, their amendments to the federal budget bill enjoy a kind of sanctity in Congress.

Curiously, the special deference attributed to the individual amendments survives the end of the legislative process, remaining alive throughout the budget execution. At least in the Brazilian context, amendments to a bill are not like an amendment to the Constitution, which alters, introduces, or eliminates valid constitutional provisions and has a normative standing after promulgation.[234] Instead, an amendment to a bill is just a proposal whose objective is to modify another one in the course of legislative procedures.[235] In other words, they are simply a lawmaking working instrument. As such, what is valid and binding after enactment is a statute, a code, a legislative decree, or any other normative species, not the original bill or the many amendments through which legislators suggested alterations to the starting proposal. Nonetheless, the budgetary amendments enjoy a special status even after the federal budget goes into force.

First, their authorship is perfectly identifiable. In other bills, typically in the form of purely textual language, it is usually tricky to check who the author of a specific provision is, if not impossible. It may easily happen that the final wording results from numerous contributions, being almost impossible to link the authorship to a single individual. In the budget case, some indexes establish such an association

[231] *See id*. art. 41, III (Braz.).

[232] *See id*. art. 49 (Braz.).

[233] *See* C.F. 1988, *supra* note 69, art. 166. (Braz.); R.C.N. 1/2006, *supra* note 157, art. 82 (Braz.).

[234] *See* C.F. 1988, *supra* note 69, arts. 59, I, and 60 (Braz.).

[235] *See* R.I.C.D., *supra* note 114, art. 118 (Braz.), and R.I.S.F., *supra* note 114, arts. 211, VI, and 230-234 (Braz.).

in the published law[236] or its databases.[237] For instance, if the budgetary bill originally proposed $Q for a project (say, the construction of a dam) and a representative suggested adding $q to the same project, and supposing these values' approval, the budgetary law does not simply show the appropriation of $Q', equal to $(Q+q), but shows the parcels separately, making it clear that $q derives from a representative's initiative through an amendment.

Second, the provisions concerning budget execution attribute normative relevance to the amendments beyond legislative procedures. Accordingly, the Constitution provides that "[e]xecution of the budget and financial appropriation" resulting from individual amendments "is mandatory," except "in cases of technical impediments."[238] Moreover, it is up to each author – either a senator or a federal deputy – to state, through official communication, further details of how the public administration must comply with her intent.[239] In the face of the said impediments, it is also up to each author to define how the financial amount fixed in a problematic amendment of her own must be appropriated elsewhere.[240] Summarizing, the unique status enjoyed by the budgetary amendments in Brazil encompasses a kind of legal interpretation in which the pursuance of the author's intention literally means entitling her to say how public officials must apply a piece of law she proposed.

It is this personalism associated with the execution of budgetary earmarks that does not seem to fit the republican principle.[241] Honestly, there are arguments stating

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[236] *See* LEI DE DIRETRIZES ORÇAMENTÁRIAS PARA 2023 [L.D.O. 2023] [BUDGET DIRECTIVES LAW 2023] art. 7, para. 4, II, "c" (Braz.). The L.D.O. 2023 correponds to LEI NO. 14436, DE 2022 [L. 14436/2022] [LAW NO. 14436, 2022], https://www.planalto.gov.br/ccivil_03/_ato2019-2022/2022/lei/l14436.htm (last visited Apr. 13, 2024).

[237] *See SIGA Brasil*, *Painel Emendas*, SENADO FEDERAL [*SIGA Brazil*, *Amendments Panel*, FEDERAL SENATE],
https://www9qs.senado.leg.br/extensions/Siga_Brasil_Emendas/Siga_Brasil_Emendas.html?_gl=1*4wtr88*_ga*MTU5Mzc4MTA3LjE2NTAzOTgxNDg.*_ga_CW3ZH25XMK*MTcwMjczMDI4MS40Mi4xLjE3MDI3MzM4MzEuMC4wLjA. (last visited Apr. 13, 2024).

[238] C.F. 1988, *supra* note 69, art. 166, paras. 9, 11, and 13 (Braz.), *translated in* CONSTITUTION OF THE FEDERATIVE REPUBLIC OF BRAZIL, *supra* note 69.

[239] *See* C.F. 1988, *supra* note 69, art. 166, para. 14 (Braz.), and L.D.O. 2023, *supra* note 236, art. 80 (Braz.).

[240] *See* C.F. 1988, *supra* note 69, art. 166, para. 14 (Braz.), and L.D.O. 2023, *supra* note 236, art. 80 (Braz.).

[241] Although I do not explore this strand, the separation of powers principle may also be at stake in the case I am assessing or similar ones. Indeed, "[i]nterpreting a law enacted by Congress to

just the opposite.[242] Allegedly, the legal regime concerning this topic was a reaction to using these earmarks to secure a majority in Congress.[243] In an environment of multiple political parties, such a mechanism was one of the ways by which the so-called "coalition presidentialism"[244] could assure governability at the federal level.[245] Despite real-world needs, one critique pointed out that the practice was not transparent because it was not regulated, and negotiations around the subject were not accessible.[246] Besides, another counter-argument affirmed that the method ran

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implement the legislative mandate is the very essence of 'execution' of the law." Bowsher v. Synar, 478 U.S. 714, 733 (1986).

[242] *Cf.* S.T.F., Arguição de Descumprimento de Preceito Fundamental [A.D.P.F.] No. 854, Medida Cautelar [M.C.], Relatora: Min. Rosa Weber (decisão monocrática), 5.11.2021, D.J.E. No. 221, 9.11.2021 (publicação) [S.T.F., Claim of Non-Compliance with a Fundamental Precept No. 854, Precautionary Measure, Rapporteur: Justice Rosa Weber (monocratic decision), Nov. 5, 2021, D.J.E. No. 221, Nov. 9, 2021 (publication)] 39 (Braz.), https://www.stf.jus.br/arquivo/djEletronico/DJE_20211108_221.pdf (last visited Feb. 27, 2023) (stating that the legal regime applied to these amendments rests upon the principles of transparency and impersonality).

[243] *See* Congresso Nacional, Comissão Mista de Planos, Orçamentos Públicos e Fiscalização, Parecer No. 74, de 2013-C.N., DIÁRIO DO SENADO FEDERAL, Ano LXVIII, Suplemento A, No. 181, 2.11.2013 [D.S.F. 181-A/2013] [National Congress, Joint Committee for Plans, Public Budgets, and Oversight, Opinion No. 74, 2013-C.N., GAZETTE OF THE FEDERAL SENATE, Year LXVIII, Supp. A, No. 181, Nov. 2, 2013] 6 (Braz.), https://legis.senado.leg.br/diarios/BuscaPaginasDiario?codDiario=18717&paginaInicial=1&paginaFinal=10 (last visited Feb. 27, 2023).

[244] Sérgio Henrique Hudson de Abranches, *Presidencialismo de Coalizão: O Dilema Institucional Brasileiro* [*Coalition Presidentialism: The Brazilian Institutional Dilemma*], 31 DADOS 5 (1988). "[T]he Brazilian regime has specificities which characterize its regime as an instability-prone form of presidentialism: *coalition presidentialism*. This specific form has as its main structural components: a strong presidency; multipartyism; proportional representation; federalism and coalition government." *Id.* at 32 (emphasis in original).

[245] *See* Luis Henrique Teixeira Graton, Carlos Alberto Grespan Bonacim & Sérgio Naruhiko Sakurai, *Political Bargaining Practices Through Federal Budget Execution*, 54 REV. ADM. PÚBLICA 1361, 1362–1363 (2020); Carlos Pereira & Bernardo Mueller, *Comportamento Estratégico em Presidencialismo de Coalizão: As Relações entre Executivo e Legislativo na Elaboração do Orçamento Brasileiro* [*Strategic Behavior in a Coalition-Based Presidential System: Executive-Legislative Relations in the Budgetary Process in Brazil*], 45 DADOS 265, 300 (2002).

[246] *See* Câmara dos Deputados, Comissão Especial, Parecer, Proposta de Emenda à Constituição No. 565-C, de 2006 [P.E.C. 565-C/2006], DIÁRIO DA CÂMARA DOS DEPUTADOS, Ano LXVIII, No. 132, 7.8.2013 [D.C.D. 132/2013] [Chamber of Deputies, Special Committee, Opinion, Proposal of Constitutional Amendment No. 565-C, 2006, GAZETTE OF THE CHAMBER OF

against the explicit constitutional principle of impersonality in public affairs since it made part of budgetary execution dependent upon representatives' behavior in Congress.[247] As such, it was the original relation between the two branches around budget earmarks that would not be republican, and the new regime would be a route correction.

The criticism that led to the regulatory change was justifiable, but the move created another distortion. The interpretation of a norm cannot be subject to such a commitment to individual authors' intentions that they shall be personally consulted each time executors have to apply the law. Lawmakers create legislation, they are not their proprietors. A federal law – and that is what the federal budget is, though a very special one – is a law of the Union, not of the President of the Republic or any of Congress's members. This statement is true for any legal provision, even in such a straightforward case as that of the Brazilian budgetary amendments. After all, it is a collective effort that approves them and confers their normative force on behalf of the citizenry through an aggregative process. Whether intentions or purposes may help the law's operator, they shall be the object of an interpretive technique, in whichever form (legislative history, holistic textual assessment, or anything else), not of duty to individual consultations with the authors.

4.2.Bounded and discretionary acts; procedure and substance

Interpretive issues leave room for some confusion between political and legal acts. As stated in section 2, a crucial distinction relates to broad discretion concerning political decisions. However, such a characterization does not mean that the application of norms does not itself involve choices. Plainly, legislators may consciously leave options for their addressees.[248] Additionally, textual meaning, gaps, uncertainty regarding facts, and the identification of intents or purposes introduce further subjectivity in the legal realm,[249] including lawmaking procedural rules. Ideally, the legislative process should operate like a chart flow, making it clear

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DEPUTIES, Year LXVIII, No. 132, Aug. 7, 2013] 32770-32771 (Braz.), http://imagem.camara.gov.br/Imagem/d/pdf/DCD0020130807001320000.PDF#page=235 (last visited Feb. 27, 2023).

[247] *See id.*

[248] *See* HART, *supra* note 72, at 131–132.

[249] *See id.* at 127.

which route should follow according to each possible situation until an outcome – a statute or anything similar – comes up. The reality, though, is far from this picture.

4.2.1. Bounded and discretionary acts

Acknowledging that rules' application inevitably demands some discretion does not mean that an interpreter plays the same role as those in a position to create them.[250] It certainly is a matter of degrees of freedom, but more or less autonomy makes the whole difference in this topic.[251] Clearly, politicians themselves face boundaries when they approve legislation if they must abide by a constitution. Yet, even when a constitutional text is lengthy and detailed, like the Brazilian one, they are not as constrained as when they or other public officials apply statutes, codes, or procedural rules. If a constitution introduces restraints, no one will deny that ordinary norms are much more limiting in this regard, especially when parliaments are as productive as they have been in the modern state.[252] It may be the case that framers settle that the government shall provide free primary health care, but such a command still leaves plenty of space for definitions on the side of legislators.[253] For

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[250] *Cf.* DWORKIN, *supra* note 63, at 102 ("We do not think that he [a referee] is free to legislate interstitially within the 'open texture' of imprecise rules.").

[251] *But cf.* CAPPELLETTI, *supra* note 184, at 25–27. Concerning distinctions between judicial and legislative functions, Cappelletti acknowledges that legislators are generally freer than judges, but he says that this fact does not differentiate the nature of their activities in terms of substance. For him, what distinguishes them are procedural maxims attributing non-partisan features to the judicial process as opposed to the inherently partisan nature of the legislative one. Nevertheless, he recognizes that the latter tends to mimic the former, in occidental countries, by adopting binding procedural rules to promote fairness in legislatures (*see id.* at 77.). Considering that the difference between substance and procedure is not strict, as I address forward, I insist that degrees of freedom play a crucial role in the distinction between law creation and law application.

[252] *Cf.* GRANT GILMORE, THE AGES OF AMERICAN LAW 86 (2d ed. 2014) (mentioning an "orgy of statute making"); JEREMY WALDRON, THE DIGNITY OF LEGISLATION 7 (1999) (describing English and American scholars' skepticism about the "Legislation-state, . . . a form of state devoted to the business of making continual improvements in the life of the community by means of explicit legal innovations, i.e. by parliamentary legislation.").

[253] *Cf.* Jonathan Montgomery, *Recognising a Right to Health*, *in* ECONOMIC, SOCIAL AND CULTURAL RIGHTS 184, 190 (R. Beddard & D.M. Hill eds., 1992) (stating that "[t]he Universal Declaration and the European Social Charter make explicit reference to the provision of medical services. Controversy in this area arises over the efficiency and extent of such services.");

instance, they shall decide the funding sources, whether any citizen can count on the protection or just the poor, which medical services are provided, and whether the system operates through state or private hospitals.[254] Likewise, a constitution may pose that the parliament at the federal level consists of two houses, and a bill must pass each of them as a requirement to become law.[255] Within such a framework, lawmakers have ample discretion to adopt far more exhaustive internal procedural rules. Once these further provisions are given, be they related to health care, legislative business, or anything else, public officials may still have some margin, but way reduced. As such, it is not up to them to innovate as if they were legislating but to develop upon guidance "the legislature has already created."[256] This rationale serves not only judges and administrators but also politicians applying comprehensive rules to the lawmaking process.

4.2.2. Procedure and substance

Another issue that may blur the separation between legality and politics is the distinction between substance and procedure. As the debate about substantive and procedural judicial review suggests, one approach places "substance" closer to the outcomes of lawmaking – or, according to my characterization, to its political facet – than the process leading to them.[257] However, as the same debate points out, it is impossible to isolate processing issues, as if they were pure, from substantive inquiries involving either technical or moral interpretation.[258] Depending on the case, the analysis of substance may be more direct, as in discovering to which sport a fan of "football" refers, or closer to the values that some conceptions embody, as in a discussion about "participation" or "free speech."[259]

JONATHAN WOLFF, THE HUMAN RIGHT TO HEALTH (2012) (addressing different challenges and approaches to implement the right to health care).

[254] *Cf.* Montgomery, *supra* note 253, at 190; WOLFF, *supra* note 253, at 12–38.

[255] *See, e.g.,* U.S. CONST. art. I, § 7; C.F. 1988, *supra* note 69, art. 65 (Braz.).

[256] DWORKIN, *supra* note 63, at 111.

[257] *See* RICHARD BELLAMY, POLITICAL CONSTITUTIONALISM 107–110 (2007); ELY, *supra* note 34, at 73–104.

[258] *See* BELLAMY, *supra* note 257, at 110–113; RONALD DWORKIN, A MATTER OF PRINCIPLE 57–69 (1985).

[259] *See* BELLAMY, *supra* note 257, at 110–113; DWORKIN, *supra* note 258, at 57–69.

The case for procedural judicial review develops upon the idea that it is not for the judiciary to assess the outcomes of the democratic process but oversee it in light of the citizenry's participation.[260] In the United States, assuming that the Constitution's main concern is the protection of political rights, such as freedom of speech, the role of the courts would be to evaluate not the content of statutes but whether they resulted from non-exclusionary steps.[261] Accordingly, legal provisions' annulment should follow if they derived from a process where those willing to dispute them could not do so due to unjustified restrictions.[262] Absent such limitations, there would be no reason for courts' intervention grounded on substantial considerations involving a moral assessment of justice or welfare.[263] In the presence of everlasting disagreement about these issues, it would not be for judges to have the final say "where political philosophers from Plato to Rawls have failed."[264] Instead, the solution would be resorting to open and broad democratic decision-making as the only way to settle deep dissension.

The point is that the meaning of "participation," "openness," "broadness," "freedom of speech," and correlated concepts also vary depending on the values which the law's operator professes.[265] For instance, one may think that universal voting sufficiently ensures political participation, while someone else may also deem it necessary to empower specific groups. Regarding ways of enfranchising people, some may focus on civil guarantees, such as the rights of reunion and association, while others may also appeal to socio-economic entitlements. For those defending the latter perspective, granting only formal voting rights or even further civil ones would fall short of securing meaningful political involvement. Illiteracy, no access to health care, low income, and no labor protection, among other factors, would all compromise the exercise of political citizenship. Of course, such a point of view embodies a sense of justice way distinct from that of sticking to a mere formality. Thus, a judgment based on participation in the democratic process would unavoidably involve reasoning upon values, blurring the differentiation between procedure and substance.[266]

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[260] *See* BELLAMY, *supra* note 257, at 107–110; ELY, *supra* note 34, at 73–104.

[261] *See* BELLAMY, *supra* note 257, at 107–110; ELY, *supra* note 34, at 73–104.

[262] *See* BELLAMY, *supra* note 257, at 107–110; ELY, *supra* note 34, at 73–104.

[263] *See* BELLAMY, *supra* note 257, at 107–110; ELY, *supra* note 34, at 73–104.

[264] BELLAMY, *supra* note 257, at 4.

[265] *See id.* at 110–113; DWORKIN, *supra* note 258, at 57–69.

[266] BELLAMY, *supra* note 257, at 110–113; DWORKIN, *supra* note 258, at 57–69.

4.2.3. Procedure and substance in urgent situations

An example of how substantive reflections mix with procedural matters relates to the scrutiny and voting of provisional measures in Brazil. According to the country's Constitution, "[i]n important and urgent cases, the president of the Republic may adopt provisional decrees [or measures] with the force of law and shall submit them to the National Congress immediately."[267] Before the alarming situation, these legislative species go through a fast-track process, which obviously curtails discussion. Not only do tight deadlines apply,[268] but no thematic committee plays a role in the debates. Although a joint one, formed by federal deputies and senators specifically for closer scrutiny of the matter, shall "issue an opinion thereon," that is all that happens before submission "to the floor in each House."[269] Should the bill be an ordinary proposal, more time for examination and opportunities for manifestation in specialized committees in both chambers would usually be available.

In the face of true emergencies, giving up some deliberation in favor of rapid responses is clearly justifiable. However, is it also when the case is not actually urgent? Is the standing of key actors, such as the presidents of the houses or the majoritarian coalition, sufficient as an answer? Or would it be necessary to determine whether the fast route amounts to a circumvention of regular lawmaking's burdens in disfavor of further assessment of the matter? Or, similarly, in prejudice of the minority's chances of participation? As these questions point out, evaluating the legality of provisional measures' procedures may demand substantive considerations of what is urgent in light of the legislative process's finality.

4.2.4. Procedure and substance on the assessment of fiscal rules

Another instance of non-clear boundaries between procedures and substance refers to lawmaking rules that somehow favor a specific value and interdict debates

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[267] C.F. 1988, *supra* note 69, art. 62 (Braz.).

[268] *Cf.* C.F. 1988, *supra* note 69, art. 62, para. 3 (Braz.).

[269] C.F. 1988, *supra* note 69, art. 62, para. 9 (Braz.). *See also* RESOLUÇÃO DO CONGRESSO NACIONAL NO. 1, DE 2002 [R.C.N. 1/2002] [NATIONAL CONGRESS RESOLUTION NO. 1, 2002] (Braz.), https://www2.camara.leg.br/legin/fed/rescon/2002/resolucao-1-8-maio-2002-497942-norma-pl.html (last visited Feb. 27, 2023) (regulating provisional measures' scrutiny in the Brazilian National Congress).

around it. For example, again in the Brazilian context, a recent constitutional reform introduced a stringent fiscal ceiling on the federal budget.[270] Briefly, the novel provisions froze expenses equivalent to the amount disbursed in 2016, in real terms, for the following 20 years, save a few exceptions.[271] In other words, national public policies and the administrative machinery got bounded by the 2016 expenditure level, updated by an inflationary index, for two decades. Such a move submitted the legislative process to a perspective that attributes a minimum role to the state, imposing such a controversial ideology on regular legislation, including the budget law.[272]

The problem is not with the position itself but with a sort of ban on distinct arguments about how the government should foster social policies and economic development.[273] Concretely, the severe limitation forced lawmaking in one disputable direction, regardless of the country's financial situation at each moment or Congress's composition.[274] As such, the restriction amounted to a bad procedural rule, but there is no way to state so without resorting to substantive arguments about the finality of legislative procedures. Fortunately, in December 2022, another constitutional amendment declared that the 2016 ceiling would be repealed as soon as new statutory provisions, thus with sub-constitutional status, established another fiscal landmark (such provisions were passed in 2023).[275]

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[270] *See* EMENDA CONSTITUCIONAL NO. 95, DE 2016 [E.C. 95/2016] [CONSTITUTIONAL AMENDMENT NO. 95, 2016] (Braz.), https://www.planalto.gov.br/ccivil_03/constituicao/emendas/emc/emc95.htm (last visited Feb. 27, 2023), which introduced articles 106 to 114 to the Temporary Constitutional Provisions Act (A.D.C.T.) and established the New Fiscal Regime from 2017 to 2036.

[271] *See* A.D.C.T., *supra* note 228, arts. 106, 107 (Braz.).

[272] *See* Luís Otávio Barroso da Graça, *Estado Social de Direito, Novo Regime Fiscal e os Desafios da 4a Revolução Industrial* [*Social Rule of Law, New Fiscal Regime, and the Challenges of the 4th Industrial Revolution*], *in* 3 30 ANOS DA CONSTITUIÇÃO [30 YEARS OF THE CONSTITUTION] 272 (Rafael Silveira e Silva ed., 2018).

[273] *See id.*

[274] *See id.*

[275] *See* EMENDA CONSTITUCIONAL NO. 126, DE 2022 [E.C. 126/2022] [CONSTITUTIONAL AMENDMENT NO. 126, 2022] (Braz.), https://www.planalto.gov.br/ccivil_03/constituicao/emendas/emc/emc126.htm (last visited Feb. 27, 2023); LEI COMPLEMENTAR NO. 200, DE 2023 [L.C. 200/2023] [SUPPLEMENTARY LAW NO. 200, 2023] (Braz.), https://www.planalto.gov.br/ccivil_03/leis/lcp/lcp200.htm (last visited May 1, 2024).

4.3.Imagination and rule breaking

Interpreting in "self-governing" instances, such as legislative bodies, may be especially problematic.[276] Rules' openness gives room to "imagination" "in the form of devising strategies for accomplishing some purpose that other institutional colleagues could not devise on their own."[277] The question, though, is to determine when the new meaning is reasonable or when it camouflages "rule breaking" ("transgression," "rule-inconsistent moves").[278] An outside arbiter may minimize the problem since she may not be directly interested in the controversy. Contrarily, an inner actor may always be suspicious of unduly favoring her partisans.

4.3.1. Rule breaking

A rule breaking situation arose in the Federal Senate of Brazil in 2017. The case involved a bill whose purpose was to modify statutes regulating the telecommunications sector.[279] In December 2016, after coming from the Chamber of Deputies and passing one of the Senate's committees, the bill was about to follow to the executive for sanction.[280] This move was per a constitutional provision stating that, in certain circumstances (not in dispute), "bills of law . . . are exempt from being submitted to the Plenary Assembly, except in the event of an [internal] appeal from one-tenth of the members of the respective House."[281] Under the provision's last part, at least nine out of eighty-one senators should manifest if they wished the bill to go through the full chamber. At that time, three appeals were presented.[282]

[276] *See* SHEPSLE, *supra* note 11, at 13–14.

[277] *Id.* at 24.

[278] *Id.* at 5, 29, 62.

[279] *See Projeto de Lei da Câmara No. 79, de 2016*, SENADO FEDERAL [*Chamber Bill No. 79, 2016*, FEDERAL SENATE], https://www25.senado.leg.br/web/atividade/materias/-/materia/127688 (last visited Feb. 21, 2023). For another account of this case, *see also* Graça, *supra* note 6, at 75–76.

[280] DIÁRIO DO SENADO FEDERAL, Ano LXXI, No. 203, 9.12.2016 [D.S.F. 203/2016] [GAZETTE OF THE FEDERAL SENATE, Year LXXI, No. 203, Dec. 9, 2016] 384 (Braz.), https://legis.senado.leg.br/diarios/ver/20777?sequencia=384 (last visited Sep. 2, 2022).

[281] C.F. 1988, *supra* note 69, art. 58, para. 2, I (Braz.).

[282] *See* S.T.F., M.S. No. 34562, Relator Min. Luís Roberto Barroso (decisão monocrática), 4.2.2017, D.J.E. NO. 24, 8.2.2017 (publicação) [S.T.F., M.S. No. 34562, Rapporteur Justice Luís Roberto Barroso (monocratic decision), Feb. 4, 2017, D.J.E. NO. 24, Feb. 8, 2017 (publication)]

Allegedly, except for one, two abided by the minimum number of supporters, and the same was obviously true about all of them together.[283] It seemed that bypassing the Senate's plenary would not be possible.

Fearing that the President of the Senate could forward the bill to the executive anyway, some of the appellants filed a petition before the Federal Supreme Court claiming an order barring such an action.[284] On January 31, 2017, the fear got real, and the bill was sent for sanction.[285] A few days later, the court ordered that it be returned to the Senate and that it could not go forward again before the house's President formally delivered an official decision on the internal appeals.[286] The analysis should solely check their formal conditions, like compliance with the deadline for their submission and the minimum number of valid appellants' signatures.[287] Present such requirements, the bill should pass a voting session in the full Senate. Concretely, though the challenged authority addressed the court arguing absent the requirements,[288] no official decision about them has apparently come out.[289] Yet, the bill was finally tabled before the house's plenary and approved in

154-156 (Braz.), https://www.stf.jus.br/arquivo/djEletronico/DJE_20170207_024.pdf (last visited Feb. 21, 2023); S.T.F., M.S. No. 34562, Relator Min. Alexandre de Moraes (decisão monocrática), 05.10.2017, D.J.E. NO. 231, 09.10.2017 (publicação) [S.T.F., M.S. No. 34562, Rapporteur Justice Alexandre de Moraes (monocratic decision), Oct. 5, 2017, D.J.E. NO. 231, Oct. 9, 2017 (publication)] 120-121 (Braz.), https://www.stf.jus.br/arquivo/djEletronico/DJE_20171006_231.pdf (last visited Feb. 21, 2023).

[283] *See* S.T.F., M.S. No. 34562, Relator Min. Luís Roberto Barroso, *supra* note 282, at 154-156 (Braz.); S.T.F., M.S. No. 34562, Relator Min. Alexandre de Moraes, *supra* note 282, at 120-121 (Braz.).

[284] *See* S.T.F., M.S. No. 34562, Relator Min. Luís Roberto Barroso, *supra* note 282, at 154-156 (Braz.); S.T.F., M.S. No. 34562, Relator Min. Alexandre de Moraes, *supra* note 282, at 120-121 (Braz.).

[285] *See* S.T.F., M.S. No. 34562, Relator Min. Luís Roberto Barroso, *supra* note 282, at 155 (Braz.).

[286] *See id.* at 156.

[287] *See id.*

[288] *See id.* at 155.

[289] *See* S.T.F., M.S. No. 34562, Relator Min. Alexandre de Moraes, *supra* note 282, at 121 (Braz.). Additionally, I have not found any information concerning a formal decision about the appeal's requirements (*see Projeto de Lei da Câmara No. 79, de 2016*, *supra* note 279).

September 2019.[290] The broken rule, in this case, referred simply to the lack of a public and formal statement from the presiding authority but made all the difference concerning the legislative route.

4.3.2. Rule breaking or imagination?

Again, Brazilian politics offers a good example. The case involves the approval, in the Chamber of Deputies, of a constitutional amendment proposed by the federal government in August 2021.[291] Due to fiscal constraints, the purpose was to postpone the payment of public debts resulting from courts' orders.[292] That house approved the proposal by a narrow margin at the beginning of November. According to the opposition, the approval was only possible after the house's board broke procedural rules.[293] On November 3, 2021, the directing deputies authorized that representatives on official missions (outside the Chamber) could vote remotely by electronic means.[294] The board's members probably resorted to an internal rule

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[290] *See* DIÁRIO DO SENADO FEDERAL, Ano LXXIV, No. 135, 12.9.2019 [D.S.F. 135/2019] [GAZETTE OF THE FEDERAL SENATE, Year LXXIV, No. 135, Sep. 12, 2016], 141–156 (Braz.), https://legis.senado.leg.br/diarios/ver/101922?sequencia=1 (last visited Feb. 22, 2023).

[291] *See Proposta de Emenda à Constituição No. 23, de 2021*, CÂMARA DOS DEPUTADOS [*P.E.C. 23/2021-C.D.*] [*Proposal of Constitutional Amendment No. 23, 2021*, CHAMBER OF DEPUTIES], https://www.camara.leg.br/proposicoesWeb/fichadetramitacao?idProposicao=2293449 (last visited Nov. 17, 2021). Both the Chamber of Deputies and the Senate passed the proposal. *See* EMENDA CONSTITUCIONAL NO. 113, DE 2021 [E.C. 113/2021] [CONSTITUTIONAL AMENDMENT NO. 113, 2021] (Braz.), http://www.planalto.gov.br/ccivil_03/constituicao/emendas/emc/emc113.htm (last visited Mar. 4, 2022).

[292] *See P.E.C. 23/2021-C.D.*, *supra* note 291; E.C. 113/2021, *supra* note 291, (Braz.).

[293] *See* the Initial Applications filed before the S.T.F., M.S. No. 38300 (Braz.), https://static.poder360.com.br/2021/11/mandado-seguranca-multipartidario-pec-precatorios-5nov2021.pdf (last visited Nov. 16, 2021); M.S. No. 38303 (Braz.), https://static.poder360.com.br/2021/11/peticao-pdt-pec-precatorios-4nov2021.pdf (last visited Nov. 16, 2021); and M.S. No. 38304 (Braz.), https://static.poder360.com.br/2021/11/Petic%CC%A7a%CC%83o-Inicial_-MS-PEC-23.2021-Dep.-Rodrigo-Maia-06.11.2021-_-VF.pdf (last visited Nov. 16, 2021) [hereinafter Initial Applications].

[294] *See* ATO DA MESA DA CÂMARA DOS DEPUTADOS No. 12, de 2021 [ACT OF THE BOARD OF THE CHAMBER OF DEPUTIES No. 12, 2021] (Braz.), https://www2.camara.leg.br/legin/int/atomes/2021/atodamesa-212-3-novembro-2021-791936-publicacaooriginal-163733-cd-mesa.html (last visited Nov. 18, 2021).

stating that instructing electronic voting is their responsibility.[295] However, another internal provision establishes that a deputy on a mission is on leave, meaning that she is not exercising her regular functions.[296] Or so the meaning should be. The proposed constitutional amendment would have allegedly been defeated if those deputies on missions had not voted.[297] Opposing deputies claimed that the Chamber's board solution disrespected the house's internal rules.[298] Summing up, the case shows how difficult it is to distinguish "imagination" from "rule breaking" in legislative struggles.

Other legal issues may also arise in the lawmaking process. On certain occasions, the legislators may prefer to keep the *status quo* by tolerating minor deviations instead of formally changing the procedures since the modification would introduce new rule-interpretation uncertainties.[299] In some others, the majority may force stricter interpretations to restrict the rights or powers of the minority.[300] Reversely, on other ones, the minority may abuse its prerogatives.[301] These problems demand remedies for keeping legislative procedures on track.

5. Conclusion

The legislative process is, at the same time, broad and confined. It is broad in its political aspect, dealing with countless legitimate solutions for social problems. Reversely, it is bound by the rules governing a legislature's business. In spite of the

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[295] *See* R.I.C.D., *supra* note 114, art. 187 (Braz.).

[296] *See id.* art. 235, I (Braz.).

[297] *See* Initial Applications, *supra* note 293.

[298] *See id.*

[299] *See* SHEPSLE, *supra* note 11, at 20.

[300] *See id.* at 65–66. *Cf.* Nikos Marantzidis, *'For my friends, everything; for my enemies, the law,'* EKATHIMERINI.COM (Mar. 12, 2021), https://www.ekathimerini.com/opinion/1156932/for-my-friends-everything-for-my-enemies-the-law/ (last visited Mar. 5, 2022) (on administrative Greek affairs, attributing the quote to Peru's General and former President Óscar Benavides); Hélio Schwartsman, *Aos inimigos, a lei* [*For Enemies, the Law*], FOLHAONLINE (2008), https://www1.folha.uol.com.br/folha/pensata/helioschwartsman/ult510u388268.shtml (last visited Mar. 5, 2022) (on Brazilian traffic violations, introducing the topic with a quote similar to the one referred to by Marantzidis).

[301] *See* SHEPSLE, *supra* note 11, at 41, 68–72.

uncertainties that arise in their application, these rules have the force of law and, as such, are binding. This conclusion matters because it entitles legislators to demand that parliamentary scrutiny of a subject follow an expected route. In the case of a breach, enforcing tools shall exist to bring lawmaking back on the right track. These tools may be available in the legislature or even involve judicial oversight. What mechanisms might exist and in which circumstances they may be applied are topics for Part II.

Part II

Why and How Legislatures Shall Abide by Legislative Procedural Rules

1. Introduction

In 1812, in his farewell speech, Joseph Story, then Speaker of the Massachusetts House of Representatives, urged his peers to stick to the rules that governed their legislative business. He did so in the following terms.

> Cheered indeed by your kindness, I have been able, in controversies, marked with peculiar political zeal, to appreciate the excellence of those established rules which invite liberal discussions, but define the boundary of right, and check the intemperance of debate. I have learned, that the rigid enforcement of these rules, while it enables the majority to mature their measures with wisdom and dignity, is the only barrier of the rights of the minority against the encroachments of power and ambition. If any thing can restrain the impetuosity of triumph, or the vehemence of opposition – if any thing can awaken the glow of oratory, and the spirit of virtue – if any thing can preserve the courtesy of generous minds amidst the rivalries and jealousies of contending parties, it will be found in the protection with which these rules encircle and shield every member of the legislative body. **Permit me, therefore, with the sincerity of a parting friend, earnestly to recommend to your attention a steady adherence to these venerable usages.**[1]

Joseph Story's words go to the heart of this article's concerns. His recommendation, delivered more than two centuries ago, remains up to date. A legislature, even more so nowadays, is not a group of fellows with common backgrounds and interests. Instead, it brings together quite distinct people with diverging views on a vast array of issues, representing contemporary societies' complexities to the extent permitted by electoral laws. Moreover, it deals with an

[1] Joseph Story's Farewell Speech in the Massachusetts House of Representatives (Jan. 17, 1812), https://archives.lib.state.ma.us/bitstream/handle/2452/819790/ocm39986872-1812-HB-UN0002.pdf?sequence=1&isAllowed=y (last visited Apr. 5, 2023) (emphasis added).

unprecedented volume of topics resulting from governmental roles' enlargement, addressing civil and socio-economic rights, public finance, economic sectors' regulation, environmental protection, and so on. In light of this scenario, and to foster fairness, participation, and transparency, legislatures shall be organized spaces under binding rules and count on enforcing mechanisms operated by legislators and third, supposedly neutral, parties.

There are several reasons why lawmakers shall abide by the legislative procedural rules. First, it is a matter of the rule of law, meaning that the participants in the lawmaking process have the right to play according to the pertinent provisions, like in a fair game.[2] Concededly, legislatures are not to operate like judicial litigation, where the steps shall ideally be precisely established, and the judge must strictly oversee the process to make it as unbiased as possible concerning the opposing parties. Inversely, legislative procedures admit a larger degree of flexibility. Although compromise may also settle a dispute in courtrooms, bargaining and agreement are familiar to politics.[3] In legislatures, then, law enforcement might not seem as salient as in other realms.

Nonetheless (and second), compliance with the stated procedures safeguards participation and the flow of diverse opinions and, thus, democratic representativeness.[4] Compromise in parliaments cannot mean reaching a deal at the expense of complete disregard for those not concurring with it. All lawmakers shall have the opportunity to propose alternatives, defend their points of view, and vote. As such, the deliberative space shall be minimally organized and rule-compliant so that fairness prevails.[5]

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[2] *See* Luís Otávio Barroso da Graça, *Judicial Review of the Legislative Process in Brazil*, 7 U.C.L. JOURNAL OF LAW AND JURISPRUDENCE 55, 58–61 (2018).

[3] *See* WILLIAM N. ESKRIDGE JR., ABBE R. GLICK & VICTORIA F. NOURSE, STATUTES, REGULATION, AND INTERPRETATION 2, 11, 17 (2014). *Cf.* SUSAN ROSE-ACKERMAN, STEFANIE EGIDY & JAMES FOWKES, DUE PROCESS OF LAWMAKING: THE UNITED STATES, SOUTH AFRICA, GERMANY, AND THE EUROPEAN UNION 22 (2015) ("In the United States, the Supreme Court has sometimes required Congress to produce 'findings,' a mandate that flies in the face of the process of compromise and horse trading that lies behind any important statute in a presidential system.").

[4] *See* Graça, *supra* note 2, at 61–64.

[5] *See* BRENDA ERICKSON, A LEGISLATOR'S GUIDE TO PARLIAMENTARY PROCEDURE 6 (2020), https://www.ncsl.org/Portals/1/Documents/About_State_Legislatures/2020-NCSL-Leg-Guide-Parliamentary-Procedure-Final.pdf (last visited Nov. 11, 2022); Ittai Bar-Siman-Tov, *Lawmakers as Lawbreakers*, 52 WILLIAM AND MARY LAW REVIEW 805, 815 (2010).

Finally (and third), rules' observance fosters transparency,[6] shedding light on a bill and its motives.[7] For instance, a procedural rule may require that a legislative proposal's author justifies her initiative in writing. Another one may establish that a voting session only occurs some days after the publication of a bill or report and that debates precede the decision on the matter. Such commands exist to clarify, for other lawmakers and the general audience, how a novel piece of legislation shall operate and the rationale behind it or its amendments. From all the listed reasons, it follows that rule breaking in legislatures may negatively affect fairness, participation, and transparency.

Before delving into these reasons on the second section, I must state that I assume they provide not only a rationale for compliance with the procedural rules but also for adopting the very same rules in the first place. Thus, my comments apply to a situation in which the lawmaking provisions, one way or another, satisfy something like the principles enunciated in the internal rules of the Federal Senate of Brazil.[8] In summary, such principles are the following: a) equality among legislators; b) due process of lawmaking; c) respect for minorities;[9] d) collegiate decisions (alternatively, majoritarianism);[10] e) publicity;[11] f) ample discussions.[12] As long as legislative procedural norms are constructed upon these fundaments, sticking to the rules shall naturally foster fairness, participation, and transparency, all democratic values whose ultimate purpose is to enhance legislation's legitimacy.[13]

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[6] *See* Bar-Siman-Tov, *supra* note 5, at 815.

[7] *See generally* Luc J. Wintgens, *Legisprudence as a New Theory of Legislation*, 19 RATIO JURIS 1, 10 (2006) (mentioning "[t]he duty of justification" regarding legislation).

[8] *See* REGIMENTO INTERNO DO SENADO FEDERAL [R.I.S.F.] [INTERNAL REGULATIONS OF THE FEDERAL SENATE] art. 412 (Braz.), https://www25.senado.leg.br/documents/12427/45868/RISF+2018+Volume+1.pdf/cd5769c8-46c5-4c8a-9af7-99be436b89c4 (last visited May 5, 2023).

[9] *See also* WALTER J. OLESZEK ET AL., CONGRESSIONAL PROCEDURES AND THE POLICY PROCESS 10–11 (11th ed. 2020) (about minority rights in the context of U.S. Congress's procedural rules' functions).

[10] *See also id.* at 12 ("Congress is a collegial, not hierarchical, body.").

[11] *See also id* ("Congress's deliberations are more accessible and transparent to the public than those of perhaps any other kind of organization.").

[12] For all the principles, s*ee* R.I.S.F., *supra* note 8, art. 412 (Braz.).

[13] *See id.*; OLESZEK ET AL., *supra* note 9, at 9; Bar-Siman-Tov, *supra* note 5, at 814–815.

A concrete case illustrates the significance of principles such as the ones stated in the Brazilian Senate's internal rules.[14] By the end of the 90s, the São Paulo City Council, in Brazil, adopted a resolution according to which the majority of its members could define bills that would be voted in block, as a whole, without debate or amendment, during floor proceedings.[15] At first sight, the resolution created an all-or-nothing process by which those supporting some measures could not know what to do if they opposed others. However, it was worse than that. As long as the majority could choose the bills going under the new procedure, passing them was almost a mere formality.[16] As expected, councilors in the minority complained, affirming that such a procedural rule harmed their voting and speech rights.[17] Fortunately, the majority took advantage of the mechanism just once, anyway approving more than twenty bills on that occasion.[18] After that, the Council repealed the controversial resolution,[19] which had obviously introduced unfair legislative procedures.

With these initial remarks, I do not mean that legislators should deliberately disregard lawmaking rules that do not comply with the said or other principles. It may be that specific procedures cannot actually be justified. It was certainly the case with the São Paulo City Council block voting procedure. It is possibly the case with the filibuster in the U.S. Federal Senate, a practice according to which, generally, three-fifths of that house's members shall agree on ceasing debates before a bill may proceed to vote.[20] Although such a requirement promotes discussions and deference for the minority,[21] some argue it undermines majoritarianism.[22] One way or another,

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[14] *See* Instituto do Legislativo Paulista, *Direito do Parlamentar ao Devido Processo Legislativo* [*Representative's Right to Due Legislative Process*], YOUTUBE (Sep. 2, 2021), https://www.youtube.com/watch?v=CktLj3HBi5I (last visited Sep. 2, 2021) (Breno Gandelman's speech, especially from 00:22:42 to 00:31:33).

[15] *See id*.

[16] *See id*.

[17] *See id*.

[18] *See id*.

[19] *See id*.

[20] *See* STANDING RULES OF THE SENATE r. XXII(2), S. DOC. NO. 113-18 (2013), https://www.rules.senate.gov/imo/media/doc/CDOC-113sdoc18.pdf (last visited Jan. 5, 2023).

[21] *See* RICHARD A. ARENBERG & ROBERT B. DOVE, DEFENDING THE FILIBUSTER xiv–xv (2014).

[22] *See generally* Josh Chafetz, *The Unconstitutionality of the Filibuster*, 43 CONNECTICUT LAW REVIEW 1003 (2011); Jonathan S. Gould, Kenneth A. Shepsle & Matthew C. Stephenson, *Democratizing the Senate from Within*, 13 JOURNAL OF LEGAL ANALYSIS 502 (2021).

simply breaking the rules, even unreasonable ones, cannot be the pattern. First, because a provision's appropriateness is itself the object of disputes. Second, because this would open the road to casuistry according to the wills of powerful leaders or eventual majorities, undermining the confidence in the system. Hence, the only available way to circumvent inadequate lawmaking rules is through established regular procedures, as in the case of any other law modification.

Compliance with procedural rules shall result from enforcing tools managed not only by legislators but also by third parties. Self-discipline and mechanisms such as points of order and internal appeals are ways by which lawmakers may adhere to the rules governing their business. Notwithstanding, these arrangements may not suffice in light of interests or pressures forcing deviations from established procedures. Then, non-legislators, such as judges or personnel specialized in the legislative process, actors not directly involved in the political struggles within parliaments, shall play a role. Reflections on these issues, addressing manners and conditions under which enforcing tools shall operate, are the object of the third and fourth sections. The former deals with instruments applied by legislators themselves. The latter, with third-party arrangements.

Finally, a note on methodology. This article develops a theoretical or speculative approach to its topic focusing on regulations and cases from the national congresses in Brazil and the United States. Yet, though more related to these institutions, the observations and conclusions herein will probably be of general interest, supposing the legislative branch operates similarly elsewhere.

2. Why legislators shall abide by the procedural rules

2.1. Fairness: rule of law, legislative due process

Sticking to lawmaking rules matters because they influence the outcomes of the legislative process.[23] Some people may think that a legal innovation, either in the form of a new statute or the modification or repeal of an existing piece of law,

[23] *See* Bar-Siman-Tov, *supra* note 5, at 809–810, 813, 841; Jonathan S. Gould, *Law Within Congress*, 129 THE YALE LAW JOURNAL 1946, 1950 (2020); Adrian Vermeule, *The Constitutional Law of Congressional Procedure*, 71 THE UNIVERSITY OF CHICAGO LAW REVIEW 361, 362 (2004).

depends only on a sufficient number of supporters. According to this perception, it would make no difference how legislators pass a bill as long as it results from the will of the majority (or supermajority, depending on the case). However, alternative paths may lead to distinct results. Suppose that, in a bicameral system, passing a bill requires votes representing the absolute majority (more than half of the members) in both houses.[24] Also, that: a) fifty members constitute one of the chambers, and all of them support a legislative proposal; b) one hundred representatives belong to the other chamber, and just twenty-six favor the bill. Taking both houses together, seventy-six out of a hundred fifty individuals support the bill, and they would pass it if they could act as a single assembly. Nevertheless, the outcome is the opposite when the chambers operate separately. Though all the members could approve the proposal in one of them, it would not count with the necessary votes in the other. Summing up, diverse lawmaking rules "affect which bills pass."[25] Clearly, the same is true when parliaments follow or disregard the established procedures.

The case of the tax law passed by the U.S. Congress at the end of 2017 might offer an example of how distinct procedural ways influence legislative outcomes. The comparing standard, according to Stephen Gardbaum, is the approval of the "Tax Reform Act of 1986."[26] From the initial hearings in Congress in June 1985 until President Reagan signed its correspondent bill into law in October 1986, drafting, amending, debating, and voting ran over roughly one year and four months.[27] In the end, Republicans and Democrats passed it with significant support in both Congress houses.[28] Inversely, the 2017 tax law was enacted in less than two months "without holding a single evidentiary hearing, through a parliamentary maneuver that dispensed with the need for any bipartisan support and the threat of a filibuster in the Senate."[29] Additionally, approving the correspondent bill's final

[24] For voting purposes, an absolute majority demands "the affirmative vote of a majority of all those eligible to vote in the institution." Under simple majority requirements, "only those present and voting are counted." Adrian Vermeule, *Absolute Majority Rules*, 37 BRITISH JOURNAL OF POLITICAL SCIENCE 643 (2007).

[25] Gary W. Cox, *On the Effects of Legislative Rules*, 25 LEGISLATIVE STUDIES QUARTERLY 169, 170 (2000).

[26] *See* Stephen Gardbaum, *Due Process of Lawmaking Revisited*, 21 UNIVERSITY OF PENNSYLVANIA JOURNAL OF CONSTITUTIONAL LAW 1, 6 (2018).

[27] *See* David E. Rosenbaum, *The Tax Reform Act of 1986: How the Measure Came Together*, THE NEW YORK TIMES, Oct. 23, 1986, at D16.

[28] *See id.*

[29] Gardbaum, *supra* note 26, at 5.

version counted "with no meaningful deliberation."[30] Gardbaum reports that "[f]or many critics, the flaws in the procedure and the reluctance to engage in deliberation or public consideration were directly related to – and an attempt to hide – its content, which vastly favors the rich at the expense of everyone else."[31] From these remarks, it is possible to foresee that the 2017 tax law would not have been approved or its content would be something else if Congress had stuck to the due procedures.

Compliance with the legislative procedural rules might be seen through the lens of the due process of lawmaking. Pursuant to the Fifth Amendment to the U.S. Constitution, no person shall "be deprived of life, liberty, or property, without due process of law."[32] Similarly, section 1 of the Fourteenth Amendment stipulates that no state shall "deprive any person of life, liberty, or property, without due process of law."[33] One strand sees these clauses as a restraint on the substance of the legislation, either in the form of statutes passed by legislatures or executive acts.[34] In such a version, for instance, the due process clauses would secure the right to privacy against governmental intrusion in cases such as *Roe v. Wade* and *Griswold v. Connecticut*.[35] On another one, due process would imply overseeing the political mechanism of representation, as in John Hart Ely's interpretation of the decision's footnote 4 in *United States v. Carolene Products Co.*.[36] Accordingly, the weight of each individual's votes, citizens' rights of participation in the public sphere, and similar guarantees should be the controlling values concerning the law's enactment.[37] Finally, under one more version, due process of lawmaking could

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[30] *Id.* at 6.

[31] *Id.* at 6.

[32] U.S. CONST. amend. V.

[33] U.S. CONST. amend. XIV, § 1.

[34] *See* Gardbaum, *supra* note 26, at 13.

[35] Roe v. Wade, 410 U.S. 113 (1973) (affirming abortion rights); Griswold v. Connecticut, 381 U.S. 479 (1965) (striking down legislation prohibiting the use of contraceptives). These cases are brought up as illustrations by Gardbaum, *supra* note 26, at 13.

[36] United States v. Carolene Products Co., 304 U.S. 144 (1398). The decision upheld federal legislation prohibiting filled (adulterated) milk interstate shipment. The disputed statute was tested against the due process clause of the Fifth Amendment. The Supreme Court affirmed that the clause would not impede the enactment of a restriction in a situation where Congress had a rational basis to do so. Footnote 4, however, suggested that judicial scrutiny's standards would be higher in the face of political rights curtailment.

[37] *See* JOHN HART ELY, DEMOCRACY AND DISTRUST 73–104 (1980).

justify supervising procedures in the executive or legislative branches according to republican and democratic standards.[38]

Particularly, my object of interest refers to the approach that relates due process to legislative houses' procedures. In this regard, it does not matter whether the rules governing the legislators' business are constitutional, statutory, or internal. The case may be more straightforward for constitutional or statutory provisions but less so for legislatures' internal rules. After all, authorities may see the former as mandatory while the latter as nonbinding.[39] However, the difference among all legal rules should refer solely to their weight according to the hierarchy of norms,[40] not to their enforceability taken in isolation. Thus, a rule belonging to a legislative chamber's ordinances may cede if it conflicts with a constitutional provision. Absent such a clash, applying or not the said rule would not be a matter of choice. That is so because legislative bodies' internal procedures purport not only a political nature but also a legal one.[41] As such, the principle of due process compels a competent authority to conduct lawmaking abiding by such procedures and not by any other guidance (except other related legal provisions).

Regardless of the procedural rules' hierarchy, whether constitutional or otherwise, the legislative due process is a corollary of the rule of law in its liberal version.[42] As posed by theorists such as Friedrich Hayek, Joseph Raz, or John Rawls, abiding by the rule of law allows its subjects to predict outcomes from their behavior.[43] Accordingly, people may plan their attitudes or foresee paths they desire to follow in the face of previously stated norms.[44] For instance, if the legal environment permits individuals to profit from their entrepreneurship, they may

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[38] *See* Gardbaum, *supra* note 26, at 14.

[39] *See* Jacob E. Gersen & Eric A. Posner, *Soft Law: Lessons from Congressional Practice*, 61 STANFORD LAW REVIEW 573, 577, 582 (2018); Michael B. Miller, *The Justiciability of Legislative Rules and the "Political" Political Question Doctrine*, 78 CALIFORNIA LAW REVIEW 1341, 1341–1342 (1990).

[40] *See generally* HANS KELSEN, INTRODUCTION TO THE PROBLEMS OF LEGAL THEORY 55–75 (Bonnie Litschewski Paulson & Stanley L. Paulson trans., 1992) (for the hierarchy of norms).

[41] *See supra* Part I.

[42] *See* Graça, *supra* note 2, at 58–61.

[43] *See id. See also* F. A. HAYEK, LAW, LEGISLATION AND LIBERTY: A NEW STATEMENT OF THE LIBERAL PRINCIPLES OF JUSTICE AND POLITICAL ECONOMY 98, 102, 113 (1982); JOSEPH RAZ, THE AUTHORITY OF LAW: ESSAYS ON LAW AND MORALITY 222 (1979); JOHN RAWLS, A THEORY OF JUSTICE 207 (rev. ed. 1999).

[44] *See* Graça, *supra* note 2, at 58–61.

initiate a business with a reasonable expectation of earning money on success.[45] This rationale applies to all human relations; the legislative process is no different. Indeed, a legislator is entitled to play the lawmaking game by its posed norms.[46] Significant or constant rule breaking undermines the rules' force. If something alike becomes the pattern, a legislator can no longer envisage an appropriate behavior in light of a possible outcome.[47] A person or an authority's will would overcome the rule of law. Personalism or authoritarianism would be the mark of such a legislative process.

Ultimately, the case for submitting the lawmaking business to the rule of law relies on the citizens. Plainly, the right to the due application of procedural rules belongs to the legislators, who are the ones entitled to participate in the production of norms by presenting bills or amendments to a bill under scrutiny, voting for or against them, and discussing matters related to these proposals, or any other issue.[48] Notwithstanding, these legislators, in a democracy, act on behalf of the population, be they their constituents or not.[49] Of course, representatives may care for personal or partisan interests due to political negotiations involving trade-offs or campaign funding.[50] It may even occur that some of them use their position to benefit their private businesses.[51] Concerning these situations, the legitimacy of the latter is highly contestable, and that of the former will depend on how the bargains foster public goals. Overseeing mechanisms try to avoid illegitimate behavior. One of them refers to the enforcement of anti-corruption and similar laws.[52] Other encompasses enhancing political actors' accountability. Still, another one resorts to procedural compliance in the legislature. Indeed, it is reasonable to expect that a chamber working fairly under rules abiding by the principles I referred to above give room to

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[45] *See id.*

[46] *See id.*

[47] *See id.*

[48] *Cf.* ARENBERG AND DOVE, *supra* note 21, at xv (referring to "the rights of senators to debate and amend").

[49] *Cf.* KENNETH A. SHEPSLE, RULE BREAKING AND POLITICAL IMAGINATION 83 (2017) (mentioning logroll); Gardbaum, *supra* note 26, at 1, 6 (referring to "the paying or withholding of donations for votes"); Jonathan S. Gould, *The Law of Legislative Representation*, 107 VIRGINIA LAW REVIEW 765, 776–783 (2021) (on the responsiveness to constituents and interest groups).

[50] *Cf.* Gould, *supra* note 49, at 776–783 (referring to legislators' responsiveness to party leaders).

[51] *See* Gardbaum, *supra* note 26, at 7.

[52] *See id.* at 10–12.

the population's demands and reproduce, as far as the electoral system permits, their weight in society. In other words, the legislators' entitlement to the rule of law in parliaments would finally improve representation in favor of the people.

2.2.Participation, democratic representativeness

A skeptic may question how exactly keeping the procedures on track (according to the established guidelines, whatever they are) may foster democratic representativeness. A parliament shall grant elected members conditions for participating in lawmaking.[53] As they have different backgrounds and represent diverse, often sharply opposing, interests,[54] the space where they perform their duties shall be organized.[55] They shall count on the right to offer bills and amendments.[56] Moreover, they shall have time to understand and discuss the content of legislative proposals. In other words, there shall be room for debates and the flow of different ideas.[57] These organizational aspects concern legislators in the first place. However, they also involve other actors. For instance, journalists may take advantage of well-designed and respected procedural rules since appropriate debates may make reporting the issues under scrutiny easier. Taking the U.S. 2017 tax law case, as described by Gardbaum, it is hard to suppose that the general audience or even the bulk of the lawmakers could clearly understand what was going on. Admittedly, constituents may have no interest in the details of the process. They may simply have no time or skill to follow it. Sometimes, they may prefer "rule breaking" shall the outcome favor them.[58] However, the one that benefits today may be at a disadvantage tomorrow.[59] Thus, at least in the long run, rule compliance may enhance fairness,

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[53] *See* Jeremy Waldron, *Principles of Legislation*, *in* THE LEAST EXAMINED BRANCH 15, 23–24 (Richard W. Bauman & Tsvi Kahana eds., 2006).

[54] *See id.* at 25.

[55] *Cf.* OLESZEK ET AL., *supra* note 9, at 11–12 (stressing the importance of order to reduce conflicts in Congress).

[56] *See* ARENBERG AND DOVE, *supra* note 21, at xv.

[57] *See* Waldron, *supra* note 53, at 23, 27; Graça, *supra* note 2, at 62. *See also* Jürgen Habermas, *Constitutional Democracy: A Paradoxical Union of Contradictory Principles?*, 29 POLITICAL THEORY 766, 771 (2001).

[58] *See* Bar-Siman-Tov, *supra* note 5, at 833.

[59] *See* Gould, *supra* note 23, at 1958.

understood as balanced chances of influencing the outcomes, in the broad political arena through its projection in legislatures.

One primary concern regarding democratic processes refers to the right to participate in political struggles, "the right of rights," as Waldron defines it.[60] In vast and complex societies, diversity shows up as a remarkable feature. People have distinct origins, backgrounds, preferences, religions, and views about morality. Some may support more liberal economic approaches, while others may advocate for more regulation or state intervention. Some may be more progressive regarding social relations, whilst others may be more conservative. Some might feel more cosmopolitan, whereas others might be fonder of local values. In places where so many "tribes" share the same space, with profound differences, achieving consensus on common problems may be tricky. Notwithstanding, countless problems demand solutions, even though the responses might be dissatisfying from the viewpoint of large parcels of society. Moreover, remedies typically affect all, and not only those favoring them. Thus, how can it be possible to reach an agreement where disagreement reigns? Possibly, the best way is through consultation mechanisms in which citizens have not only the right to decide but also to have a say and be heard. In the broad public sphere, procedural fairness then requires universal, periodic, and secret voting rights as well as guarantees like freedom of conscience, speech, and association, all with the support of policies designed to empower the underprivileged.[61] Ultimately, the purpose is to avoid "the arbitrariness and insult that unequal or disproportionate treatment involves."[62]

In a representative democracy, the citizenry's right to participate in politics may become meaningless if legislators cannot adequately perform their tasks in lawmaking houses.[63] After all, except for plebiscites and referendums, in which people directly decide upon a matter, it is up to representatives to elaborate laws or policies on behalf of the public. In this sense, seeing the people as a car's engine, the energy it generates as the social claims and the legislature as the tires, representative democracy works as the axis transmitting power from the engine to the car's tires. The motor may function well, but if the tires are flat, the vehicle will not

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[60] JEREMY WALDRON, LAW AND DISAGREEMENT 232–254 (Reprinted ed. 2004). The rest of the paragraph flows from the same reference.

[61] On the empowerment of the worse off, *see generally* N. W. Barber, *Must Legalistic Conceptions of the Rule of Law Have a Social Dimension?*, 17 RATIO JURIS 474 (2004).

[62] WALDRON, *supra* note 60, at 238.

[63] *Cf.* Bar-Siman-Tov, *supra* note 5, at 814 (associating "legislative procedures" with "the legitimacy of law" in the face of profound disagreement within a society).

appropriately accomplish its purpose. Likewise, the political system may be defective if parliaments, like flat tires, do not transform the demands it receives into well-built policies or legislation. Consequently, just as any individual shall count on the right to participate in the broad political arena, so shall their representatives in legislative chambers. Undue or unexpected maneuvers in legislatures may end up preventing some of the representatives from the opportunity to reflect on the subject under scrutiny, debate with their peers, and offer new perspectives or adjustments through amendments. More seriously, rule breaking may even deny lawmakers the chance to vote on behalf of their constituents. In situations alike, the political system fails in avoiding "the arbitrariness and insult" to which Waldron refers.[64]

Bentham's approach to the British Parliament's three readings rule illustrates how legislative procedures may enhance the right to participate in decisionmaking.[65] Writing in the nineteenth century, he initially depicts the practice. In his words, "every bill shall be debated three times upon different days, and these days oftentimes distant from each other. . . . The bill may be thrown out on the first, the second, or the third reading; but it is not passed till it has been read three times."[66] The general justification for such a rule, on Bentham's account, is that "[t]he best argument requires to be presented at different times, and under many aspects."[67] Accordingly, he explains "[t]he advantages of these reiterated debates."[68] First, he states that the procedure fosters "[m]aturity in the deliberations, arising from the opportunities given to a great number of persons of speaking upon different days, after they have profited by the information which discussion has elicited."[69] Relatedly, he notices that the procedure protects "the minority of the assembly, by securing to it different periods at which to state its opinions."[70] Additionally, that the practice offers "members absent during the first debate" the opportunity "to attend when they perceive that their presence may influence the fate of the bill."[71] Together with all these benefits, more directly linked to a legislature's internal arrangements,

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[64] WALDRON, *supra* note 60, at 238.

[65] *See* JEREMY BENTHAM, POLITICAL TACTICS 129–131 (Michael James, Cyprian Blamires, & Catherine Pease-Watkin eds., 1999).

[66] *Id.* at 129.

[67] *Id.* at 131.

[68] *Id.* at 129.

[69] *Id.*

[70] *Id.*

[71] *Id.*

he also points out that the three readings rule confers on the members the occasion "to consult enlightened persons out of doors" and on the public the chance "to make itself heard."[72] Clearly, compliance with procedures such as the one Bentham describes advances participation in deliberative houses and, consequently, reduces the risk that citizens' involvement in politics does not find its way toward appropriate legal responses.

2.3. Transparency and justification

One more reason legislators shall comply with procedural rules refers to justifying law-creation.[73] This is what Legisprudence demands.[74] If the law is, at least to a certain extent, a matter of limiting a subject's liberty, those imposing the restrictions must explain their necessity. A law that criminalizes conduct may impose imprisonment on the perpetrator. If the behavior is illegally killing someone, a possible explanation for the correspondent foreseen penalty is preventing people from taking others' lives or disproportionately retributing unjust harm. Likewise, taxation implies taking something of material value from someone to finance the public treasury. In this case, the justification may relate to the support of governmental actions, such as providing health care or education, on behalf of the people. As legal provisions commonly mean a state interference over the private realm, either directly, as in criminal and tax law, or indirectly, as in the case of the provision of social rights that may ultimately require taxation to cover the expenses,[75] those affected in their privacy are entitled to know why the interfering measures are necessary. Correspondingly, lawmakers have a duty to demonstrate why the limitation they envisage is "an alternative for [allegedly] failing social

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[72] *Id.*

[73] *See* Bar-Siman-Tov, *supra* note 5, at 814. *But cf.* WILLIAM N. ESKRIDGE, JR., PHILIP P. FRICKEY & ELIZABETH GARRETT, LEGISLATION AND STATUTORY INTERPRETATION 81–83 (2d ed. 2006) (stating that "proceduralism does not guarantee" that there will be deliberation, or that the deliberation will be meaningful; additionally, that "it is unclear whether deliberation necessarily improves legislation.").

[74] *See* Wintgens, *supra* note 7, at 10.

[75] The provision of social rights does not necessarily imply more taxation in proportional terms. For example, one alternative is financing public services through the issuance of public bonds in the expectation that the present state action leverages the economy in the future, which could generate more fiscal revenues without the need of creating new taxes or increasing tax rates.

interaction" in the face of the options that distinct historical moments offer.[76] Summing up, as Wintgens puts it, "[t]he justification of legislation is marked as a process of weighing and balancing the moral and the political limitations of freedom . . . . Justification is part of the process of legitimation."[77]

The duty to justify lawmaking shall not depend on explicit provisions stating it. Indeed, it may simply result from the foundations of democracy and the rule of law without further elaboration. Nevertheless, legal systems may contain specific rules demanding justification for enacting legislation. For instance, in Europe, "the Union legislator is under a duty to state reasons."[78] This is so pursuant to Article 296(2) of the Treaty on the Functioning of the European Union: "Legal acts shall state the reasons on which they are based and shall refer to any proposals, initiatives, recommendations, requests or opinions required by the Treaties."[79] While it creates an obligation on the side of the lawmaker, the provision also enables "the persons concerned to understand the motivation" behind the Union law.[80] In Brazil, similar provisions apply to the National Congress. There, the Senate's internal regulations state that bills, constitutional amendments, and other legislative pieces, like reports, "shall be accompanied by a justification."[81] Relatedly, that house's rules establish that "no amendment will be accepted without a justification."[82] As in the Senate, the Chamber of Deputies has suchlike requirements.[83] Concluding, lawmakers have a duty to clarify the motives behind legislative proposals. Though not necessary, legislatures' rules may even make such an obligation clear, as in the European Union or Brazil.

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[76] Wintgens, *supra* note 7, at 10, 13–14.

[77] *Id.* at 10.

[78] Jonathan Bauerschmidt, *The Basic Principles of the European Union's Ordinary Legislative Procedure*, 22 ERA FORUM 211, 227 (2021).

[79] Consolidated Version of the Treaty on the Functioning of the European Union art. 296(2), Jun. 7, 2016, 2016 O.J. (C 202) 44.

[80] Bauerschmidt, *supra* note 78, at 227.

[81] R.I.S.F., *supra* note 8, art. 238 (Braz.) (the translation is mine).

[82] *Id.* art. 233 (Braz.) (the translation is mine).

[83] *See* REGIMENTO INTERNO DA CÂMARA DOS DEPUTADOS [R.I.C.D.] [INTERNAL REGULATIONS OF THE CHAMBER OF DEPUTIES] arts. 103 and 107, para. 1 (Braz.), https://www2.camara.leg.br/atividade-legislativa/legislacao/regimento-interno-da-camara-dos-deputados/ (last visited May 16, 2023).

Obviously, justification may take different forms. It may be delivered as a written text. Alternatively, it may be the object of a speech. However, paragraphs attached to a legislative proposal or an oral pronunciation may not suffice since they may explain nothing or conceal motives.[84] For example, concerning a bill aiming to exempt some economic sectors from taxation, the actual purpose may be advancing a party's supporters' businesses. In contrast, the announced rationale may be the general intent of improving everyone's lives. This could have been the case with the U.S. 2017 tax law, which allegedly was "a pay-off to the tiny class of billionaire Republican donors."[85] Contrarily, scrutiny on the matter may raise doubts or clarify them. At this point, sticking to procedural rules that grant the right to participate in the legislative process comes again into play. If rule-makers have appropriate opportunities to delve into the subject under discussion and debate it, its opponents may disclose the hidden motivation behind the matter. In such a case, even if the majority counts on enough votes to approve a bill, following the pertinent steps works in favor of justification. Thus, for the sake of transparency, from the perspective of "why," lawmaking shall comply with due procedures.

Transparency in the legislative process is also the object of rules that promote publicity. Obviously, exceptions may exist to safeguard sensitive information or protect lawmakers from pressure in specific situations, but secrecy shall not be the pattern.[86] In democratic regimes, although politicians may privately gather to bargain or negotiate agreements, the expectation is that discussing and voting sessions happen in public and that these reunions' time, place, and subject be announced in advance. Of course, access to working spots or galleries from which the general audience may witness the works may be restricted for security or organizational reasons. However, where possible, live broadcasting may provide illimited access to the meetings. One way or another, official records of the sessions shall be available for consultation at any time. Additionally, anyone shall have access to documents such as bills, amendments, reports, and subsidizing materials. They shall be available prior to the discussions and voting sessions. After a decision, the outcomes shall also be publicized. Clearly, it is not necessary to disclose everything. For instance, there may be countless versions of a bill or report, and they may be just working drafts for the assessment of one or some legislators. Likewise,

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[84] *Cf.* ESKRIDGE, JR., FRICKEY, AND GARRETT, *supra* note 73, at 76 ("the keepers of the vetogates also have incentives to shade the truth, so relying on committee reports and statements by floor managers does not always provide accurate information.").

[85] Gardbaum, *supra* note 26, at 5–6.

[86] "Secrecy is an instrument of conspiracy; it ought not, therefore, to be the system of a regular government." BENTHAM, *supra* note 65, at 39.

advisors or the technical staff may write opinions about a subject under scrutiny, and sometimes such statements are just for internal consumption. These documents' purpose may be only to warn lawmakers about problematic aspects they might need to address, and it is up to them – the ones who have the mandate to do so – to incorporate the findings into the debate or not. Summing up, procedural rules granting publicity may foster the appropriate level of transparency through which the audience may look for the reasons behind the legislation.

Finally, it is necessary to delineate the scope of justification. Though there is a need to state the motives behind the enactment of the legislation, it is not necessary to go through the particularities in every single provision. The duty to make the reasons clear is addressed primarily to the citizens so that they can oversee the activities of their representatives and "act from knowledge."[87] Since the legislative business deals with complex and innumerable questions and consumes too much time, it is almost impossible to demand an explanation for every bill's article, section, clause, or the like. Possibly, too much effort would be addressed to minimal issues, and, eventually, the audience would lose sight of the core aspects of the discussion. That is why, in the context of the European Union, a commentator remarks that "Union legislation is not required to go into every relevant point of fact and law."[88] He further explains that "for acts of general application it suffices to disclose the essential objective pursued by the Union legislature and it would be excessive to require a specific statement of reasons for all the various technical choices made."[89] Such a conclusion clearly applies to any parliament. The more numerous, complex, and broader the topics a legislative house copes with, the lesser the requirement for delving into every detail. Compliance with procedural rules fostering transparency, participation, and debate in legislatures may naturally contribute to selecting the most relevant aspects for the discussion.

2.4. The majority's acquiescence to rule breaking is not equivalent to due procedural changes

It is possible to argue that rule breaking is not a problem since legislative bodies may change most of their procedures at any moment. However, such an argument is flawed. Even self-governed groups may have procedures for altering

[87] *Id.* at 33.

[88] Bauerschmidt, *supra* note 78, at 227.

[89] *Id.*

their institutions.[90] For example, the modifying initiative may demand support from members, and its analysis may have to follow specific routes.[91] Thus, even absent a supermajority requirement, breaking the rules is not equivalent to diligently changing them. To the extent that the procedures shape the outcome,[92] distortion or undue creation may be tantamount to cheating.

Even when lawmakers modify a rule according to due procedures, they should avoid doing so with an immediate achievement in mind.[93] They should only do so for future cases as if under a "veil of ignorance."[94] An example clarifies the issue. In 2015, the Brazilian Congress raised the maximum age for justices of the country's superior courts from 70 to 75 years.[95] Though based on reasons such as the civil service's efficiency and the elderlies' expertise,[96] the shift concretely barred former President Dilma Rousseff, from the leftist Workers' Party, from appointing more justices for the Federal Supreme Court (S.T.F., the acronym for *Supremo Tribunal*

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[90] *Cf.* SHEPSLE, *supra* note 49, at 18.

[91] *See* REGIMENTO COMUM DO CONGRESSO NACIONAL [R.C.C.N.] [JOINT REGULATIONS OF THE NATIONAL CONGRESS] arts. 128-130 (Braz.), https://www25.senado.leg.br/documents/59501/97171143/RCCN.pdf/ (last visited Apr. 19, 2024).

[92] *See* Gould, *supra* note 23, at 1950.; Vermeule, *supra* note 23, at 362.

[93] In the context of the case that I describe in the following paragraphs, Brazilian Federal Deputy Chico Alencar (P.S.O.L.-R.J., *Partido Socialismo e Liberdade* (Socialism and Freedom Party), state of Rio de Janeiro) affirmed: "We cannot change the Constitution at the mercy of immediacy or an advantage that nobody claims because it is too small." (*"Nós não podemos mudar a Constituição ao sabor do imediatismo ou de uma vantagem que ninguém proclama aqui porque é muito pequena."*) DIÁRIO DA CÂMARA DOS DEPUTADOS, Ano LXX, No. 70, 6.5.2015 [D.C.D. 70/2015] [GAZETTE OF THE CHAMBER OF DEPUTIES, Year LXX, No. 70, May 6, 2015] 143 (Braz.), http://imagem.camara.gov.br/Imagem/d/pdf/DCD0020150506000700000.PDF#page= (last visited May 17, 2023) (the translation is mine).

[94] Vermeule, *supra* note 23, at 429. *See also* RAWLS, *supra* note 43, at 11 (on the "veil of ignorance").

[95] *See* EMENDA CONSTITUCIONAL NO. 88, DE 2015 [E.C. 88/2015] [CONSTITUTIONAL AMENDMENT NO. 88, 2015] (Braz.), http://www.planalto.gov.br/ccivil_03/constituicao/emendas/emc/emc88.htm (last visited May 17, 2023).

[96] *See* DIÁRIO DO SENADO FEDERAL, Ano LVIII, No. 73, 3.6.2003 [D.S.F. 73/2003] [GAZETTE OF THE FEDERAL SENATE, Year LVIII, No. 73, Jun. 3, 2003] 14107–14108 (Braz.), https://legis.senado.leg.br/diarios/ver/930?sequencia=113 (last visited Feb. 25, 2022).

Federal) until the end of her second term in 2018.[97] Had nothing been changed, and had she not been ousted in 2016, she would have appointed five more of them[98] in addition to the five she had already nominated.[99] Since the Workers' Party came into power in 2003, with the election of President Lula, a total of eighteen S.T.F.'s justices would have been appointed.[100] By the end of Dilma Rousseff's second term, ten out of the eleven justices would have been indicated by a President affiliated with the Workers' Party (Lula or Dilma).[101] As the age shift was the object of a constitutional amendment, the President herself had no veto power according to the Brazilian legal framework.[102]

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[97] According to Brazilian Federal Deputy Chico Alencar (P.S.O.L.-R.J.). *See* D.C.D. 70/2015, *supra* note 93, at 143 (Braz.).

[98] *See* Nathalia Passarinho, *Em sessão com ministros do STF, Congresso promulga PEC da Bengala* [*In session with STF justices, Congress promulgates Walking Stick Proposal of Amendment to the Constitution*], G1 (2015), https://g1.globo.com/politica/noticia/2015/05/com-presenca-de-ministros-do-stf-congresso-promulga-pec-da-bengala.html (last visited Feb. 25, 2022).

[99] *See Presidentes da República que nomearam ministros para o Supremo Tribunal Federal*, SUPREMO TRIBUNAL FEDERAL [*Presidents of the Republic who appointed justices to the Federal Supreme Court*, FEDERAL SUPREME COURT], http://portal.stf.jus.br/ostf/ministros/ministro.asp?periodo=STF&consulta=QUADRO_INDICACOES (last visited Feb. 25, 2022).

[100] *Cf.* Passarinho, *supra* note 98; *Presidentes da República que nomearam ministros para o Supremo Tribunal Federal* [*Presidents of the Republic who appointed justices to the Federal Supreme Court*], *supra* note 99.

[101] *Cf.* Passarinho, *supra* note 98; *Composição Plenária Anterior, Período: 10/09/2014 a 15/06/2015*, SUPREMO TRIBUNAL FEDERAL [*Previous Full Court Composition from Sep. 10, 2014, to Jun. 15, 2015*, FEDERAL SUPREME COURT], https://portal.stf.jus.br/ostf/plenario/visualizar.asp?id=1481 (last visited May 17, 2023); *Presidentes da República que nomearam ministros para o Supremo Tribunal Federal* [*Presidents of the Republic who appointed justices to the Federal Supreme Court*], *supra* note 99.

[102] *See* CONSTITUIÇÃO FEDERAL DE 1988 [C.F. 1988] [1988 FEDERAL CONSTITUTION] art. 60, para. 3 (Braz.), https://www.planalto.gov.br/ccivil_03/constituicao/constituicao.htm (last visited Jan. 20, 2024), *translated in* CONSTITUTION OF THE FEDERATIVE REPUBLIC OF BRAZIL, (2022), https://www.stf.jus.br/arquivo/cms/legislacaoConstituicao/anexo/Brazil_Federal_Constitution_EC_125.pdf (last visited Sep. 14, 2022) (henceforth, references to the this translated version of the Brazilian Constitution are omitted except where clearly stated).

Just four years after the age rise, legislators proposed its revocation, bringing the maximum age of the justices serving in the superior courts back to 70 years.[103] The declared justification was that the change had not proved useful. Concretely, the reversion would allow far-right President Jair Bolsonaro to appoint more Supreme Court justices.[104] Instead of two in his first term, he would nominate four until 2022.[105] As of May 17, 2023, such a proposal had not been approved.[106] The lesson from these events is that lawmakers should refrain from obtaining advantages via tailored procedural modifications, mainly based on "casuistry."[107]

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[103] *See Proposta de Emenda à Constituição No. 159, de 2019*, CÂMARA DOS DEPUTADOS [*P.E.C. 159/2019-C.D.*] [*Proposal of Constitutional Amendment No. 159, 2019*, CHAMBER OF DEPUTIES], https://www.camara.leg.br/proposicoesWeb/fichadetramitacao?idProposicao=2223878 (last visited May 17, 2023).

[104] *See* Fellipe Sampaio, *Entenda a PEC que antecipa a aposentadoria dos ministros do STF* [*Understand the Proposal of Amendment to the Constitution that anticipates the retirement of STF justices*], CNN BRASIL (Nov. 25, 2021), https://www.cnnbrasil.com.br/politica/entenda-a-pec-que-antecipa-a-aposentadoria-dos-ministros-do-stf/ (last visited Feb. 25, 2022).

[105] *See id.*

[106] *See P.E.C. 159/2019-C.D.*, *supra* note 103.

[107] "Casuistry" (*casuísmo*, in Portuguese) is how Brazilian Federal Deputies Alessandro Molon (P.T.-R.J.), Chico Alencar (P.S.O.L.-R.J.), Henrique Fontana (P.T.-R.S.), Ivan Valente (P.S.O.L.-S.P.), and Major Olimpio (P.D.T.-S.P.) labeled the Amendment to the Constitution 88/2015's approval during floor discussions before the second-round voting session. For contrary opinions, see the speeches of Federal Deputies Alceu Moreira (P.M.D.B.-R.S.), Domingos Neto (P.R.O.S.-C.E.), Efraim Filho (D.E.M.-P.B.), Esperidião Amin (P.P.-S.C.), Miro Teixeira (P.R.O.S.-R.J.), Moroni Torgan (D.E.M.-C.E.), and Nilson Leitão (P.S.D.B.-M.T.) in the same occasion. Among the contrary opinions, it is especially worth examining that of Federal Deputy Miro Teixeira (P.R.O.S.-R.J.), advocating that the rule regarding justices' appointments by the President of the Republic should be adjusted according to the possibility of presidential reelection for an additional term, introduced in the Brazilian political system in 1997. *See* D.C.D. 70/2015, *supra* note 93, at (in favor) 143–145, 155, 158, 197–198, 201, 203–207, 252; and (contrary) 161, 203-204, 207, 211-212, 216 (Braz.) (the acronyms' meanings are: P.T., *Partido dos Trabalhadores* (Workers' Party); P.S.O.L., *Partido Socialismo e Liberdade* (Socialism and Freedom Party); P.D.T., *Partido Democrático Trabalhista* (Labor Democratic Party); P.M.D.B., *Partido do Movimento Democrático Brasileiro* (Brazlian Democratic Movement Party); P.R.O.S., *Partido Republicano da Ordem Social* (Republican Party of the Social Order); D.E.M., *Democratas* (Democrats); P.P., *Partido Progressista* (Progressive Party); P.S.D.B., *Partido da Social Democracia Brasileira* (Brazilian Social Democracy Party); R.J., state of Rio da Janeiro; R.S., state of Rio Grande do Sul; S.P., state of São Paulo; C.E., state of Ceará; P.B., state of Paraíba; S.C., state of Santa Catarina; M.T., state of Mato Grosso). *See also* DIÁRIO DA CÂMARA DOS DEPUTADOS, Ano LXI, No. 103, 13.6.2006 [D.C.D. 103/2006] [GAZETTE OF THE CHAMBER OF DEPUTIES, Year LXI, No. 103, Jun. 13, 2006] 29971–29977 (Braz.),

The problem with rule breaking or casuistry rule changing is the confidence in a system that largely depends on itself to be stable. If nobody believes in the stated procedures because authorities or occasional majorities ignore them, instability comes into play. Like a ball on the top of a convex surface, in a situation of unstable equilibrium, the slightest movement may destabilize the arrangement.[108] However, the stability may improve by placing barriers around the ball. In real life, these barriers would be the "institutional capacity" that might prevent the system from collapsing.[109] In the following sections, I will address institutional barriers that may help keep legislative procedures on track or under the rule of law.

3. Enforcement by the legislators themselves

Ideally, legislators shall be the main actors in promoting compliance with their own procedural rules.[110] The previous subsection showed that following stated paths tends to make the process fairer than a non-foreseeable one. Additionally, resorting to another instance for problem-solving, such as the judiciary, may raise complex issues among the state's branches. Given these reasons, this subsection tackles arrangements managed by members of parliaments to keep the legislative process on track.

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http://imagem.camara.gov.br/Imagem/d/pdf/DCD13JUN2006.pdf#page= (last visited Mar. 6, 2022) (showing that the Special Committee in charge of examining the case in the Chamber of Deputies also referred to the age rise as "casuistry," although not in relation to former President Dilma Rousseff's nominations to the Federal Supreme Court).

[108] *See* JOSEPH A. SCHUMPETER, HISTORY OF ECONOMIC ANALYSIS 971 (Elizabeth Boody Schumpeter ed., Reprinted 1994 ed. 1954).

[109] *Cf.* JOSHUA A. CHAFETZ, CONGRESS'S CONSTITUTION 290 (2017) (referring to institutional capacity); Nelson W. Polsby, *The Institutionalization of the U.S. House of Representatives*, 62 THE AMERICAN POLITICAL SCIENCE REVIEW 144, 144–145 (1968) (stating that a viable political system "must be institutionalized," operating under "universalistic rather than particularistic criteria, and automatic rather than discretionary methods").

[110] *Cf.* CHAFETZ, *supra* note 109, at 290 ("Used effectively, cameral control over internal procedures can build institutional capacity.").

3.1.Each legislature's member's self-discipline

Maybe the best alternative to achieve compliance with rules is through an environment in which their subjects naturally abide by them, regardless of the coercing mechanisms in place. Adopting as clear commands as possible may be helpful in this regard. After all, dubiousness adds further uncertainty to the already confusing norms' interpretive task.[111] Under opaque conditions, obtaining automatic coordination, without someone's guidance or enforcement, seems to be less likely. For instance, traffic lights generally suffice to provide unequivocal orientation for drivers and pedestrians, and agents' presence at each intersection is usually dispensable. However, particularly in populated areas, the case may not be as straightforward where the lights' colors or brightness might be misleading for any reason (defect, poor equipment quality, sun's position, or the like). In situations where clarity holds, compliance with signs or legal provisions by their addressees is reasonably expected to be more easily achievable.

Along with the effect related to the more straightforward interpretation, clear and explicit rules may also favor self-discipline from a psychological perspective. In this case, "explicitness" makes wrongdoing or undesirable behavior harder to perform, "even assuming the absence of an external audience."[112] Taking a case from health care policies, "[t]he calorie counts on food packages and the warning labels on cigarette packets and alcohol containers provide examples of this phenomenon."[113] More than making information available, the purpose is to constrain people in the expectation that they reduce or abandon such products' consumption.[114] "[T]he warning by virtue of its explicitness makes it more difficult for people to refuse to face up to what they have known all along."[115] In legislatures, stating clearly their regulating provisions may lead to similar results. In the face of explicit procedural rules, the impulse to perform undue deviations may diminish,[116] though, concededly, questions might arise about the conditions for and magnitude of such an effect.

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[111] *See supra* Part I.

[112] Frederick Schauer, *Legislatures as Rule-Followers*, *in* THE LEAST EXAMINED BRANCH 468, 474 (Richard W. Bauman & Tsvi Kahana eds., 2006).

[113] *Id.* at 474.

[114] *Id.*

[115] *Id.*

[116] *See id.*

Possibly, making the legislative business more open to public scrutiny may enhance rules' behavioral influence over politicians.[117] I have previously addressed how procedural compliance may favor transparency and publicity for the sake of lawmaking justification. Briefly, my argument stated that compliance with the due legislative process offers more opportunities for debate, promoting chances for appropriate assessment of the matter under discussion by anyone interested in it. The rationale now takes the inverse direction. It refers to how exposure invites surveillance, which in turn may foster self-compliance in a legislature. Accordingly, in more crystalline scenarios, "legislative violation or modification of a rule designed to constrain that legislature must be done in the glare of public and press attention,"[118] not to mention political opposition watch.[119] As such, "what we know about individual behavior may suggest that for legislative behavior as well transparency and the consequent publicity may make rule-following easier, and rule-violation or rule-modification more difficult."[120]

Could the influence of enhanced transparency over self-compliance in legislatures have to do with constituents' electoral choices for their representatives? The answer would probably be positive where voters purport special deference for at least some procedural rules.[121] It seems, however, that such cases would be rare in the face of modern life's burdens. In ancient societies, citizens (those who could participate in the polity) did not need to worry about their basic intimate needs (nourishment, clothing, cleanliness, etc.), in charge of noncitizens or enslaved people.[122] Fortunately, modernity entitled everyone under a given jurisdiction to political rights. However, most modern citizens cannot put their private tasks aside and fully dedicate themselves to politics. Contrarily, according to Hannah Arendt, basic personal concerns have occupied the public realm in mass-production societies.[123] If privacy was once the locus for resignation and fulfilling the most fundamental human necessities, the public space is now used for the same

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[117] *See* id.

[118] *Id.* at 474.

[119] *See id.*

[120] *Id.*

[121] *See id.* at 474–475.

[122] *See* Benjamin Constant, *The Liberty of the Ancients Compared with That of the Moderns*, *in* DEMOCRACY 108 (Ricardo Blaug & John Schwarzmantel eds., 2016).

[123] *See* HANNAH ARENDT, THE HUMAN CONDITION 28 (2d ed. 1998).

purpose.[124] Knowingly, people spend a significant part of their time working and moving within urban areas to provide for their subsistence. As a consequence, they barely find time to act politically and claim their rights in the polity.[125] This outcome might be even more salient concerning attention to lawmaking details,[126] especially when voters have to ponder issues concerning politicians' character, behavior, and policy views in a single choice at each election.[127] A voter will hardly attribute a heavy weight to a candidate's commitment to procedural rules.[128] Therefore, it seems unlikely that "electoral accountability"[129] could generally imply a considerable positive effect over adherence to due process in parliaments.[130]

The remarks on how transparency may enhance self-policing in lawmaking houses do not deny the existence of undesired side effects from broad openness to the wide audience. Admittedly, negotiators may need some privacy to properly address an issue, even on behalf of the public interest. As such, on the one hand, too much light may "drive decisionmaking underground" as a form of protecting bargains from scrutiny.[131] On the other hand, overwhelming surveillance might not permit negotiations at all. In this case, gridlock or a kind of all-or-nothing decision may result instead of legislation that could accommodate several interests.[132] Finally, "transparency may exacerbate the effects of decisionmaking pathologies that

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[124] *See id.* at 33.

[125] *See id.* at 40, 49.

[126] *Cf.* Robert H. Michel, *The Minority Leader Replies*, THE WASHINGTON POST (Dec. 29, 1987), https://www.washingtonpost.com/archive/opinions/1987/12/29/the-minority-leader-replies/95d94d68-11e1-4522-9619-5266e7c4e6f0/ (last visited May 20, 2023) ("Nothing is so boring to the layman as a litany of complaints over the more obscure provisions of House procedures. It is all 'inside baseball.' Even among the media, none but the brave seek to attend to the howls of dismay from Republicans over such esoterica as the kinds of rules under which we are forced to debate. But what is more important to democracy than the method by which its laws are created?").

[127] *See* Richard Briffault, *Campaign Finance Disclosure 2.0*, 9 ELECTION LAW JOURNAL 273, 288–289 (2010).

[128] *See* Bar-Siman-Tov, *supra* note 5, at 833.

[129] Schauer, *supra* note 112, at 474.

[130] Though an evaluation of overall fairness in legislatures may influence voters' electoral decisions. *See* Tom R. Tyler, *Governing amid Diversity: The Effect of Fair Decisionmaking Procedures on the Legitimacy of Government*, 28 LAW & SOCIETY REVIEW 809 (1994).

[131] Vermeule, *supra* note 23, at 413.

[132] *See id.*

sometimes grip mobilized publics."[133] For instance, politicians may use their overexposure in parliaments to inflame some of their supporters, furthering the polarization process that Brazil, the United States, and other countries have been witnessing. Acknowledging these side effects, however, does not invalidate a conclusion that transparency may foster procedural compliance in legislatures.[134]

Members' self-discipline, enhanced or not by openness to scrutiny and rules' clarity and explicitness, indicates the level of "internalization"[135] in legislative chambers. When norms are internalized, they become so important and natural that "the necessity of enforcement may, except to guard against outliers, disappear."[136] On the one hand, the problem is that, as the quote acknowledges, it might be necessary to count on tools to cope even with the rare situations in which regularity is challenged. On the other hand, there may be no sufficient level of internalization. Such a fact might relate to the community members' rotativity. Under high turnover rates, outgoers carry with them what they have just learned, while newcomers struggle to abide by the group's rules. It may also indicate that the rules, though binding, are inadequate, recommending adopting another institutional design through the reforming routes in place. Finally, it may point to an overall lack of commitment to due process in light of foreseeable legislative outcomes.[137] Absent internalization, enforcement mechanisms shall exist to keep lawmaking procedures on track.

3.2.Internal compliance mechanisms applied by lawmakers

Internal institutions driven by lawmakers may figure as oversight mechanisms. Firstly, houses' presiding officers and committee chairs are responsible for safeguarding procedures according to the appropriate rules. Secondly, other members can use policing tools. Whenever there is a complaint or a doubt

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[133] *See id.* at 412.

[134] An investigation on the right balance between the desired and undesired forces associated with transparency and publicity is beyond the scope of this text.

[135] Schauer, *supra* note 112, at 475.

[136] *Id.*

[137] In opposition to what Schauer refers to as "[c]anonization, . . . a process that, tautologically, requires a text, and that, second, requires that a relevant community . . . have a certain positive and reverential attitude toward that text such that it is largely unthinkable to imagine its modification or violation." *Id.* at 473.

concerning a procedural rule, a legislator may make a point of order.[138] Then, it will be up to an assigned authority to decide on the matter, generally the presiding officer or a committee chair, depending on the situation.[139] If the point of order's author does not agree with the decision, she may appeal to a superior instance, such as the full house.[140]

The officer in charge of presiding over a legislative house is not necessarily one of its members, but that is generally the case in Congress in Brazil and the United States. In Brazil, whether a non-member could preside over the Chamber of Deputies or the Federal Senate is not even questioned.[141] In each house, senators and federal deputies choose one of their peers as President for a two-year term in office.[142] In the United States, the Vice President of the Republic is also the President of the Senate,[143] though she rarely performs this role.[144] Usually, the duties of such a position are in charge of a President pro tempore, a senator chosen by her peers.[145] In the House of Representatives, the presidency is attributed to the Speaker.[146] Although she may be an outsider, none has ever been appointed for the office, which has always been in charge of a representative.[147]

The duties and prerogatives of a legislature's presiding officers vary according to the legal framework that rules their activities. Notwithstanding, it is possible to find common grounds related to them in Congress in Brazil and the United States. The four perform administrative, political, and procedural roles,

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[138] *See* Bar-Siman-Tov, *supra* note 5, at 818.

[139] *See id.* In the following lines, I will only address the role of legislative houses' presiding officers. Generally, however, much of what I say about their competences, including those concerning points of order, *mutatis mutandis*, also applies to committees' chairs.

[140] *See id.*

[141] The Brazilian Constitution is silent about the issue. The internal rules of each Congress's houses are not explicit, but certain provisions indicate that the houses' presidents shall be one of their members. *See* R.I.C.D., *supra* note 83, art. 4, para. 1 (Braz.); R.I.S.F., *supra* note 8, art. 3, II (Braz.).

[142] *See* C.F. 1988, *supra* note 102, art. 57, para. 4 (Braz.); R.I.C.D., *supra* note 83, arts. 5, *caput*, and 6, *caput* (Braz.); R.I.S.F., *supra* note 8, arts. 59, *caput*, and 60, *caput* and para. 1, I (Braz.).

[143] *See* U.S. CONST. art. I, § 3, cl. 5.

[144] *See* ROGER H. DAVIDSON ET AL., CONGRESS AND ITS MEMBERS 159 (18th ed. 2022).

[145] *See* U.S. CONST. art. I, § 3, cl. 5; STANDING RULES OF THE SENATE, *supra* note 20, r. I, cl. 1.

[146] *See* U.S. CONST. art. I, § 2, cl. 5.

[147] *See* DAVIDSON ET AL., *supra* note 144, at 146.

usually with not-so-clear boundaries among these activities. Administratively, they oversee their houses' bureaucracy or directly discharge some managerial tasks. Politically, they exert more or less influence over lawmaking depending on several factors, such as: personal behavior; position in the leadership of their parties or coalitions; or institutional (legal) restrictions upon them or tools at their disposal. In Brazil, the legal structure in both Congress houses is somehow equivalent, and what may discern the weight of the President of the Senate from that of the President of the Chamber of Deputies is more associated with the other factors. In the modern U.S. Congress, apart from personal characteristics, the Speaker is allegedly more powerful than her Senate counterpart (the President pro tempore) due to institutional reasons as well as a more salient role in the leadership within the House of Representatives.[148] One way or another, the presiding officers' political role often intertwines with the procedural one, as in settling the legislative agendas in Brazil and the United States, especially in the House of Representatives.[149]

Concerning the procedures, presiding officers shall conduct a greater or lesser portion of the lawmaking business (depending on the competencies assigned to them), applying the rules that govern at least part of the process that will ultimately result in new legislation. In the chairing task, general legal principles or specific ones may help the officers in subsuming concrete situations before them to the appropriate norms or to the adequate interpretation of provisions. For instance, in the Brazilian Senate, a written guideline states that decisions resulting from leadership agreements or full-chamber discussions cannot prevail over the internal norms except under a unanimous roll-call vote under a quorum of at least three-fifths of the members.[150] The rationale behind such a guideline seems to relate to the legal, and thus binding, nature of the procedural rules, even when they do not enjoy constitutional or statutory status.[151] Therefore, the majority and leaders shall comply with them, and so shall the presiding officer herself. For Bentham, the latter should not "possess any power, the effect of which would be to give him [or her] a controul in any degree

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[148] *See id.* at 159 (on the institutional aspect); CHRISTOPHER M. DAVIS, CONGRESSIONAL RESEARCH SERVICE, RL30960, THE PRESIDENT PRO TEMPORE OF THE SENATE: HISTORY AND AUTHORITY OF THE OFFICE 7 (2015), https://crsreports.congress.gov/product/pdf/RL/RL30960 (last visited Mar. 25, 2023) (on both aspects). *Cf.* OLESZEK ET AL., *supra* note 9, at 421 ("the majority leader is pivotal in determining the Senate's agenda").

[149] In the case of the U.S. Senate, the definition of the legislative agenda is more prone to the majority leader. *See* OLESZEK ET AL., *supra* note 9, at 421.

[150] *See* R.I.S.F., *supra* note 8, art. 412, III (Braz.).

[151] *See supra* Part I.

over the will of the assembly."[152] Concededly, on the one hand, presidents or speakers may act politically, to a certain extent, advancing partisan agendas, and may have some discretion in deciding how to apply particular rules, depending on the case.[153] On the other hand, such an entitlement cannot equate to an arbitrary procedural break under the risk of jeopardizing the legislative process's fairness and legitimacy.

Before an alleged rule violation, a member can typically pose a parliamentary inquiry[154] or raise a point (or question) of order within the legislature.[155] Similar features apply to these mechanisms in the U.S. and Brazilian federal chambers. Generally, a parliamentary inquiry is a consultation addressed to the officer chairing a session,[156] who may be the Speaker, the President of the assembly, or any other agent in charge of conducting the works at a particular moment. Obviously, legislatures' heads do not preside over procedures all the time. In their absence, the duty lies on formal substitutes (such as Vice or Deputy Presidents or Speakers of a house) or other members according to the pertinent rules or customs. Typically, the reply to the inquiry is an explanation and not a ruling.[157] As such, it is not subject to

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[152] BENTHAM, *supra* note 65, at 67.

[153] *See* VALERIE HEITSHUSEN, CONGRESSIONAL RESEARCH SERVICE, 97-780, THE SPEAKER OF THE HOUSE: HOUSE OFFICER, PARTY LEADER, AND REPRESENTATIVE 4, https://crsreports.congress.gov/product/pdf/RL/97-780 (last visited Mar. 25, 2023).

[154] The parliamentary inquiry serves, more broadly, for clarification about the procedures. A lawmaker who is in doubt about an issue may simply question the presiding officer about it with no further formalities.

[155] *See* R.C.C.N., *supra* note 91, art. 131, *caput* (Braz.); R.I.C.D. *supra* note 83, art. 95, *caput* (Braz.); R.I.S.F. *supra* note 8, arts. 403, *caput*, and 408, *caput* (Braz.); CHARLES W. JOHNSON, JOHN V. SULLIVAN & THOMAS WICKHAM, JR., HOUSE PRACTICE 679 (2017) (ch. 37, § 1); FLOYD M. RIDDICK & ALAN S. FRUMIN, RIDDICK'S SENATE PROCEDURE, S. DOC. NO. 101-28 987 (Alan S. Frumin ed., Revised ed. 1992).

[156] *See* R.I.S.F., *supra* note 8, art. 14, X, "a" ("*pela ordem*"); VALERIE HEITSHUSEN, CONGRESSIONAL RESEARCH SERVICE, 98-306, POINTS OF ORDER, RULINGS, AND APPEALS IN THE SENATE 3, https://crsreports.congress.gov/product/pdf/RS/98-306 (last visited Apr. 9, 2023) [hereinafter HEITSHUSEN, POINTS OF ORDER IN THE SENATE]; VALERIE HEITSHUSEN, CONGRESSIONAL RESEARCH SERVICE, 98-307, POINTS OF ORDER, RULINGS, AND APPEALS IN THE HOUSE OF REPRESENTATIVES 3, https://crsreports.congress.gov/product/pdf/RS/98-307 (last visited Apr. 9, 2023) [hereinafter HEITSHUSEN, POINTS OF ORDER IN THE HOUSE].

[157] *See* HEITSHUSEN, POINTS OF ORDER IN THE SENATE, *supra* note 156, at 3; HEITSHUSEN, POINTS OF ORDER IN THE HOUSE, *supra* note 156, at 3.

appeal.[158] For the same reason, the response is way less authoritative as a precedent than a decision given under the formulation of a point of order.[159]

A point of order is a much more formal tool than a parliamentary inquiry. It ordinarily refers to a concrete and pending situation.[160] Relatedly, the formulation shall be objective, clearly identifying the controversy or doubt and specifying the associated rules or precedents.[161] In Brazil, joint Congress internal rules (applicable to joint sessions of the Senate and the Chamber of Deputies) and the internal regulations of the Senate go as far as to explicitly forbid a challenge to a "thesis of doctrinal or speculative nature" through a point or order.[162] Typically, the dissatisfied member shall timely raise the question. Otherwise, preclusion bars the assessment of the contentious case. In other words, "[o]n the demand for the 'regular order,' . . . the [m]ember must either make his or her point of order at that time or lose the opportunity to do so."[163] Such a remark, made for the U.S. House of Representatives, can generally extend to the other lawmaking bodies under scrutiny in this text.[164]

The decision on a point of order lies primarily on the agent chairing the legislative process.[165] In such a task, the presiding officer may receive guidance from

[158] *See* HEITSHUSEN, POINTS OF ORDER IN THE SENATE, *supra* note 156, at 3; HEITSHUSEN, POINTS OF ORDER IN THE HOUSE, *supra* note 156, at 3; JOHNSON, SULLIVAN, AND WICKHAM, JR., *supra* note 155, at 67 (ch. 3, § 3).

[159] *See* HEITSHUSEN, POINTS OF ORDER IN THE SENATE, *supra* note 156, at 3; HEITSHUSEN, POINTS OF ORDER IN THE HOUSE, *supra* note 156, at 3.

[160] *See* R.C.C.N., *supra* note 91, art. 131, *caput* (Braz.); R.I.C.D. *supra* note 83, art. 95, *caput* (Braz.); R.I.S.F., *supra* note 8, arts. 403, *caput*, and 408, *caput* (Braz.); JOHNSON, SULLIVAN, AND WICKHAM, JR., *supra* note 155, at 679 (ch. 37, § 1); RIDDICK AND FRUMIN, *supra* note 155, at 987.

[161] *See* R.C.C.N., *supra* note 91, art. 131, para. 1 (Braz.); R.I.C.D. *supra* note 83, art. 95, para. 4 (Braz.); R.I.S.F. *supra* note 8, arts. 404 (Braz.); HEITSHUSEN, POINTS OF ORDER IN THE SENATE, *supra* note 156, at 1–2; HEITSHUSEN, POINTS OF ORDER IN THE HOUSE, *supra* note 156, at 1; JOHNSON, SULLIVAN, AND WICKHAM, JR., *supra* note 155, at 680 (ch. 37, § 1).

[162] R.C.C.N., *supra* note 91, art. 131, para. 1 (Braz.); R.I.S.F., *supra* note 8, art. 404 (Braz.).

[163] HEITSHUSEN, POINTS OF ORDER IN THE HOUSE, *supra* note 156, at 1. *See also* Bar-Siman-Tov, *supra* note 5, at 818 ("When a point of order is not timely raised, it is 'effectively waived,' and the violation of the rule can no longer be challenged.").

[164] Concerning the U.S. Congress, *see* Bar-Siman-Tov, *supra* note 5, at 818.

[165] *See* R.C.C.N., *supra* note 91, art. 132, *caput* (Braz.); R.I.C.D., *supra* note 83, art. 17, I, "n" (Braz.); R.I.S.F., *supra* note 8, art. 48, XIII (Braz.); RULES OF THE HOUSE OF REPRESENTATIVES, 118TH CONGRESS, r. I, cl. 5,

advisors, the parliamentarian (a nonpartisan officer specialized in legislative procedures in the U.S. Congress),[166] or specialized committees (depending on the subject).[167] Theoretically, the chair may decline to decide, transferring the duty to the full chamber. The Standing Rules of the U.S. Senate expressly admit such an alternative.[168] There, though seldom, "[t]he presiding officer is most likely to do so when the procedural question has not arisen before, and there is no Senate rule or precedent on which to base a ruling."[169] Along with such a possibility, the ruling on a point of order is directly attributed to the U.S. Senate on specified occasions, like when the question is alleged unconstitutional.[170] The rationale behind a possible constitutional breach "is that while the presiding officer has authority to interpret Senate rules, he or she does not have the authority to interpret the Constitution."[171] Reasonable or not, such a justification, the debate on the constitutionality of bills may avoid some of the burdens that critics find in judicial review of legislation, regardless of who decides the issue within the parliament.

A kind of control of constitutionality performed by elected actors may be an option to the alleged non-democratic nature of judicial review in its strong version, in which courts have the power to strike down statutes.[172] Concededly, legislators may not be as technical as judges, and the formers' arguments will probably be much

https://rules.house.gov/sites/republicans.rules118.house.gov/files/documents/Rules%20and%20Resources/118-House-Rules-Clerk.pdf (last assessed Apr. 5, 2023); STANDING RULES OF THE SENATE, *supra* note 20, r. XX, cl. 1; Bar-Siman-Tov, *supra* note 5, at 818 (on the U.S. Congress).

[166] *See* VALERIE HEITSHUSEN, CONGRESSIONAL RESEARCH SERVICE, RS20544, THE OFFICE OF THE PARLIAMENTARIAN IN THE HOUSE AND SENATE, https://crsreports.congress.gov/product/pdf/RS/RS20544 (last visited Apr. 25, 2023).

[167] For instance, in the U.S. Senate, "rulings on certain budget points of order require examination of estimates supplied by the Senate Budget Committee." HEITSHUSEN, POINTS OF ORDER IN THE SENATE, *supra* note 156, at 3 (footnote 15).

[168] STANDING RULES OF THE SENATE, *supra* note 20, r. XX, cl. 2.

[169] HEITSHUSEN, POINTS OF ORDER IN THE SENATE, *supra* note 156, at 1.

[170] *See id.* at 1–2.

[171] VALERIE HEITSHUSEN, CONGRESSIONAL RESEARCH SERVICE, R40948, CONSTITUTIONAL POINTS OF ORDER IN THE SENATE 2, https://crsreports.congress.gov/product/pdf/R/R40948 (last visited Apr. 9, 2023).

[172] *See* Jeremy Waldron, *The Core of the Case Against Judicial Review*, 115 THE YALE LAW JOURNAL 1346, 1354 (2006).

more influenced by partisanship and policy considerations than the latters'.[173] Notwithstanding, as Mark Tushnet remarks in relation to U.S. Senate constitutional points of order, "it seems that nearly all the debates contain the skeletons of decent constitutional arguments."[174] Such an observation is in line with Peter Häberle's defense of the "open society of constitutional interpreters,"[175] or the conviction that all citizens are entitled to participate in the collective enterprise related to interpreting their fundamental law. In legislative bodies, debates on any issue may resort to the constitution, and lawmakers shall engage in them not only under questions of order but also in daily affairs. In Brazil, for instance, together with discussions at any moment of the procedures, the Constitution and Justice Committees in both Congress houses have the specific duty to address the constitutionality of bills.[176] Under points of order or otherwise, "non-judicial review"[177] finds its place in legislatures and enhances the interpretation of the constitution.

A presiding officer's decision on points of order is generally subject to appeal, submitting the doubt or the controversy to the whole body as the ultimate authority within a house. The purpose is to circumvent equivocal or arbitrary positions from just one person.[178] Usually, not only the one who raised the question may challenge the chair's ruling but any member.[179] That is so because, on the one hand, the original author or a peer with the same interest may be dissatisfied with a denial; on the other, any other congressperson may disagree with a granting. In this regard, two cases in Brazil present some particularities. First, in the Senate, the appellant, either the

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[173] *See* Mark Tushnet, *Non-Judicial Review*, HARVARD JOURNAL ON LEGISLATION 453, 461 (2003).

[174] *Id.* at 460.

[175] PETER HÄBERLE, PETER HÄBERLE ON CONSTITUTIONAL THEORY: CONSTITUTION AS CULTURE AND THE OPEN SOCIETY OF CONSTITUTIONAL INTERPRETERS (Markus Kotzur ed., 1st ed. 2018).

[176] *See* R.I.C.D., *supra* note 83, art. 32, IV, "a" (Braz.); R.I.S.F., *supra* note 8, art. 101, I (Braz.).

[177] Tushnet, *supra* note 173, at 461.

[178] "The right to appeal from a decision of the Chair on a question of order is derived from the English Parliament and is recognized under clause 5 of rule I, which dates from 1789 . . . . This right of appeal, which may be invoked by any Member, protects the House against arbitrary control by the Speaker." JOHNSON, SULLIVAN, AND WICKHAM, JR., *supra* note 155, at 65 (ch. 3, § 1).

[179] *See* R.I.C.D., *supra* note 83, art. 95, para 8 (Braz.); RULES OF THE HOUSE OF REPRESENTATIVES, 118TH CONGRESS, *supra* note 165, r. I, cl. 5; HEITSHUSEN, POINTS OF ORDER IN THE SENATE, *supra* note 156, at 2.

question's author or another senator, must be a leader or have a leader's support.[180] Likewise, in joint sessions of the Senate and the Chamber of Deputies, only a leader or a member supported by a leader can appeal.[181] Second, in such joint sessions, appeals only stand if the question relates to a constitutional provision.[182] Finally, as a corollary of the situation in which the presiding officer readily declines to rule on the question, she, in theory at least, can challenge her own decision if she feels the case requires all members' consideration. The internal rules of the Brazilian Senate even provide for such a possibility.[183]

As in the case of the decision by the chair, the whole body may benefit from informal or formal consultation with staff or legislative committees before ruling under appeal.[184] In the Brazilian Senate, the Constitution and Justice Committee may be called to issue an opinion in two business days.[185] With or without it, the full house shall deliberate after the assigned deadline.[186] In the Chamber of Deputies, procedures are slightly different and less adequate. According to its internal rules' more persuasive wording, the equivalent committee shall opine about the controversial question.[187] On the one hand, such a requirement theoretically introduces more authoritative reasoning in the debate. On the other hand, it may make it harder for the appellants to obtain a timely response. The risk is even more salient because the Chamber can only deliberate after publishing the committee's opinion.[188] Although there is a specified deadline for the manifestation, there is no enforcement tool in case the committee remains silent, except for another point of order with, obviously, no good perspectives of success.

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[180] *See* R.I.S.F., *supra* note 8, art. 405 (Braz.).

[181] *See* R.C.C.N., *supra* note 91, art. 151 (Braz.) combined with R.I.S.F., *supra* note 8, art. 405 (Braz.).

[182] *See* R.C.C.N., *supra* note 91, art. 132, *caput* (Braz.)

[183] *See* R.I.S.F., *supra* note 8, art. 405 (Braz.).

[184] *See* R.C.C.N., *supra* note 91, art. 132, para. 1 (Braz.); R.I.C.D. *supra* note 83, art. 95, para. 8 (Braz.); R.I.S.F. *supra* note 8, arts. 101, VI, and 408, *caput* (Braz.); HEITSHUSEN, *supra* note 153, at 3 (footnote 15); JOHNSON, SULLIVAN, AND WICKHAM, JR., *supra* note 155, at 682 (ch. 37, § 2); RIDDICK AND FRUMIN, *supra* note 155, at 989.

[185] *See* R.I.S.F. *supra* note 8, art. 408, *caput*, and para. 2 (Braz.).

[186] *See id.*

[187] *See* R.I.C.D. *supra* note 83, art. 95, para. 8 (Braz.).

[188] *See id.*

Finally, decisions on points of order may generate precedents.[189] In the United States, Congress houses shall apply previous rulings to resembling cases just as courts do pursuant to the *stare decisis* doctrine.[190] Naturally, decisions adopted by full bodies (either the House or the Senate) tend to be more authoritative than those adopted solely by a presiding officer.[191] The situation is similar in Brazil, though precedents are more guiding than binding regardless of who rules on the case, those sanctioned by the whole corpus having more weight.[192] Such an approach possibly derives from the country's civil law tradition, in which a court ruling may guide future judgments but generally does not bind them.[193] Notwithstanding, in the Brazilian Congress, precedents may give rise to internal rules' change as any other intended procedural innovation. In these cases, the arising provisions obviously purport the same authority as those already in place.

Summing up, legislatures count on internal mechanisms to oversee and enforce due procedures. First, chairs or presiding officers shall administer the legislative process according to the pertinent rules, be they constitutional, statutory, or internal. Second, if a lawmaker finds something wrong, she may formulate a point of order (or anything similar), claiming a route correction. Generally, it is up to the presiding officer to examine the case and deliver a solution. Finally, any dissatisfied

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[189] *See* R.C.C.N., *supra* note 91, art. 132, para. 2 (Braz.); R.I.C.D. *supra* note 83, art. 95, para. 10 (Braz.); R.I.S.F. *supra* note 8, art. 406 (Braz.); HEITSHUSEN, *supra* note 156, at 3; HEITSHUSEN, *supra* note 156, at 2; JOHNSON, SULLIVAN, AND WICKHAM, JR., *supra* note 155, at 683 (ch. 37, § 2); RIDDICK AND FRUMIN, *supra* note 155, at 987.

[190] *See* JOHNSON, SULLIVAN, AND WICKHAM, JR., *supra* note 155, at 683 (ch. 37, § 2); Gould, *supra* note 23, at 1956.

[191] *See* HEITSHUSEN, POINTS OF ORDER IN THE SENATE, *supra* note 156, at 3.

[192] *See* R.C.C.N., *supra* note 91, art. 132, para. 2 (Braz.); R.I.C.D. *supra* note 83, art. 95, para. 10 (Braz.); R.I.S.F. *supra* note 8, art. 406 (Braz.); 2 LUCIANO HENRIQUE DA SILVA OLIVEIRA, COMENTÁRIOS AO REGIMENTO INTERNO DO SENADO FEDERAL [COMMENTS ON THE INTERNAL REGULATIONS OF THE FEDERAL SENATE] 580 (2021), https://www2.senado.leg.br/bdsf/bitstream/handle/id/590473/Comentarios_regimento_interno_Senado_Federal_v2.pdf (last visited Apr. 14, 2024).

[193] Though new legislation has been conferring binding force to some judicial decisions. For instance, in 2004 Congress passed a constitutional amendment stating that the Federal Supreme Court may issue *summulas* with "a binding effect upon the lower courts of the Judicial branch and the government bodies and associated entities, in the federal, state, and local levels." C.F. 1988, *supra* note 102, art. 103-A (Braz.), introduced by EMENDA CONSTITUCIONAL NO. 45, DE 2004 [E.C. 45/2004] [CONSTITUTIONAL AMENDMENT NO. 45, 2004] (Braz.), https://www.planalto.gov.br/ccivil_03/constituicao/Emendas/Emc/emc45.htm#art2 (last visited Jun. 9, 2023).

member may appeal against the chair's decision, asking for a ruling by the whole body. In theory, such a policing framework seems to be appropriate. Nevertheless, it may not work adequately in concrete situations.

3.3.Concerns about relying on self-enforcement mechanisms

Points of order and appeals may not be as useful as they should be in legislatures. First, chairs or majorities may simply disregard a question raised or an appeal since no other internal mechanisms oblige them to act. Second, political bonds among members may make it harder to reverse a presiding officer's decision. Third, houses' rules may offer broad opportunities for waiving procedural enforcement tools. Finally, the majority may even questionably use points of order to circumvent supermajority requirements.

3.3.1. Inertia

The skepticism of a Brazilian federal deputy, in 1997, illustrates how self-enforcing mechanisms in legislatures may be unreliable, at least in some lawmakers' eyes. Dissatisfied with the course of the legislative business in relation to a specific matter, he disappointedly manifested his intention of challenging the alleged wrongdoing. In his words: "I will raise a point of order knowing that it will fall into the void because the reply will be just a matter of formality, and, even if I appeal, an opinion from the Constitution and Justice Committee will be indefinitely postponed, and unfortunately no consequence will result thereafter."[194]

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[194] *"Formularei minha questão de ordem mesmo sabendo que ela acabará caindo no vazio, porque será respondida de forma protocolar, e, ainda que venhamos a interpor recurso, ele será enviado para as calendas da Comissão de Constituição e Justiça, e nenhum resultado terá, infelizmente."* Federal Deputy Arnaldo Faria de Sá (P.P.B.-S.P.) according to Lourimar Rabelo dos Santos, As Questões de Ordem na Câmara dos Deputados: Estabilidade ou Instabilidade Hermenêutica? [Questions of Order in the Chamber of Deputies: Hermeneutic Stability or Instability?] 117 (2005) (monografia de Especialização em Gestão Legislativa, Universidade de Brasília, Brasil [Legislative Management Specialization monograph, University of Brasilia, Brazil]), https://bd.camara.leg.br/bd/bitstream/handle/bdcamara/3563/questoes_ordem_lourimar.pdf?sequence=1&isAllowed=y (last visited Apr. 12, 2023) (the acronyms' meanings are: P.P.B., *Partido Progressista Brasileiro* (Brazilian Progressive Party); S.P., state of São Paulo) (the translation is mine).

Points of order may turn useless if presiding officers or the full house do not feel compelled to decide the raised question. Plainly, any decision on the point shall be delivered on time, so that a correcting action may take place. Notwithstanding, an analysis of this topic, in the Chamber of Deputies of Brazil, accounts for occasions when the Speaker (or a deputy conducting the works on the floor) does not tackle the alleged breach or procedural doubt timely.[195] Sometimes, though promising feedback shortly, the chair simply ignores the issue.[196] Likewise, appeals may also be fruitless. In the previous paragraphs, I mentioned that an appeal in the Chamber of Deputies shall be instructed with a mandatory opinion from that house's Constitution and Justice Committee.[197] Although the internal regulations impose a deadline for the opinion's issuance, the committee seldom abides by it.[198] As a result, the raised question becomes ineffective. Pursuant to a procedural rule,[199] such an outcome could be avoided if the Chamber's plenary (full house) suspended any further action (debates, amendments, votings, and the like) related to the matter to which a point of order refers until a decision arose. However, the plenary rarely grants such a suspension.[200] Concluding, inertia on the side of the presiding officer, the full house, or any other actor performing a mandatory step (like a committee) may make a point of order meaningless.

3.3.2. Political bonds

Points of order's effectiveness may be affected by the political relations among the legislators raising them or appealing and the deciding authority, either a chair or the full chamber. Scholarship in the U.S. Congress reveals that the House presiding officer tends to uphold or reject a point of order by his party line.[201] This

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[195] See *id.* at 12.

[196] See *id.*

[197] *See* R.I.C.D., *supra* note 83, art. 95, para. 8 (Braz.).

[198] *See* Santos, *supra* note 194, at 117.

[199] *See* R.I.C.D., *supra* note 83, art. 95 para. 9 (Braz.).

[200] *See* Santos, *supra* note 194, at 117.

[201] *See* Bar-Siman-Tov, *supra* note 5, at 846.

pattern was also observable in the Senate,[202] although the introduction, in the first half of the twentieth century, of advice from the parliamentarian allegedly mitigated the trend from that moment onwards.[203] In addition, the studies point out that reversing a presiding officer's ruling is unlikely in both chambers.[204] In other words, under an appeal, members often maintain the initial decision, though "even appeals were treated in a more neutral fashion once a formal parliamentarian was serving regularly in the Senate."[205] In sum, these remarks suggest that partisanship, one way or another, plays a role in points of order's decisionmaking.

The case relating specifically to the amendment process is perhaps more elucidative of partisanship influence in the U.S. Senate. The voting process, on the merits, may refuse a bill amendment. Alternatively, procedural considerations may also strike it down. One way of doing so is by formulating a point of order challenging the amendment's adequacy as to constitutional, statutory, or internal requirements.[206] If the presiding officer or the full chamber ultimately agrees with the raised point, "the amendment dies."[207] In this regard, an analysis covering the 101st through the 106th Congress (January 1989 to January 2001) showed that "Senate point-of-order vote killed more than twice as many minority amendments as majority amendments."[208] Such a conclusion is in line with the overall perception that political bonds in legislatures influence the usefulness of questions of order.

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[202] *See* Anthony J. Madonna, Michael S. Lynch & Ryan D. Williamson, *Questions of Order in the U.S. Senate: Procedural Uncertainty and the Role of the Parliamentarian*, 100 SOCIAL SCIENCE QUARTERLY 1343, 1350, 1355 (2019).

[203] *See id. But see* James I. Wallner, *Parliamentary Rule: The US Senate Parliamentarian and Institutional Constraints on Legislator Behaviour*, 20 THE JOURNAL OF LEGISLATIVE STUDIES 380, 380 (2014) ("the majority party has recently disregarded the norm of parliamentary constraint reflected in past practice and demonstrated a willingness to ignore Senate rules when doing so was necessary to achieve legislative success. This could signify a potential shift in how majorities view the constraints imposed by Senate rules if current trends of legislative dysfunction continue.").

[204] *See* HEITSHUSEN, POINTS OF ORDER IN THE SENATE, *supra* note 156, at 3; Bar-Siman-Tov, *supra* note 5, at 818, 846–847; Madonna, Lynch, and Williamson, *supra* note 202, at 1354.

[205] Madonna, Lynch, and Williamson, *supra* note 202, at 1354.

[206] *See* CHRIS DEN HARTOG & NATHAN W. MONROE, AGENDA SETTING IN THE U.S. SENATE 139 (2011).

[207] *Id.*

[208] *Id.* at 144.

Generally, minorities tend to be less successful whenever they resort to these mechanisms.

3.3.3. Waiving tools

Waiving instruments may work around points of order. In the U.S. House, members can pass a bill through an expeditious action suspending regular procedures,[209] save specified ones.[210] A single voting process is necessary for both suspension and passing, but the threshold amounts to two-thirds of those "present and voting, a quorum being present."[211] Together with debate and amendment limitations,[212] such a fast-track course precludes points of order related to the bill under scrutiny.[213] Another possibility refers to a "special order of business reported from the Committee on Rules."[214] Such a special rule, adopted by a majority in the House,[215] may temporarily set aside current procedures "for the consideration of a particular bill."[216] As in the case of suspension, the interim procedure may also waive points of order,[217] save for cases in which there are constraints upon the committee's

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[209] *See* JOHNSON, SULLIVAN, AND WICKHAM, JR., *supra* note 155, at 898 (ch. 53, § 2); ELIZABETH RYBICKI, CONGRESSIONAL RESEARCH SERVICE, 98-314, SUSPENSION OF THE RULES IN THE HOUSE: PRINCIPAL FEATURES 1, https://crsreports.congress.gov/product/pdf/RS/98-314 (last visited Apr. 5, 2023).

[210] *See* JOHNSON, SULLIVAN, AND WICKHAM, JR., *supra* note 155, at 899 (ch. 53, § 3).

[211] RYBICKI, *supra* note 209, at 1. *See* RULES OF THE HOUSE OF REPRESENTATIVES, 118TH CONGRESS, *supra* note 165, r. XV, cl. 1; JOHNSON, SULLIVAN, AND WICKHAM, JR., *supra* note 155, at 897 (ch. 53, § 1). On quorum requirements, "a majority of each [Congress house] shall constitute a quorum to do business." U.S. CONST. art. I, § 5, cl. 1.

[212] "[N]o floor amendments are in order. The Member making the motion [to suspend the rules], however, can include amendments as part of his or her motion." RYBICKI, *supra* note 209, at 1.

[213] *See* JOHNSON, SULLIVAN, AND WICKHAM, JR., *supra* note 155, at 897, 899 (ch. 53, §§ 1 and 2); RYBICKI, *supra* note 209, at 1.

[214] JOHNSON, SULLIVAN, AND WICKHAM, JR., *supra* note 155, at 855 (ch. 50, § 4). For the competence of the House Committee on Rules, *see* RULES OF THE HOUSE OF REPRESENTATIVES, 118TH CONGRESS, *supra* note 165, r. X, cl. 1(o). *See also* WALTER J. OLESZEK, CONGRESSIONAL RESEARCH SERVICE, R46597, THE "REGULAR ORDER": A PERSPECTIVE 31–33, https://crsreports.congress.gov/product/pdf/R/R46597 (last visited Apr. 22, 2023).

[215] *See* JOHNSON, SULLIVAN, AND WICKHAM, JR., *supra* note 155, at 892 (ch. 52, § 5).

[216] *Id.* at 855 (ch. 50, § 4).

[217] *See id.* (ch. 50, § 4).

authority in this regard.[218] Finally, not only in the House but also in the U.S. Senate, unanimous consent, a quorum being present, may also provisionally suspend rules and questions of order concerning a specific deliberation.[219]

Waiving the regular process is also possible in the Brazilian Congress. In the Senate, unanimous consent regarding a specific matter may set aside the internal rules provided three-fifths of the senators are present.[220] Additionally, both houses count on motions that, if approved by a (simple, in most cases) majority,[221] may trigger expedited procedures, generally shortening deadlines, bypassing committees, limiting debates, and restraining the opportunity for proposing amendments.[222] Depending on the situation, the rules grant the right to file such a motion to: a) fractions of the members in each house, varying from one-fourth to two-thirds according to the case; b) leaders representing these quantities; c) committees; or d) the houses' boards.[223] Finally, regardless of a request, an automatic waiver applies for matters or situations specified in the procedural rules,[224] such as the authorization to "the president of the Republic to declare war" or the approval of "a state of

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[218] *See id.* at 888 (ch. 52, § 1).

[219] *See* STANDING RULES OF THE SENATE, *supra* note 20, r. V, cl. 1, and r. XII, cl. 4; HEITSHUSEN, *supra* note 171, at 1; JOHNSON, SULLIVAN, AND WICKHAM, JR., *supra* note 155, at 855, 907 (ch. 50, § 4, and ch. 54, § 1); WALTER J. OLESZEK, CONGRESSIONAL RESEARCH SERVICE, RL33939, THE RISE OF SENATE UNANIMOUS CONSENT AGREEMENTS 1, 4, https://crsreports.congress.gov/product/pdf/RL/RL33939 (last visited Apr. 18, 2023).

[220] *See* R.I.S.F., *supra* note 8, art. 412, III (Braz.).

[221] See *supra* note 24 for the distinction between absolute and simple majorities for voting purposes.

[222] *See* R.I.C.D., *supra* note 83, arts. 152–155 (Braz.); R.I.S.F., *supra* note 8, arts. 336–337 (Braz.). The expedited procedures are labeled as "urgent" in all these provisions. Many situations they describe clearly deserve that label, such as a public calamity or a threat to national security. In other situations, the sense of urgency depends on the discretion of each Congress house and may relate not to a concrete peril but to political convenience.

[223] *See* R.I.C.D., *supra* note 83, arts. 154 (Braz.); R.I.S.F., *supra* note 8, art. 338 (Braz.). The boards conduct the houses' legislative and administrative businesses. Together with the Speaker, ten other federal deputies, including four substitutes, compose the board in the Chamber of Deputies (*see* R.I.C.D., *supra* note 83, art. 14, *caput*, and paras. 1 and 2 (Braz.)). Likewise, the Senate board is composed of the house's President and ten other senators, including four substitutes (*see* R.I.S.F., *supra* note 8, art. 46, *caput*, and paras. 1 and 2 (Braz.)).

[224] *See* C.F. 1988, *supra* note 102, art. 64, and 223, para. 1 (Braz.); R.I.C.D., *supra* note 83, art. 151, I, combined with art. 159, para. 2 (Braz.); R.I.S.F., *supra* note 8, arts. 353 (Braz.).

defense."[225] While unanimous consent or expedited procedures are in place, there is no room for points of order referring to ordinary courses of action. Yet, any member may raise a question against the misapplication of the rules governing the legislative business under the waiving mechanisms.

The overall purpose of legislative procedures' waivers is to accelerate the lawmaking process. Sometimes, matters do not awaken opposition because they do not promote considerable changes.[226] On other occasions, there may be broad agreement around a particular subject. In such cases, submitting a bill to all the common legislative steps may be pointless.[227] Therefore, waiving the standard procedures and their corresponding points of order may be reasonable in some situations. This conclusion holds especially when the waiver does not result simply from a presiding officer's or the majority's will, with no legal support, but draws its authority from the very same rules that govern the legislative process in the first place. In other words, as long as constitutional, statutory, or internal regulation on the waiving tools exists, relying on them to manage the business as appropriate is theoretically in order. Still, abuses may occur mainly when no more than a simple majority suffices to decide the issue.[228] It may then be questionable whether there shall be so many opportunities to work around ordinary procedures and, as a consequence, points of order – the chief procedural overseeing instrument in parliaments.[229]

A reported episode in the 59th U.S. Congress (1905-1907) illustrates how a waiver may be deemed inappropriate, at least in the eyes of the dissatisfied legislators.[230] The case involved authorizations in an appropriation bill in breach of House Rule XXI. Concretely, representatives wanted to include text authorizing an increase in the salaries of some federal employees as well as the creation of new

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[225] C.F. 1988, *supra* note 102, art. 49, II, and IV (Braz.).

[226] Concededly, the legislative action, in this case, may not even trigger an interest in hurrying things up.

[227] *See* JOHNSON, SULLIVAN, AND WICKHAM, JR., *supra* note 155, at 898, 907–908 (ch. 53, § 2, and ch. 54, § 1); OLESZEK, *supra* note 219, at 1.

[228] *Cf.* BRYAN W. MARSHALL, RULES FOR WAR: PROCEDURAL CHOICE IN THE US HOUSE OF REPRESENTATIVES 5 (2005) ("partisanship on special rules . . . can be explained by the increased use [or abuse] of floor waivers.").

[229] *Cf.* Bar-Siman-Tov, *supra* note 5, at 819 ("while points of order are Congress's main mechanism for enforcing the rules that regulate lawmaking, at least in the House, this mechanism is severely limited.").

[230] *See* MARSHALL, *supra* note 228, at 105–106.

positions in a bill whose purpose was to appropriate funds for the federal government.[231] To make such an intent feasible, a special rule from the Committee on Rules "contained a waiver for Rule XXI that would prohibit members from bringing points of order to strike provisions contained in the bill that had not been previously authorized."[232] As a reaction against the undue inclusion of legislation in the said bill, "several members complained that the waiver protecting unauthorized provisions unfairly advantaged the Committee on Appropriation at the expense of the rest of the House."[233] In the modern Congress, special rules, including those suspending the standing regulations, have become a handy tool for the majority in the U.S. House.[234]

3.3.4. Waivers in the Congress of Brazil during the Covid-19 pandemic

As soon as the Covid-19 pandemic officially struck the country on February 26, 2020,[235] the National Congress of Brazil adopted a series of expedients to waive established legislative procedures or requirements.[236] In the face of the disease's

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[231] *See id.*

[232] *Id.*

[233] *Id.*

[234] *See id.* at 105–115; BARBARA SINCLAIR, UNORTHODOX LAWMAKING: NEW LEGISLATIVE PROCESSES IN THE U.S. CONGRESS 152–155 (5th ed. 2017).

[235] *See* Edlaine Faria De Moura Villela et al., *COVID-19 Outbreak in Brazil: Adherence to National Preventive Measures and Impact on People's Lives, an Online Survey*, 21 BMC PUBLIC HEALTH 152 (2021).

[236] *Cf.* EMENDA CONSTITUCIONAL NO. 106, DE 2020 [E.C. 106/2020] [CONSTITUTIONAL AMENDMENT NO. 106, 2020] (Braz.), https://www.planalto.gov.br/ccivil_03/constituicao/emendas/emc/emc106.htm (last visited May. 27, 2023) (establishing an extraordinary fiscal regime at the federal level); RESOLUÇÃO DA CÂMARA DOS DEPUTADOS NO. 14, DE 2020 [R.C.D. 14/2020] [CHAMBER OF DEPUTIES RESOLUTION NO. 14, 2020] (Braz.), https://www2.camara.leg.br/legin/fed/rescad/2020/resolucaodacamaradosdeputados-14-17-marco-2020-789854-publicacaooriginal-160143-pl.html (last visited Jun. 29, 2023) (regulating virtual sessions, and online voting in the Chamber of Deputies); ATO CONJUNTO DAS MESAS DA CÂMARA DOS DEPUTADOS E DO SENADO FEDERAL NO. 1, DE 2020 [A.C.M. 1/2020] [JOINT ACT OF THE BOARDS OF THE CHAMBER OF DEPUTIES AND THE FEDERAL SENATE NO. 1, 2020] (Braz.), https://legis.senado.leg.br/norma/32032762/publicacao/32033423 (last visited Jun. 29, 2023) (establishing temporary rules for provisional measures processing in both houses); ATO CONJUNTO DAS MESAS DA CÂMARA DOS DEPUTADOS E DO SENADO FEDERAL NO. 2, DE 2020

high contamination risk and lethal potential, Congress houses switched to virtual sessions and online voting through electronic applications.[237] Moreover, each house fixed an expedited (urgent) regime for the general processing of legislative proposals.[238] Finally, through joint acts, the Chamber of Deputies and the Senate boards modified the rite of provisional measures (provisional presidential decrees with the force of law) and budget bills, attributing more rapidness to the already fast course of action these legislative species follow.[239] Ultimately, the purpose was to provide society with timely legal responses to cope with the crisis, suspending regular lawmaking steps. Nonetheless, some of the waiving arrangements raised doubts as to their legal foundations.

The first constitutional amendment promulgated by Congress under the pandemic triggered procedural concerns. Both Congress houses expeditiously eased public finance constraints, paving the way for extra federal expenses destined to face the emergency.[240] In their course of action, the houses bypassed procedures that

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[A.C.M. 2/2020] [JOINT ACT OF THE BOARDS OF THE CHAMBER OF DEPUTIES AND THE FEDERAL SENATE NO. 2, 2020] (Braz.), https://legis.senado.leg.br/norma/32040643/publicacao/32041455 (last visited Jun. 29, 2023) (establishing temporary rules for federal budget bills processing in both houses); ATO DA MESA DA CÂMARA DOS DEPUTADOS NO. 123, DE 2020 [ATO DA MESA 123/2020-CD] [CHAMBER OF DEPUTIES, BOARD ACT NO. 123, 2020] (Braz.), https://www2.camara.leg.br/legin/int/atomes/2020/atodamesa-123-20-marco-2020-789867-norma-cd-mesa.html (last visited Jun. 29, 2023) (establishing more detailed rules for virtual sessions, and online voting in the Chamber of Deputies); ATO DA COMISSÃO DIRETORA DO SENADO FEDERAL NO. 7, DE 2020 [A.T.C. 7/2020-SF] [FEDERAL SENATE EXECUTIVE COMMITTEE ACT NO. 7, 2020] (Braz.), https://www12.senado.leg.br/noticias/materias/arquivos/2020/03/17/ato-da-comissao-diretora-no-7-de-2020 (last visited Jun. 29, 2023) (establishing rules for virtual sessions, and online voting, and settling an urgent regime for the legislative process in the Senate).

[237] *See* R.C.D. 14/2020, *supra* note 236, (Braz.); ATO DA MESA 123/2020-CD, *supra* note 236, (Braz.); A.T.C. 7/2020-SF, *supra* note 236, (Braz.).

[238] *See* R.C.D. 14/2020, *supra* note 236, (Braz.); ATO DA MESA 123/2020-CD, *supra* note 236, (Braz.); A.T.C. 7/2020-SF, *supra* note 236, (Braz.).

[239] *See* A.C.M. 1/2020, *supra* note 236, (Braz.); A.C.M. 2/2020, *supra* note 236, (Braz.). For the boards' composition, *see supra* note 223.

[240] *See* E.C. 106/2020, *supra* note 236, (Braz.). For the legislative process that led to this constitutional amendment promulgation, s*ee Proposta de Emenda à Constituição No. 10, de 2020*, CÂMARA DOS DEPUTADOS [*P.E.C. 10/2020-C.D.*] [*Proposal of Amendment to the Constitution No. 10, 2020*, CHAMBER OF DEPUTIES], https://www.camara.leg.br/proposicoesWeb/fichadetramitacao?idProposicao=2242583 (last visited Apr. 30, 2023) (phase 1); *Proposta de Emenda à Constituição No. 10, de 2020, Fase 2*, CÂMARA DOS DEPUTADOS [*P.E.C. 10/2020-Fase 2-C.D.*] [*Proposal of Amendment to the*

would ordinarily take place.[241] On the one hand, they complied with constitutional provisions, such as the one demanding two voting rounds, in each house, for passing amendments to the Constitution.[242] On the other hand, the houses waived internal rules, skipping committees' analysis and shortening processing periods, including the time-lapse for broader discussion between each voting round.[243] As long as neither the permanent internal regulations nor the temporary ones, explicitly approved for the lawmaking process during the pandemic, were clear about the possibility of waiving procedures in the case of constitutional amendments,[244] suspicion could have arisen as to the appropriateness of the houses' move.[245] Nevertheless, as the potential breaches referred primarily to inner arrangements, and

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Constitution No. 10, 2020, Phase 2, CHAMBER OF DEPUTIES], https://www.camara.leg.br/proposicoesWeb/fichadetramitacao?idProposicao=2249946 (last visited Apr. 30, 2023); *Proposta de Emenda à Constituição No. 10, de 2020*, SENADO FEDERAL [*P.E.C. 10/2020-S.F.*] [*Proposal of Amendment to the Constitution No. 10, 2020*, FEDERAL SENATE], https://www25.senado.leg.br/web/atividade/materias/-/materia/141443 (last visited Apr. 30, 2023).

[241] *See P.E.C. 10/2020-C.D.*, *supra* note 240; *P.E.C. 10/2020-Fase 2-C.D.*, *supra* note 240; *P.E.C. 10/2020-S.F.*, *supra* note 240.

[242] *See* C.F. 1988, *supra* note 102, art. 60, para. 2 (Braz.).

[243] *See P.E.C. 10/2020-C.D.*, *supra* note 240; *P.E.C. 10/2020-Fase 2-C.D.*, *supra* note 240; *P.E.C. 10/2020-S.F.*, *supra* note 240. The two voting rounds occurred on the same day (April 3, 2020) in the Chamber of Deputies before the matter followed to the Senate, though the former house's standing rules demand a five-session lapse between each of them (*see* R.I.C.D., *supra* note 83, art. 202, para. 8 (Braz.)), at least under normal situations. The time shortening resulted from a motion approved by the full house, allegedly in compliance with the rules (*see id.* art 150, sole paragraph (Braz.)). In the Senate, the final round happened two days after the first (April 17 and 15, 2020, respectively), whereas its standing rules require a lapse of five business days (*see* R.I.S.F., *supra* note 8, art. 362 (Braz.)). There, I did not find a motion for the lapse shortening. Apparently, the Senate understood such a motion was unnecessary under the urgent regime already in place.

[244] Save possibly for committees' scrutiny in the Chamber of Deputies while remote sessions were in place as per R.C.D. 14/2020, *supra* note 236, art. 2, para. 1 (Braz.). Such a resolution, passed by the full Chamber, had the same status as that house's standing rules and could theoretically trump the ordinary procedures. In the Senate, the case was trickier since the chief waiving piece concerning the legislative business during the pandemic (*see* A.T.C. 7/2020-SF, *supra* note 236, (Braz.)) was hierarchically lower than the Senate's standing rules.

[245] *See* ANDRÉ CORRÊA DE SÁ CARNEIRO, LUIZ CLÁUDIO ALVES DOS SANTOS & MIGUEL GERÔNIMO DA NÓBREGA NETTO, CURSO DE REGIMENTO INTERNO DA CÂMARA DOS DEPUTADOS [INTERNAL REGULATIONS OF THE CHAMBER OF DEPUTIES COURSE] 286 (6th ed.), https://livraria.camara.leg.br/curso-regimento-interno-6ed (last visited Apr. 12, 2023).

the expedited track counted with ample support in Congress,[246] eventual criticism regarding the chosen path had a limited range.[247]

One of the most troublesome waivers during the Covid-19 pandemic referred to provisional measures. According to the Constitution, the President of the Republic can adopt said measures with the force of law from the very moment they arise in an "important and urgent" situation.[248] Immediately after adoption, Congress proceeds to their scrutiny.[249] Passing, with or without modification, gives rise to statutes.[250] Disapproval obviously kills said measures, and, pursuant to a sunset clause, the same is true if lawmakers remain inert.[251] Concerning the pertinent constitutional procedures, short deadlines apply. Congress shall conclude the business in sixty days, after a provisional measure's publication date, with a possible extension "for an identical period."[252] Furthermore, a mandatory step consists of the matter's examination by a joint committee of senators and federal deputies before each full

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[246] *See id.* at 285.

[247] Yet, further consequences could result if an understanding that a drastic time shortening between two voting rounds amounted to a breach of the Brazilian Constitution art. 60, para. 2 (*see* C.F. 1988, *supra* note 102, (Braz.)). On the edge, voting on a matter immediately after the first round is meaningless. It is equivalent to voting on it only once. It is highly unlikely, though, that such a reasoning could succeed. Approving motions for reducing the period between two voting rounds in the case of constitutional amendments has been commonplace in both Brazilian Congress houses. Moreover, the Federal Supreme Court has been highly deferential to the legislative in cases involving the lawmaking business, especially those dealing with the burdens that the Covid-19 pandemic imposed. For an account of the question regarding the lapse between voting rounds associated with amendments to the Constitution, *see* Heraldo Pereira de Carvalho, A Subtração do Tempo de Interstício entre Turnos de Votação de Proposta de Emenda à Constituição de 1988: Uma Contextualização de Interesses Segmentados em Detrimento do Direito da Cidadania [The Subtraction of Interstitial Time Between Voting Rounds of a Proposal of Amendment to the 1988 Constitution: A Contextualization of Segmented Interests to the Detriment of the Right of Citizenship] (2010) (dissertação de Mestrado em Direito, Universidade de Brasília, Brasil [Master of Laws dissertation, University of Brasilia, Brazil]), https://repositorio.unb.br/bitstream/10482/8379/1/2010_HeraldoPereiradeCarvalho.pdf (last visited Apr. 30, 2023).

[248] C.F. 1988, *supra* note 102, art. 62, *caput* (Braz.)

[249] *See id*.

[250] *See id.* art. 62, paras. 3 and 12 (Braz.).

[251] *See id.* art. 62, para. 3 (Braz.).

[252] *Id*. art. 62, para. 7 (Braz.).

house can jump in.[253] Shortly after the pandemic awakening, however, Congress instated distinct rules for processing such a unique legislative species.

The disturbing issue about the new regime governing provisional measures consisted of shortcutting the constitutional procedures through an internal waiver. On March 31, 2023, the boards of both Congress houses adopted a joint act that drastically reduced the deadlines for processing provisional measures during the pandemic.[254] Instead of approximately four months,[255] already a fast track, the boards fixed that the time slot should be roughly two weeks.[256] To make such a short period feasible, the boards decided, among other things, that the matters would not be submitted to a joint committee of federal deputies and senators.[257] This move, however, clearly clashed with the Constitution, which provides no waiver for the committee examination. To bypass such a collegiate, Congress should approve a constitutional amendment introducing the appropriate suspending tool. Notwithstanding, the chosen alternative fell short of any constitutional status, being merely an act signed by no more than thirteen members among 594 congresspeople (513 federal deputies plus 81 senators).[258] For comparison, constitutional amendments require approval in two rounds at each house, and the threshold in each voting session amounts to three-fifths of each house's composition.[259] Plainly, the urgent regime imposed by the boards could not stand if challenged.

Nevertheless, despite the weakness as to its legal form, the waiver applying to provisional measures' processing survived the Federal Supreme Court's scrutiny. As a matter of fact, it counted on the court's support even before the houses' boards adopted it.[260] As soon as the pandemic officially reached the country, the boards

[253] *See id.* art. 62, para. 9 (Braz.).

[254] *See* A.C.M. 1/2020, *supra* note 236, arts. 4 and 5 (Braz.).

[255] *See* C.F. 1988, *supra* note 102, art. 62, para. 7 (Braz.).

[256] *See* A.C.M. 1/2020, *supra* note 236, arts. 4 and 5 (Braz.).

[257] *See id.* art. 2, sole paragraph (Braz.).

[258] *See id.*

[259] *See* C.F. 1988, *supra* note 102, art. 60, para. 2 (Braz.).

[260] *See* Supremo Tribunal Federal [S.T.F.], Arguição de Descumprimento de Preceito Fundamental [A.D.P.F.] No. 661, Medida Cautelar [M.C.], Relator: Ministro [Min.] Alexandre de Moraes (decisão monocrática), 27.3.2020, DIÁRIO DA JUSTIÇA ELETRÔNICO [D.J.E.] No. 78, 31.3.2020 (publicação) [Federal Supreme Court, Claim of Non-Compliance with a Fundamental Precept No. 661, Precautionary Measure, Rapporteur: Justice Alexandre de Moraes (monocratic decision), Mar. 27, 2020, ELECTRONIC JUDICIARY GAZETTE No. 78, Mar. 31, 2020 (publication)]

requested that the S.T.F. authorized the suspension of the constitutional requirements through the adoption of the joint act.[261] In a preliminary decision, Justice Alexandre de Moraes gave them the green light. Briefly, his argument relied on two fundamental constitutional precepts: a) independent and harmonious relations among the three political branches; and b) efficiency in public services' deliverance.[262] Accordingly, in the face of an unforeseeable and grave threat, the necessity of protecting these values would trump legislative procedural requirements, even those entrenched in the Constitution. Later, the full court ratified the preliminary ruling on two opportunities, though not unanimously.[263] The waiving arrangement for the legislative check on provisional measures was definitely considered valid.

Another worrying situation referred to budget bills. Like the provisional measures' case, a joint act from Congress houses boards made it possible to suspend the examination of said bills by the Joint Committee on the Budget.[264] The problem, once again, was that such a step is mandatory under a constitutional provision.[265] How, then, could the legislators skip that committee without amending the Constitution? Worse, with an instrument that had not even been submitted to the full lawmaking bodies? Nevertheless, in 2020, Congress passed the budget directives law for 2021 with no opinion from the Joint Committee on the Budget, which was not operating at that time.[266] Though at odds with the regular procedures, it is hardly

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115–118 (Braz.), https://www.stf.jus.br/arquivo/djEletronico/DJE_20200330_078.pdf (last visited Jun. 30, 2023).

[261] *See id*.

[262] *See id. See also* C.F. 1988, *supra* note 102, arts. 2, and 37, *caput* (stating the mentioned precepts).

[263] *See* S.T.F., A.D.P.F. No. 661, M.C., Referendo, Relator: Min. Alexandre de Moraes (tribunal pleno, inteiro teor do acórdão), 21.12.2020 [S.T.F., A.D.P.F. No. 661, M.C., Endorsement, Rapporteur: Justice Alexandre de Moraes (full court, judgment's entire content), Dec. 21, 2020] 3 (Braz.), https://portal.stf.jus.br/processos/downloadPeca.asp?id=15346108523&ext=.pdf (last visited Jun. 30, 2023); S.T.F, A.D.P.F. No. 661, Relator: Min. Alexandre de Moraes (tribunal pleno, inteiro teor do acórdão), 8.9.2021 [S.T.F., A.D.P.F. No. 661, Rapporteur: Justice Alexandre de Moraes (full court, judgment's entire content), Sep. 8, 2021] 3 (Braz.), https://portal.stf.jus.br/processos/downloadPeca.asp?id=15347785089&ext=.pdf (last visited Jun. 30, 2023).

[264] *See* A.C.M. 2/2020, *supra* note 236, (Braz.).

[265] *See* C.F. 1988, *supra* note 102, art. 166, para. 1 (Braz.).

[266] *See* ATO DO PRESIDENTE DA MESA DO CONGRESSO NACIONAL NO. 155, DE 2020 [A.P.N. 155/2020] [ACT OF THE PRESIDENT OF THE BOARD OF THE NATIONAL CONGRESS NO. 155, 2020]

the case that the move or the law itself could be deemed void in light of the S.T.F.'s position concerning provisional measures' processing.[267]

Congress's waivers regarding provisional measures and the S.T.F.'s ruling were awkward. The Brazilian Constitution provides no alternative to its provisions on the matter.[268] Indeed, they settle an already expedited route so that the executive and the legislative may address "important and urgent cases."[269] The houses boards had no authority to create an even faster track to tackle the crisis. Moreover, the court's reasoning seems weak as long as constitutional provisions have equal status compared to each other. Truly, those passed by amendments can be struck down in the face of the petrified clauses ("federalist form;" "direct, secret, universal, and periodic suffrage;" "separation of powers;" "individual rights and guarantees").[270] Concededly, one of the court's arguments put the issue in terms of "separation of powers,"[271] but the waivers had nothing to do with such a value since they referred to the legislature's own business. On top of that, the validity of the constitutional provision imposing that joint committees shall issue opinions on provisional measures was simply not at stake. Actually, in another situation, the court had already decided that an internal congressional arrangement bypassing said committees was unconstitutional.[272] Fragile as they were, the legislative and judicial

(Braz.), https://www.camara.leg.br/internet/comissao/index/mista/orca/ldo/LDO2021/crono/Ato-155.pdf (last visited Jun. 30, 2023).

[267] *See* EUGÊNIO GREGGIANIN, MÁRIO LUÍS GURGEL DE SOUZA & TÚLIO CAMBRAIA, NOTA INFORMATIVA: ATENDIMENTO À SOLICITAÇÃO DE TRABALHO CONOF/CD NO. 1155/2020, TRAMITAÇÃO DO PLDO 2021 E DO PLOA 2021. REGIME NORMAL VERSUS REGIME EXCEPCIONAL (PANDEMIA). SUBSÍDIOS. PRECEDENTES. FUNDAMENTAÇÃO LEGAL. (2020), https://www.camara.leg.br/midias/file/2020/11/1155-20.pdf (last visited May 3, 2023).

[268] *See* C.F. 1988, *supra* note 102, art. 62 (Braz.).

[269] *Id*. art. 62, *caput* (Braz.).

[270] *Id*. art. 60, para. 4 (Braz.).

[271] *See* A.D.P.F. 661/2020-M.C.-Monocrática, *supra* note 260, (Braz.); A.D.P.F. 661/2020-M.C.-Referendo, *supra* note 263, (Braz.); A.D.P.F. 661/2020-Acórdão, *supra* note 263, (Braz.). But notice that the Federal Supreme Court does not address the issue under the petrified clauses concept. I just refer to it for the sake of argumentation.

[272] *See* S.T.F., A.D.I. No. 4029, Relator: Min. Luiz Fux (tribunal pleno), 8.3.2012, D.J.E. No. 125, 27.6.2012 (publicação) [S.T.F., A.D.I. No. 4029, Rapporteur: Justice Luiz Fux (full court), Mar. 8, 2012, D.J.E. No. 125, Jun. 27, 2012 (publication)] 34–35 (Braz.), https://www.stf.jus.br/arquivo/djEletronico/DJE_20120626_125.pdf (last visited Jun. 30, 2023).

decisions on the topic can only be explained by the unprecedented challenges that the Covid-19 pandemic imposed.

3.3.5. Circumvention of due procedures

In spite of their overseeing purpose, points of order and appeals may end up playing the opposite role, serving as tools for working around the due process of lawmaking.[273] Such an outcome may follow when there is enough pressure to approve a matter, but the procedures impose barriers that can hardly be overcome. Difficulty in complying with supermajority requirements is a case in which an eventual hardball game generates incentives for the use of not exactly appropriate alternatives to the regular routes. For instance, in the U.S. Senate, a two-thirds vote is required to close debates (cloture) and move to the vote on a proposal aiming at modifying the standing rules. Since the stakes for cloture are very high, passing new internal rules is unlikely, except in the face of broad agreement. Nevertheless, there is a nonconventional way out. "First, a senator makes a point of order, knowing that the point of order will fail under current rules. Next, the point of order fails, as expected. Finally, the senator appeals to the full Senate and a simple majority reverses the decision of the chair, thereby creating a new precedent."[274] Typically, this unorthodox path is feasible when the appeal is nondebatable.[275] Otherwise, a supermajority threshold for cloture may bar the attempt.[276] Summing up, through procedural mechanisms whose purpose is to enforce the rules, a simple majority may bypass the regular order and achieve its objective.

The scholarship in the U.S. Senate procedures describes occasions when points of order and appeals served to circumvent established rules. One occurred in 1975, generally reducing cloture requirements but still keeping the demand for a supermajority (from two-thirds to three-fifths, save the case of internal rules'

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[273] *See* Gould, *supra* note 23, at 1976–1977.

[274] *Id.*

[275] *See* RICHARD S. BETH, CONGRESSIONAL RESEARCH SERVICE, R42929, PROCEDURES FOR CONSIDERING CHANGES IN SENATE RULES 12 (2013), https://crsreports.congress.gov/product/pdf/R/R42929 (last visited Apr. 26, 2023); CHRISTOPHER M. DAVIS, CONGRESSIONAL RESEARCH SERVICE, IN10875, EIGHT MECHANISMS TO ENACT PROCEDURAL CHANGE IN THE U.S. SENATE 2 (2020), https://crsreports.congress.gov/product/pdf/IN/IN10875 (last visited Apr. 26, 2023).

[276] *See* BETH, *supra* note 275, at 12; DAVIS, *supra* note 275, at 2.

change, as mentioned in the previous paragraph).[277] Other instances took place in the 2010s. In 2013, "the Senate reinterpreted the cloture rule to lower the threshold for invoking clotures for all nominations *except* to the Supreme Court."[278] In 2017, the chamber extended this flexibilization to include that tribunal.[279] In all situations, a simple majority now suffices to move from debates to the nominees' approval or rejection.[280] An account of the 1975 case concludes that "[t]he filibuster was modified, but only because the rules were broken."[281] It seems such a statement also applies to the nomination examples.[282] Though alternative but potentially illegal[283] procedures might untie knots and momentarily alleviate political pressures, there remain concerns about the legitimacy of the legislative business in the long run.[284]

Legislatures' policing tools used and enforced by their members may fall short of keeping legislative procedures under the rule of law. On the one hand, due to political commitments or any other motive, those deciding the issues may opt for breaching the norms to facilitate a bill's approval.[285] On the other hand, they may

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[277] *See* SHEPSLE, *supra* note 49, at 51–53.

[278] VALERIE HEITSHUSEN, CONGRESSIONAL RESEARCH SERVICE, R44819, SENATE PROCEEDINGS ESTABLISHING MAJORITY CLOTURE FOR SUPREME COURT NOMINATIONS: IN BRIEF 1 (2017), https://crsreports.congress.gov/product/pdf/R/R44819 (last visited Apr. 26, 2023) (emphasis in original).

[279] *See id.* at 1.

[280] *See id.*

[281] SHEPSLE, *supra* note 49, at 53.

[282] *See id.* at 53–54.

[283] Under the constitutional option theory, procedural rules' amendments through points of order and appeals (or other tools) would be legal. Accordingly, U.S. CONST. art. I, § 5, cl. 2, stating that each Congress chamber "may determine the rules of its proceedings," would trump rule V of the Senate Standing Rules, imposing the regulations fixed by a previous Senate on the present one. As such, current senators would not be bound by ancient requirements (including supermajorities) if they chose to change them by a majoritarian decision at the beginning of a new Congress. *See* BETH, *supra* note 275, at 8, 11–12; Martin B. Gold & Dimple Gupta, *The Constitutional Option to Change Senate Rules and Procedures: A Majoritarian Means to Over Come the Filibuster*, 28 HARVARD JOURNAL OF LAW & PUBLIC POLICY 205, 206–210 (2004).

[284] *See* SHEPSLE, *supra* note 49, at 54.

[285] *See* Bar-Siman-Tov, *supra* note 5, at 866.

use the same rules to circumvent the minority's intentions or strategies.[286] Hence, resorting solely to peers for policing legislative procedures may face limits.

4. Neutral players

> No man is allowed to be a judge in his own case, because his interest would certainly bias his judgment, and, not improbably, corrupt his integrity. With equal, nay with greater reason, a body of men are unfit to be both judge and parties at the same time . . . .[287]

Enhancing neutral players' capacities may be a way of working around partisan bias toward internal procedures. Clearly, neutrality does not refer to an inner sentiment of indifference, something that cannot be demanded from any human being. Nevertheless, it refers to formal distancing from the game, like a sport's arbiter. A referee may intimately prefer one of the contenders, but she must avoid this feeling affecting her judgment. Obviously, such avoidance may be easier if she does not have a relationship with one of them. The same rationale applies to judges in courts or to any situation where disputes arise, including procedural legislative struggles.

Even when it is impossible to instate nonpartisan chairing, other neutral actors may help foster compliance with due procedures. Notably, the chambers' staff may have an essential role in this regard. Specialized personnel may help strengthen the legislative branch's autonomy and favor its internal institutional stability.[288] The reason is straightforward: nonpartisan professionals with strong educational backgrounds and familiarization with lawmaking procedures tend to offer better advice pursuant to the appropriate rules. Even when their opinions are not binding, their reasoning may compel a political actor not to divert from the route. Such a result will be more or less likely, depending on how they feel protected from external

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[286] *See id.* at 865. In Brazil, rules demanding that bills be accompanied by expenditure estimates and fiscal compensation measures, on the one hand, have been used to bar specific legislative initiatives; on the other hand, the same rules have also been waived pursuant to the majority's interest.

[287] THE FEDERALIST NO. 10, at 124 (James Madison) (Isaac Kramnick ed., 1987).

[288] *Cf.* CHAFETZ, *supra* note 109, at 290–295 (on enhanced institutional capacity in the face of other branches).

or internal pressure.[289] Fixed terms or tenure and work autonomy are minimum guarantees on which nonpartisan staff shall count. Remarkably, the legislators' freedom of speech shall extend to professional advice.[290] While such a warranty protects elected representatives from "action in the courts or any place outside of Parliament,"[291] its content shall safeguard legislative staff not only elsewhere[292] but also in the houses themselves. Therefore, the advisors would confidently state their opinion, possibly enhancing the prevention of unduly procedural maneuvers.

4.1.The U.S. House Office of Congressional Ethics as a benchmark

The U.S. Office of Congressional Ethics (O.C.E.) possibly offers an interesting benchmark for the role of neutral players within legislatures. The office is in charge "of assisting the House in carrying out its responsibilities" regarding disciplinary actions.[293] Its creation in 2008 resulted from concerns about the effectiveness of relying on representatives to oversee each other's conduct. Criticism of self-judgments points to "conflict of interest"[294] and "partisan abuse of the process,"[295] leading to "[d]oubts about the fairness of the proceedings and public

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[289] *Cf.* Schauer, *supra* note 112, at 477 (stating how professionals in charge of monitoring "legislative compliance with the full array of legislative [including constitutional] rules" should be "immunized in some way from the consequences of taking legislatively and electorally unpopular actions.").

[290] On the legislator's freedom of speech, *cf.* BILL OF RIGHTS 1689 art. 9 (Engl. and Wales); C.F. 1988, *supra* note 102, art. 53 (Braz.); U.S. CONST. art. I, § 6, cl. 1.

[291] Oonagh Gay & Hugh Tomlinson, *Privilege and Freedom of Speech*, *in* PARLIAMENT AND THE LAW 35, 38 (Alexander Horne, Gavin Drewry, & Dawn Oliver eds., 2013).

[292] *See id.* at 44 ("In addition to Members, [Bill of Rights 1689] Article 9 applies to officers of Parliament and non-members who participate in proceedings in Parliament . . . ."). *See also* Freedom of speech in debate, Paragraph 13.2, ERSKINE MAY, https://erskinemay.parliament.uk/section/4581/freedom-of-speech-in-debate/ (last visited Mar. 13, 2022) ("The principle of freedom of speech protects not only Members, but others taking part in parliamentary proceedings, or, depending on the closeness of the relationship, preparing material for such proceedings.").

[293] H.R. 895, 110th Cong. § 1(a) (2008) (enacted).

[294] Dennis F. Thompson, *Both Judge and Party*, 13 BROOKINGS REVIEW 44 (1995).

[295] Denis Saint-Martin, *Gradual Institutional Change in Congressional Ethics: Endogenous Pressures Toward Third-Party Enforcement*, 28 STUDIES IN AMERICAN POLITICAL DEVELOPMENT 161, 161 (2014).

distrust."[296] Though of limited range,[297] the office's activities contribute to smoothing these feelings.[298] Such an outcome allegedly derives from the way such a specialized body operates. Its board consists of "six 'outsiders,'"[299] half appointed "by the Speaker subject to the concurrence of the minority leader," and the other half "by the minority leader subject to the concurrence of the Speaker."[300] Board members serve "a four-year term,"[301] and they can only "be removed from office for cause" when the authorities in charge of the appointments jointly decide thereon.[302] Although decisionmaking power relating to misconduct remains with House representatives,[303] the office's participation, consisting of "preliminary investigations and . . . referrals and recommendations to the House Ethics Committee,"[304] might enhance disciplinary processes' legitimacy.[305] This conclusion would follow not from O.C.E. professionals' character but from the fact that they would not be acting, theoretically at least, "on their own cause."[306]

The O.C.E. case is not directly associated with the legislative process, but it gives insights into how to foster compliance with internal rules. After all, the difficulties that increase public distrust concerning mutual oversight by politicians as to their adherence to appropriate standards of conduct similarly apply to the lawmaking business. It is hardly the case that anyone would deny that "conflict of

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[296] Thompson, *supra* note 294.

[297] *Cf.* Saint-Martin, *supra* note 295, at 162 (mentioning that "the OCE is restricted to stating only findings of fact and a description of relevant information it was unable to obtain.").

[298] *Cf.* CHAFETZ, *supra* note 109, at 263 (stating that "[t]he OCE is unquestionably a move in the right direction").

[299] Saint-Martin, *supra* note 295, at 161.

[300] H.R. 895, 110th Cong. § 1(b)(1) (2008) (enacted).

[301] JACOB R. STRAUS, CONGRESSIONAL RESEARCH SERVICE, R40760, HOUSE OFFICE OF CONGRESSIONAL ETHICS: HISTORY, AUTHORITY, AND PROCEDURES (2022), https://crsreports.congress.gov/product/pdf/R/R40760 (last visited Mar. 15, 2023) (in the summary). *See also* H.R. 895, 110th Cong. § 1(b)(6)(A) (2008) (enacted).

[302] *See* H.R. 895, 110th Cong. § 1(b)(6)(C) (2008) (enacted).

[303] *See* CHAFETZ, *supra* note 109, at 263; Saint-Martin, *supra* note 295, at 162.

[304] Saint-Martin, *supra* note 295, at 161.

[305] *Cf. id.* at 171 (mentioning "recommended proposals for the involvement of outsiders as a way to strengthen the legitimacy of the ethics process.").

[306] Thompson, *supra* note 294.

interest"[307] and "partisan abuse of the process"[308] may also show up while a legislature passes a bill. By the way, in 2009, a representative introduced a proposal whose objective was "to ensure that Members have a reasonable amount of time to read legislation that will be voted upon."[309] Although such a purpose clearly referred to lawmaking procedures, the proposal also intended to attribute to the O.C.E. the duty of investigating "allegations that a [House] Member voted for any measure that violated" the novel rule.[310] The proposal's author possibly understood that disregarding the stated time-lapse would constitute serious misconduct. He may have also judged that the O.C.E. was an appropriate apparatus for addressing at least some lawmaking procedural breaches.

4.2.U.S. Congress parliamentarians

The case of the U.S. House of Representatives and Senate parliamentarians is also worth examining. Each chamber counts on one such official, "appointed by the majority party leadership."[311] Their duties consist in providing "expert advice and assistance on questions relating to the meaning and application" of the lawmaking rules,[312] notably to the legislator presiding over floor proceedings.[313] They also recommend referring legislative proposals to this or that committee.[314] In the Senate, the parliamentarian plays a crucial role in reconciliation,[315] in which senators modify legislation to meet budget requirements.[316] Since the procedure is not subject to filibustering,[317] there are attempts to pass extraneous matters through reconciliation. In this case, it is up to the parliamentarian to state "which provisions are extraneous

[307] *Id.*

[308] Saint-Martin, *supra* note 295, at 161.

[309] H. Res. 216/2009, 111th Cong. (2009) (as introduced by Rep. Ron Paul (R.-Tex.)).

[310] *Id.*

[311] Gould, *supra* note 23, at 1950.

[312] HEITSHUSEN, *supra* note 166, at 1.

[313] *See id.*; Gould, *supra* note 23, at 1965.

[314] *See* HEITSHUSEN, *supra* note 166, at 1; Gould, *supra* note 23, at 1969–1971.

[315] *See* OLESZEK ET AL., *supra* note 9, at 76; Gould, *supra* note 23, at 1971–1973.

[316] *See* OLESZEK ET AL., *supra* note 9, at 71.

[317] *See id.* at 74; Gould, *supra* note 23, at 1975.

and which are not."[318] In the end, the House and Senate parliamentarians, aided by a professional staff, act like "procedural referees" in their advising capacity during the lawmaking process.[319]

The parliamentarians' authority relies on how they approach the issues before them. They struggle to remain neutral by supporting their advice on an enhanced background concerning the chambers' internal rules and precedents.[320] Although their opinions are not binding,[321] they are compelling.[322] Particularly in the Senate, where the obstruction mechanisms are powerful and, thus, rules' interpretation for overcoming them are especially troublesome, as in the case of reconciliation, the parliamentarian's role may be critical. Such a conclusion is twofold. On the one hand, it may be critical in the sense that it enhances the legislative process's stability, reducing "uncertainty regarding procedural matters."[323] On the other hand, it may be critical in the sense that it may raise suspicion from lawmakers displeased with a specific rule interpretation. That is why, in the Senate, "majority parties removed the parliamentarian several times between 1981 and 2001."[324] Amidst sharp partisan disputes, even parliamentarians' acknowledged expertise may not suffice to hold procedures on track.

4.3.O.C.E.'s and parliamentarians' limitations

The U.S. House O.C.E. and Congress parliamentarians are instances of neutral players fostering compliance with legislatures' rules. Notwithstanding, their institutional place may fall short of a more entrenched position. For example, as just stated, majorities can substitute a parliamentarian if her opinions embarrass their intent.[325] In the case of the O.C.E., scholarship on the topic suggests some

[318] OLESZEK ET AL., *supra* note 9, at 76.

[319] Gould, *supra* note 23, at 1951.

[320] *See id.* at 1946, 1953.

[321] *See id.* at 1979.

[322] *See id.*

[323] Madonna, Lynch, and Williamson, *supra* note 202, at 1344.

[324] Gould, *supra* note 23, at 1976. *See also* Madonna, Lynch, and Williamson, *supra* note 202, at 1355 (on Senate parliamentarians' replacement).

[325] *See* Gould, *supra* note 23, at 1976; Madonna, Lynch, and Williamson, *supra* note 202, at 1355.

improvements.[326] Remarkably, one would be attributing the office a more perennial status, regulating it through a statute and not merely by a House resolution.[327] Finally, the O.C.E.'s and parliamentarians' roles are limited since their findings or opinions are not binding.[328] Indeed, the ultimate decisionmaking power within Congress remains with representatives and senators. That is so not only in the United States but also in Brazil.

4.4.Drafters in the Brazilian Congress

In the Brazilian Congress, overseeing procedures is primarily a duty of the legislators, but neutral actors also aid them in the task. Congress counts on specialized groups of nonpartisan civil servants who are in charge of drafting legislation, according to their area of expertise, and counseling any lawmaker on the substantive matters under scrutiny. Moreover, these professionals may provide nonbinding advice about legislative procedures. In this capacity, their role seems to differ from that of the U.S. parliamentarians. The work of the Brazilian drafters, in terms of procedural issues, seems to be more decentralized, with less frequent interactions with a presiding officer. Still, they may also displease a group or politician whenever called to deliver an opinion on a sensitive issue. As they generally count on tenure, they can hardly be dismissed for a dissatisfying statement. Yet, they might face embarrassing situations and, theoretically, at least, dubious judicial or internal charges, depending on the case.

Enhanced safeguards protecting drafters in the Brazilian Congress may build upon the British and U.S. approaches to their speech and debate clauses. In the United Kingdom, "the freedom of speech and debates or proceedings"[329] applies not only to members but also "to officers of Parliament and non-members who participate in proceedings in Parliament."[330] In the United States, "[a]n aide of a

[326] *See* CHAFETZ, *supra* note 109, at 263–264; STRAUS, *supra* note 301, at 25; Saint-Martin, *supra* note 295, at 162.

[327] *See* STRAUS, *supra* note 301, at 25; Saint-Martin, *supra* note 295, at 162.

[328] *See* HEITSHUSEN, *supra* note 166, at 1; STRAUS, *supra* note 301 (in the summary); Gould, *supra* note 23, at 1979; Saint-Martin, *supra* note 295, at 162.

[329] BILL OF RIGHTS 1689 art. 9 (Engl. and Wales).

[330] Gay and Tomlinson, *supra* note 291, at 44.

Senator or Representative is . . . protected [under the speech and debate clause][331] when performing legislative acts which would be protected by the Member himself."[332] These guarantees somehow shield legislative staff from judicial charges, as happened in a case where legislators and U.S. House personnel were released from the accusation of publicizing students' private information in a committee report.[333] Such an approach should also protect drafters outside the legislature, extending the Brazilian version of the speech and debate clause to them.[334] Nevertheless, this move would not suffice to immunize them from internal (or administrative) charges.

To avoid internal burdens and strengthen their institutional position, the same guarantee that would protect drafters outside should safeguard them within the legislature. Due to their attributions, they can be called to deliver technical opinions amidst sharp political struggles, unpleasing one or some of the contenders. Such an event occurred at the end of 2021. The case allegedly referred to using Brazilian federal budget law amendments as a comprehensive logrolling tool. Under challenges filed by political parties, the Federal Supreme Court ordered, among other things, that Congress disclosed information related to the issue pursuant to the constitutional principle of official acts' publicity.[335] In the opportunity, the Chamber of Deputies and Senate boards jointly stated that they could not comply with the judicial decision because the tool was not a formal one, and, as such, numerous documents related to the case were scattered.[336] Notwithstanding, under the request

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[331] U.S. CONST. art. I, § 6, cl. 1.

[332] WILLIAM MCKAY & CHARLES W. JOHNSON, PARLIAMENT AND CONGRESS: REPRESENTATION AND SCRUTINY IN THE TWENTY-FIRST CENTURY 491 (2010).

[333] Doe v. McMillan, 412 U.S. 306 (1973).

[334] "Deputies and senators enjoy civil and criminal immunity on account of any of their opinions, words and votes." C.F., *supra* note 102, art. 53, *caput* (Braz.).

[335] *See* S.T.F., A.D.P.F. No. 854, M.C., Referendo, Relatora: Min. Rosa Weber (tribunal pleno), 11.11.2021, D.J.E. No. 225, 16.11.2021 (publicação) [S.T.F., A.D.P.F. No. 854, M.C., Endorsement, Rapporteur: Justice Rosa Weber (full court), Nov. 11, 2021, D.J.E. No. 225, Nov. 16, 2021 (publication)] 35 (Braz.), https://www.stf.jus.br/arquivo/djEletronico/DJE_20211112_225.pdf (last visited Jun. 30, 2023).

[336] *See* ATO CONJUNTO DAS MESAS DA CÂMARA DOS DEPUTADOS E DO SENADO FEDERAL NO. 1, DE 2021 [A.C.M. 1/2021] [JOINT ACT OF THE BOARDS OF THE CHAMBER OF DEPUTIES AND THE FEDERAL SENATE NO. 1, 2021] (Braz.), https://www25.senado.leg.br/documents/59501/119895056/Ato+Conjunto+das+Mesas+1+de+2021/28e48918-667e-4d76-a9aa-43ab53f376a7 (last visited May 9, 2023).

of a senator for a technical opinion on the matter, a drafter affirmed the opposite.[337] In other words, he contradicted the board's official standing. For herein purposes, it is pointless to assess who was right, whether the boards or the drafter. The question is imagining how sensitive the situation became in light of fierce political struggles around the federal budget and a conflict between the legislative and the judiciary.[338] Regardless of the embarrassment it may have caused to the houses' boards, the drafter's manifestation was delivered upon a senator's request for subsidies about the matter under debate. Therefore, immunizing the professional staff from eventual charges for opinions that may displease some ultimately safeguards the role of the information addressee – a legislator herself.

Concluding, there are ways by which the legislature itself may stick to due procedures. Chairing, advice, and dispute resolution on a nonpartisan basis show up as tools whereby lawmaking assemblies may enhance their ability to abide by their own rules. In this sense, nonpolitical actors performing one or some of those tasks shall count with guarantees to properly conduct their business, such as tenured positions or fixed mandates and freedom of speech. Notwithstanding, the legislative branch's capacity may still be insufficient for the game's fairness protection. The legal nature of the lawmaking process, then, offers a last resort: the judiciary.

[337] *See* FERNANDO MOUTINHO RAMALHO BITTENCOURT, CONSULTORIA DE ORÇAMENTOS, FISCALIZAÇÃO E CONTROLE, NOTA TÉCNICA 152/2021, PRN 4/2021 E ATO ANEXO - COMPATIBILIDADE COM DECISÃO DO STF NA ADPF 854 (2021), https://static.poder360.com.br/2021/11/nota-tecnica-senado-rp9.pdf (last visited May 9, 2023).

[338] *See* Julia Lindner & Bruno Góes, *Orçamento Secreto: Consultoria Do Senado Diz Que é Possível Divulgar Responsáveis Pelas Emendas de Relator* [*Secret Budget: Senate Advisory Office Says It Is Possible to Disclose Those Responsible for the Rapporteur's Amendments*], O GLOBO, https://oglobo.globo.com/politica/orcamento-secreto-consultoria-do-senado-diz-que-possivel-divulgar-responsaveis-pelas-emendas-de-relator-25297890 (last visited May 10, 2023); Daniel Weterman & Breno Pires, *Consultoria Do Senado Contradiz Lira e Pacheco e Alega Ser Viável Revelar Nomes Do Orçamento Secreto* [*Senate Advisory Office Contradicts Lira and Pacheco and Claims It Is Feasible to Reveal Secret Budget Names*], ESTADÃO, https://www.estadao.com.br/politica/consultoria-do-senado-contradiz-lira-e-pacheco-e-alega-ser-viavel-revelar-nomes-do-orcamento-secreto/ (last visited May 10, 2023).

4.5.The role of the judiciary

The judicial branch might have an overseeing role while a legislature is examining a bill.[339] In this case, to avoid undue interference in the political realm, the judiciary shall act with some deference to the parliament, taking as reviewing paradigms the procedural rules stated in the legislation, particularly the internal regulations of the legislative houses.

In the United Kingdom, the United States, and Brazil, the courts generally refrain from reviewing pending ordinary legislative procedures. In the United Kingdom, the justification typically relies on parliamentary sovereignty and exclusive cognizance doctrines.[340] According to the former, "law enacted by the Parliament forms the highest norm of the country."[341] The latter attributes solely to the legislature the power to assess its own proceedings pursuant to the 1689 Bill of Rights, article 9. In the United States, central paradigms are the enrolled bill and the political question doctrines.[342] The latter poses that the judiciary shall not reform a decision taken within a political agent's discretionary powers. The former "states that a bill signed by the presiding officers of the House of Representatives and the Senate cannot be challenged in courts on the basis of the process that led to its

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[339] In Brazil, the Constitution states that "the law shall not exclude any injury or threat to a right from review by the judiciary." C.F. 1988, *supra* note 102, art. 5, XXXV (Braz.).

[340] On the meaning of the two doctrines, *see* Dawn Oliver, *Parliament and the Courts: A Pragmatic (or Principled) Defence of the Sovereignty of Parliament*, *in* PARLIAMENT AND THE LAW 309, 309 (Alexander Horne, Gavin Drewry, & Dawn Oliver eds., 2013); Liam Laurence Smyth, *Privilege, Exclusive Cognisance and the Law*, *in* PARLIAMENT AND THE LAW 3, 20 (Alexander Horne, Gavin Drewry, & Dawn Oliver eds., 2013).

[341] Graça, *supra* note 2, at 65.

[342] On the enrolled bill doctrine, s*ee* Marshall Field & Co. v. Clark, 143 U.S. 649 (1892); SUSAN ROSE-ACKERMAN, STEFANIE EGIDY & JAMES FOWKES, DUE PROCESS OF LAWMAKING: THE UNITED STATES, SOUTH AFRICA, GERMANY, AND THE EUROPEAN UNION 49–50 (2015); David Sandler, *Forget What You Learned in Civics Class: The Enrolled Bill Rule and Why It's Time to Overrule Field v. Clark*, 41 COLUMBIA JOURNAL OF LAW AND SOCIAL PROBLEMS 213, 214 (2007); Ittai Bar-Siman-Tov, Separating Law-Making from Sausage-Making: The Case for Judicial Review of the Legislative Process 7 (2011) (Doctor of the Science of Law thesis, Columbia University) (on file with Columbia University Libraries). On the political question doctrine, *see* Marbury v. Madison, 5 U.S. 137 (1803); ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 140–162 (6th ed. 2019); Taisuke Kamata, *Adjudication and the Governing Process: Political Questions and Legislative Discretion*, 53 LAW AND CONTEMPORARY PROBLEMS 181 (1990).

enactment."[343] In Brazil, a standard argumentation refers to the business of the legislative bodies as *interna corporis* affairs. Accordingly, "procedures based on the Congress' own [internal] provisions" would be immune from judicial oversight.[344] Despite subtle differences between such concepts, all of them are related to the separation of powers, keeping the judiciary far from scrutinizing legislative proceedings' breaches.

Such theories are indeed appealing, but, on my account, they belong to the political facet of lawmaking (discretionary decisions about public policies).[345] When it comes to the legal aspect of legislative processes, it is up to the judiciary to maintain them under the rule of law, assessing their "procedural conditions."[346] On the one hand, this is so because the parliament's regulations organize deliberations and preserve communication flows,[347] granting even the minority the opportunity to influence the debate.[348] On the other, because, as John Hart Ely puts it, courts are "experts on process" (although, concededly, not in legislative procedures) and, possibly (in some situations and to a certain extent, at least), "political outsiders."[349]

Obviously, the judiciary shall be cautious whenever called to adjudicate legislative procedural disputes. There is certainly the risk that judges get involved in partisan conflicts. However, there is a way of avoiding such a risk. Firstly, courts shall stick to the rules that govern the procedures, including the legislative bodies' internal regulations. Indeed, examining these regulations is not equivalent to an intrusion into the political realm. Contrarily, it is a matter of the rule of law, just as in a case relating to civil procedures. Secondly, the judiciary may act with some degree of deference to legislative chambers. This attitude might result either from doctrinal constructions or supermajority decisionmaking rules. Under a specific doctrine, courts would only reject imaginative solutions for procedural queries when such solutions evidently amounted to "rule breaking."[350] Under decisionmaking rules, judges in a collegiate would only impose their exegesis in lieu of a legislature's

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[343] Graça, *supra* note 2, at 67.

[344] *Id.* at 56.

[345] *See supra* Part I.

[346] JÜRGEN HABERMAS, BETWEEN FACTS AND NORMS: CONTRIBUTIONS TO A DISCOURSE THEORY OF LAW AND DEMOCRACY 263–264 (William Rehg tran., 1996).

[347] *See* Habermas, *supra* note 57, at 771.

[348] *See* United States v. Carolene Products Co, 304 U.S. 144 (1398) (footnote 4).

[349] *See* ELY, *supra* note 37, at 88.

[350] SHEPSLE, *supra* note 49.

procedural reading if a supermajority agreed on doing so. In conclusion, adherence to the provisions adopted by lawmaking bodies and some deference to their interpretation could work around partisanship accusations.

Adjudication based on the rules governing legislative procedures may serve as a strategy for avoiding questionable incursions in the political realm. Comparing situations are those in which judicial scrutiny primarily relies on broad principles, such as rights protection or democracy.[351] Taking these canons loosely gives judges a kind of discretion mostly appropriate to legislators. Conversely, assuming that lawmaking rules foster fairness, participation, and transparency, courts would indirectly enhance such values by sticking to the applying regulations. At the same time, they would act within the lines that commonly limit the judiciary. In other words, they would decide cases concerning the legislative business not according to wide concepts but pursuant to provisions stated by lawmakers in the first place.[352] Should this approach still be unconvincing, there is the recourse to deference.

Judicial deference brings the U.S. *Chevron* ruling into the discussion.[353] The case referred to enforcing statutory rules to control air pollution from "major stationary sources."[354] In dispute was the reasonableness of the Environmental Protection Agency's interpretation allowing "a plantwide definition" of said sources, as if "all of the pollution-emitting devices within the same industrial grouping . . . were encased within a single 'bubble.'"[355] Opposedly, a narrower construing would demand that each polluting device in a plant individually met the environmental protection requirements.[356] To address the case, the U.S. Supreme Court formulated a two-step approach. In like situations, judges shall first evaluate "whether Congress has directly spoken to the precise question at issue."[357] If so, such a command must prevail.[358] "Rather [and second], if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based

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[351] *See generally* ROSE-ACKERMAN, EGIDY, AND FOWKES, *supra* note 3, at 103, 178 (addressing arguments based on democracy in South Africa, and rights protection in Germany).

[352] *See* Graça, *supra* note 2, at 70–71, 80–81.

[353] Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984).

[354] Clean Air Act Amendments of 1977, Pub. L. No. 95-95, sec. 129(b), §§ 172-173, 91 Stat. 685, 745-748 (1977).

[355] *Chevron*, 467 U.S. at 839.

[356] *See id.*

[357] *Id.* at 842.

[358] *See id.* at 842-843.

on a permissible construction of the statute."[359] After assessing *Chevron* under this scheme, the Supreme Court held it should defer to the agency's position.[360] A similar rationale could also serve to the judicial scrutiny of legislatures' procedural struggles in light of the applying rules, be they constitutional, statutory, or internal.

Alternatively, deference may also result from decisionmaking rules.[361] Concededly, the *Chevron* formulation might leave too much room for uncertainty.[362] That is so because its recipe does not provide standards for a couple of doubts. For example, how could someone be sure whether a legislative body straightforwardly tackled an issue? Or what would be the range for permissible readings?[363] Ultimately, it may be harder to provide satisfactory answers to these questions than to do what courts usually do: assess the best interpretation, in light of the judges' eyes, between those offered by the opposing parties.[364] Considering such a difficulty, an alternative approach advocates for sticking to the traditional way individual judges reason, fostering deference through higher voting thresholds in collegiates.[365] In other words, instead of inserting further variables in the argumentation, the proposal would be to uphold an agency's reading save for dissenting votes from a supermajority in the court scrutinizing the case. For instance, in an eleven-member body, such as the Brazilian Federal Supreme Court, a number ranging from seven to eleven judges, depending on the institutional arrangement, would be necessary to overcome the challenged interpretation. Such a proposal could also enhance judicial deference to legislatures in cases regarding their procedural disputes.

Finally, another precaution refers to the moment when judicial oversight could come into play. Lawmakers shall be entitled to recurring to the judiciary while the challenged legislative process is going on. By the time such a process ends, and, as a result, a bill becomes law, the possibility of courts' scrutiny depends on the case. Where procedural legislative provisions figure in the constitution or have constitutional status, and where a sort of control of constitutionality exists, there is room for judicial review of a statute under an alleged breach of such provisions. In

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[359] *Id.* at 843.

[360] *See id.* at 865.

[361] *See* Jacob E. Gersen & Adrian Vermeule, *Chevron as a Voting Rule*, 116 THE YALE LAW JOURNAL 676 (2007).

[362] *See id.* at 680.

[363] *See id.* at 690–692.

[364] *See id.*

[365] *See id.* at 679, 692–693.

this situation, the plaintiffs can be the legislators or otherwise, depending on the legal framework. Inversely, no statute's review shall take place solely upon the scrutiny of an infra-constitutional procedural rule's misapplication. In this case, the right to challenge the legislative process would be precluded. Thinking differently would be equivalent to attributing the highest normative status to such a rule, encompassing it in something like the French concept of the constitutional block.[366] Along with the controversies that such a move would raise, many more statutes could be stricken down due to procedural breaches, and legal certainty would vanish. Thus, concerning timing, precaution would recommend avoiding any possibility of reviewing legislation already in force based on infra-constitutional (internal, statutory, or otherwise) procedural norms.

Reflection on the Brazilian case as background may help clarify the point. According to the notion of the constitutional block, non-written principles or inferior legislation might be granted the highest hierarchical status if they thoroughly fulfill the Constitution's provisions' meaning.[367] As such, infra-constitutional texts that regulate the legislative process, such as the parliament's internal norms, could eventually be part of the block since they channel the democratic will, a superior principle, toward the production of legislation.[368] Appealing as this idea may be, it does not fit the country's legal framework. Accordingly, a single document bears constitutional status. Moreover, this document is comprehensive, encompassing numerous provisions on fundamental and democratic rights and the legislative process.

Regarding the argument that the parliament's internal rules fulfill constitutional values, this is not an exclusive feature of these rules but a general characteristic of

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[366] *See* JOSÉ ALCIONE BERNARDES JÚNIOR, O CONTROLE JUDICIAL DO PROCESSO LEGISLATIVO [JUDICIAL OVERSIGHT OF THE LEGISLATIVE PROCESS] 84–96 (2009); Cristiane Branco Macedo, A Legitimidade e a Extensão do Controle Judicial sobre o Processo Legislativo no Estado Democrático de Direito [Legitimacy and the Extent of Judicial Control over the Legislative Process under the Democratic Rule of Law] 70 (2007) (dissertação de Mestrado em Direito, Universidade de Brasília, Brasil [Master of Laws dissertation, University of Brasilia, Brazil]), http://icts.unb.br/jspui/bitstream/10482/2316/1/2009_Cristiane%20Branco%20Macedo.pdf (last visited Apr. 14, 2024).

[367] S.T.F., A.D.I. No. 2971, Relator: Min. Celso de Mello, Agravo Regimental (tribunal pleno, inteiro teor do acórdão), 6.11.2014 [S.T.F., A.D.I. No. 2971, Rapporteur: Justice Celso de Mello, Specific Appeal (full court, whole content of the judgement), Nov. 11, 2014] 11–14 (Braz.), http://redir.stf.jus.br/paginadorpub/paginador.jsp?docTP=TP&docID=7758406 (last visited Jul. 1, 2023).

[368] *See* BERNARDES JÚNIOR, *supra* note 366, at 84–96; Macedo, *supra* note 366, at 70.

the legislation.[369] Indeed, except for directly applicable provisions, the constitutional text generally demands the intermediation of other legal species.[370] Thus, if it could be said that legislatures' internal regulations form, along with the Constitution's text, the control of constitutionality's paradigm because they fulfill basic values, then the same should be said about any statute. In the end, all the legislation would be said to bear the highest hierarchical status, a conclusion that would undermine the very idea of a constitution. At least in the case of Brazil, the most fundamental legislative procedural rules or values against which an existing law may be assessed are enshrined in the Constitution itself. As such, any attempt to overturn a statute grounded on breaches of a lawmaking house's internal provisions shall be dismissed.[371]

This statement leads to another limitation that further narrows the scope for judicial involvement in the legislative business. Before bills become part of the legal world, the possibility of challenging their procedural breaches before courts shall only be available to those who can file related claims in the legislatures. For instance, if only current senators can file points of order in the Senate, they shall be the only ones entitled to file judicial charges concerning the same disputed question. The same would be true for representatives (or deputies) in the House (or Chamber of Deputies). In other words, while a specific legislative process is still pending, only lawmakers directly affected by a potential procedural breach could be admitted as plaintiffs in a query regarding the same issue. Hence, the case would be distinct from that in which challenges refer to a statute (whose legislative process has already finished) in the face of a constitution. In this situation, the plaintiffs could be many other actors, including citizens supporting their arguments on constitutional grounds, according to the country's legal framework. Contrarily, concerning procedures still going on, be they constitutional, statutory, or internal, the space for bringing the

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[369] If one may put things in terms of direct or indirect fulfillment of the constitution, one may also treat the theme reversely, in terms of immediate or mediate violations of the constitution. This is how Kelsen approaches the topic, stating that "constitutional control" only concerns immediate violations of the constitution. *See* Hans Kelsen, *Who Ought to Be the Guardian of the Constitution? Kelsen's Reply to Schmitt*, *in* THE GUARDIAN OF THE CONSTITUTION: HANS KELSEN AND CARL SCHMITT ON THE LIMITS OF CONSTITUTIONAL LAW 174 (Lars Vinx ed., 2015).

[370] *See* JOSÉ AFONSO DA SILVA, APLICABILIDADE DAS NORMAS CONSTITUCIONAIS [CONSTITUTIONAL NORMS APPLICABILITY] 225 (7th ed. 2007).

[371] By the time the legislative process has ended, and a bill has turned to be a law, the opportunity for correcting a violation of an internal provision has passed, and the breach shall be deemed to be validated. *See* MANOEL GONÇALVES FERREIRA FILHO, DO PROCESSO LEGISLATIVO [OF THE LEGISLATIVE PROCESS] 64 (6th rev. ed. 2007).

judiciary in would ultimately be in lawmakers' hands. Should they agree, tacitly or otherwise, to avoid such recourse, the scope for judicial intrusion in legislative affairs would be even more restricted.

5. Conclusion

> The first essential of deliberative assemblies is a system of parliamentary practice. In countries where the sense of political order is weak and self-control is wanting, popular government is exposed to the greatest dangers.[372]

Past claims for organized or institutionalized legislative arenas are even more appealing nowadays in the face of fierce political struggles around ever-growing state regulation. The purpose is to keep an environment where fairness, transparency, and broad participation prevail, enhancing the legislation's legitimacy. Legislators shall then build the regulations on their business with such aims on the horizon. However, establishing the appropriate rules does not suffice. Compliance is also necessary to make them effective.

Before social complexities and broad disagreement around numerous topics, achieving some consensus might only be feasible through aggregate mechanisms. The outcomes can only be deemed legitimate if the decisionmaking locus preserves lawmakers' rights to fair participation and voting. Additionally, sticking to the procedural rules helps to shed light on the matters under a parliament's scrutiny. This result follows from public access to debates and documents, together with the communication flow's organization. Since legislatures are a space of representation, adherence to legislative due process (an expression of the rule of law) ultimately enhances democratic ideals.

Pursuant to such reasoning, rule breaking cannot be admitted even under majorities' acquiescence. Otherwise, a lack of confidence in lawmaking may arise, compromising the legislation's legitimacy. Ideally, each legislator's self-policing behavior may prevent procedural deviations. However, amid harsh political disputes, the incentives for untying knots through undue movements might be irresistible. Therefore, enforcing tools shall be available.

Legislatures count on overseeing instruments to keep procedures on track. Typically, presiding officers have the authority to guide the legislative business

[372] M.P. FOLLETT, THE SPEAKER OF THE HOUSE OF REPRESENTATIVES 1 (1896).

according to the applicable legal provisions. Such a power, however, is not incontestable. Peers can challenge a chair's conduction by raising a point of order or anything similar. Moreover, they can generally appeal to the full chamber if the decision addressing the raised question seems unsatisfactory. Nevertheless, on the one hand, inertia on the part of those ruling, political pressures, and abuse of waiving mechanisms may undermine the policing tools available to legislators. On the other hand, points of order and appeals may even be misused in attempts to circumvent supermajority requirements. The problem is relying on referees directly interested in the procedural controversies at stake. Consequently, further checks shall be in place.

Neutral actors, agents without direct affiliation to the political parties, shall play a role in legislative proceedings' oversight. Generally, legislatures may count on non-partisan officers whose duties encompass delivering opinions or advice on procedural struggles. Even lacking binding force, their points of view may constrain an authority willing to break the established rules. To support pressures, these officers shall rely on guarantees like a fixed mandate or tenure, and freedom of speech. Notably, their ability to state a position shall count on the same safeguards that shield legislators' manifestations. Besides, such protection shall take place not only outside parliaments but also inside them, avoiding undue internal disciplinary actions.

At last, the judicial venue shall be open to those lawmakers who wish to challenge undue procedural maneuvers. In this case, courts may prevent partisanship accusations by adopting some precautions. First, instead of broad principles, they shall base their decisions on the applicable rules, including legislatures' internal regulations. Secondly, they shall display some deference, either by doctrinal construction or supermajority thresholds that, if not met, would keep the legislative authority's stance. Thirdly, precluding standards shall bar challenges whose purpose would be striking down statutes that have not complied with infra-constitutional procedural lawmaking rules. Finally, concerning alleged breaches, the judiciary shall only admit as a plaintiff an agent who could also challenge them in the legislature where they took place. Typically, such an agent will be a member of this legislature.

Part III

The Misuse of Executive Acts with the Force of Law in light of the Legal Nature of the Legislative Process: The Cases of Brazil, Italy, and the United States

1. Introduction

Imagine the following story. A low-income couple gets married and starts a joint life full of dreams. The couple strives to improve their situation and provide their children with a good living standard. The young man is a truck driver and manages to buy his first truck. Almost two decades later, he has a small freight company with five heavy vehicles. To expand his business, and with the support of his wife, he sells a house they own and one of those vehicles to buy two newer trucks. He hopes the expansion will allow them to build another property and keep their prosperous trajectory. He then meets with a dealer's representative to make the payment for the trucks. However, the transaction cannot be concluded. The truck driver, now a middle-aged businessman, has no more money available in his bank account, though he has not been stolen. Nor has he been a victim of fraud. Instead of expanding, his business has now shrunk, and his family is deprived of a significant part of their assets. From that moment on, nothing will be as it once was, and he, his wife, and his children will struggle to overcome a traumatic drawback.

Such a narration may easily scare anyone who tries to imagine it happening to him or herself. Unfortunately, it is not a mere fruit of creativity. It is the real story of a Brazilian family.[1] In 1990, between the moment the truck driver sold part of his family's property and the attempted acquisition of the two newer vehicles, the government of Brazil launched an economic plan to defeat a hyperinflation process. As one of the related measures, the President of the Republic ordered the seizure of a significant part of financial assets. Obviously, to be successful, such a measure should be effective from the very moment it was announced. Moreover, it should have the force of law. A statute resulting from a regular legislative procedure would not serve to convey the seizure rules. Otherwise, as soon as the executive introduced

[1] *See* CONFISCO [CONFISCATION] (HBO Brazil 2021).

the bill in Congress, people would hurry to withdraw money from their accounts. Besides being useless, the government's intent would provoke a collapse of the country's financial system. The envisioned solution, correctly or not, was found in article 62 of the country's Constitution, entitling the head of the executive with the power to adopt measures with the force of law in "important and urgent cases."

The case of the truck driver and his family is a drastic one. In other situations, the consequences of using a similar state faculty might not be so dramatic. Nevertheless, such a use may also raise serious concerns, and that is what this text is about. Its topic is the misuse or abuse, in light of the legal nature of the legislative process, of a specific type of lawmaking: the enactment of executive decrees, measures, directives, or anything similar, with the force of law, to tackle emergencies or pressing scenarios. On the one hand, delivering new legislation belongs to the political realm, where decisions concerning which policies shall be adopted and which juridical instruments shall be used are subject to politicians' discretion. On the other hand, legal procedural rules frame these actors' course of action. In other words, even if they may count with some latitude, lawmakers shall abide by constitutional, statutory, or legislatures' internal provisions. Such a remark applies to any kind of legislative process. It is no different with the kind of emergency lawmaking process that is the object of this essay. This route aims to immediately deliver responses with the force of law in the face of circumstances where waiting for deliberation in parliaments seems imprudent. Typically, specific guidelines curb the use of such an extraordinary lawmaking path. Notwithstanding, legislating through this emergency itinerary has been common ground in several countries. Noticeably, it has been a standard way by which the executive avoids the burdens of negotiations in parliaments.

This text poses that such a pattern is incompatible with the legal nature of the legislative process. To defend its point of view, it goes as follows. Section 2 addresses some historical and theoretical foundations behind the recourse to extravagant state action in the face of threats. It starts with the dictatorship in the ancient Roman Republic and then moves on to John Locke's, Carl Schmitt's, and Santi Romano's theorizations on the matter. Section 3 delves into the misuse or abuse of emergency lawmaking instruments in Brazil, Italy, and the United States. Finally, Section 4 delivers an assessment of the phenomenon in light of what the legal nature of the legislative process entails, offering possible remedies with a special view on the Brazilian provisional measures.

2. Reasoning behind emergency procedures

2.1. The scope

Under emergencies or other pressing circumstances, the existing legal framework may not offer, or may even hamper, the adequate governmental response to situations demanding rapid actions.[2] Hence, under actual or imminent serious threats, like wars, terrorist attacks, rebellions, natural catastrophes, or pandemics, the executive may rely on exceptional constitutional or legal powers to preserve the political system and the social tissue.[3] Depending on the extension of the threats, these powers may include, on the one hand, the abridgment or suspension of civil guarantees and rights (such as *habeas corpus* and freedom of speech and reunion),[4] and the mobilization of security, rescue, or reconstruction apparatuses.[5] On the other

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[2] *See* CHRISTOPHER M. DAVIS, CONGRESSIONAL RESEARCH SERVICE, RS20234, EXPEDITED OR "FAST-TRACK" LEGISLATIVE PROCEDURES (2015), https://crsreports.congress.gov/product/pdf/RS/RS20234 (last visited Dec. 26, 2021).

[3] *See* Bruce Ackerman, *The Emergency Constitution*, 113 THE YALE LAW JOURNAL 1029, 1031 (2004); John Ferejohn & Pasquale Pasquino, *The Law of the Exception: A Typology of Emergency Powers*, 2 INTERNATIONAL JOURNAL OF CONSTITUTIONAL LAW 210, 226 (2004).

[4] *See, e.g.,* U.S. CONST. art. I, § 9, cl. 2 (possibility of suspending the right to *habeas corpus* "in cases of rebellion or invasion the public safety may require it"); CONSTITUIÇÃO FEDERAL DE 1988 [C.F. 1988] [1988 FEDERAL CONSTITUTION] arts. 136, 137 (Braz.), https://www.planalto.gov.br/ccivil_03/constituicao/constituicao.htm (last visited Jan. 20, 2024) (respectively regulating the executive's power under states of defense and siege), *translated in* CONSTITUTION OF THE FEDERATIVE REPUBLIC OF BRAZIL, (2022), https://www.stf.jus.br/arquivo/cms/legislacaoConstituicao/anexo/Brazil_Federal_Constitution_EC_125.pdf (last visited Sep. 14, 2022) (henceforth, references to the this translated version of the Brazilian Constitution are omitted except where clearly stated). *See also* Ackerman, *supra* note 3, at 1041 (mentioning the U.S. "rudimentary emergency provision" on habeas corpus suspension); Ferejohn and Pasquino, *supra* note 3, at 231 (stating that "some constitutions . . . exclude the suspension of some fundamental rights," meaning that these very same constitutions permit the suspension of the other portion of fundamental rights); Stéphanie Hennette Vauchez, *Taming the Exception? Lessons from the Routinization of States of Emergency in France*, 20 INTERNATIONAL JOURNAL OF CONSTITUTIONAL LAW 1793, 1810 (2022) (referring to "restrictions on human rights and basic liberties").

[5] *Cf.* Santi Romano, *On the Decree Laws and the State of Siege During the Earthquakes in Messina and Reggio Calabria*, *in* LAW, NECESSITY, AND THE CRISIS OF THE STATE: THE EARLY WRITINGS OF SANTI ROMANO 24, 26 (Mariano Croce ed. & tran., 1st ed. 2023) (mentioning the need to "to restore public services").

hand, extraordinary powers might also refer to the possibility of immediately adopting new legislation or changing the existing one. In this case, the purpose is to provide the government with a manner by which it can give legal support to the necessary measures or regulate social interactions as it deems appropriate considering the pressing moment.[6] The rationale behind the attribution of the legislative function to the executive lies in the inappropriateness of ordinary lawmaking procedures to deliver prompt responses.[7] Indeed, there are occasions when waiting for debates, examination of the matter by distinct committees, and amendments until there are sufficient votes to pass a bill is not an option.

Regarding urgent situations, this text's concerns primarily refer to fast-track processes designed to immediately (or almost) deliver acts (whichever their labels) with the force of law, involving the executive, in charge of the enactment of such acts, and the legislative branches. Other courses of work, such as steps taken by administrative agencies or authorities, including security forces, are not the object of the considerations here, though there may be a reference to these steps as the theorization justifying them is roughly the same behind the existence of expedited legislative procedures under pressing circumstances. More concretely, the purpose is to address the case of measures or decrees with the force law, like the ones in Brazil and Italy.[8] In these countries, before an extenuating scenario, the government may adopt said legal species, submitting them to the legislature for conversion into statutes pursuant to constitutional provisions.[9] Herein, arguments will typically target preoccupations related to the enactment of law under these or similar rules. The text will also address distinct but close mechanisms raising analogous concerns,

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[6] In this text, unless otherwise stated, I use the term "government" as a substitute for "executive" or "executive branch."

[7] *See* ANNA MARIA DE CESARIS, DECRETO LEGGE E CORTE COSTITUZIONALE [DECREE LAW AND CONSTITUTIONAL COURT] 3, 8 (1996). *Cf.* Ferejohn and Pasquino, *supra* note 3, at 210 ("When the public safety is seriously threatened, there may be a need for quick and decisive action that cannot, perhaps, wait for the deliberate pace of ordinary constitutional rule.").

[8] *See* C.F. 1988, *supra* note 4, art. 62 (Braz.); art. 77 Costituzione [Cost.] [Constitution] (It.), https://www.senato.it/istituzione/la-costituzione (last visited Jan. 29, 2024), *translated in* CONSTITUTION OF THE ITALIAN REPUBLIC, https://www.senato.it/documenti/repository/istituzione/costituzione_inglese.pdf (last visited Mar. 16, 2022) (henceforth, references to the this translated version of the Italian Constitution are omitted except where clearly stated). In different English versions of the Brazilian Constitution, *medida provisória* is translated either as provisional decree or provisional measure. Wording similarity made me prefer the latter in this text.

[9] *See* C.F. 1988, *supra* note 4, art. 62 (Braz.); art. 77 Cost. (It.), *supra* note 8.

as with U.S. executive orders or, more generally, presidential directives. Among other differences, the recourse to such instruments is intimately related to the expansion of regulatory or administrative powers and,[10] depending on the case, needs to find support on prior statutory authorization passed by the legislature.[11] More importantly, the unilateral acts that the U.S. government can adopt do not trigger a legislative process to evaluate their conversion into statute, as in the case of Brazil and Italy. Anyway, in the three countries, their governments may issue the referred tools as they deem appropriate, save for a couple of restrictions. For this reason, cases relating to their enactment raise queries about a kind of usurpation of the legislative function.

Lawmaking procedures in which the executive plays the central role of issuing norms having the force of law from the very moment of their enactment are the focus of this text. Before it goes through some specificities regarding the matter in Brazil, Italy, and the United States, it offers an overview of some historical and theoretical foundations behind emergency measures. That is the topic of the following section.

2.2.Historical and theoretical underpinnings

This section addresses theorization and concrete experiences that influenced the discussion about emergency governmental actions. It starts with the institute of dictatorship in the Roman Republic. Then, it sketches some of the core ideas that John Locke, Carl Schmitt, and Italian jurist Santi Romano left regarding the subject. The purpose is to offer elements for an assessment of misuse or abuse of lawmaking devices under pressing scenarios.

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[10] *Cf.* Sanford Levinson & Jack M. Balkin, *Constitutional Dictatorship: Its Dangers and Its Design*, 94 MINNESOTA LAW REVIEW 1789, 1813 (2010) (stating that "[b]oth the administrative and regulatory state on the one hand, and the National Security State, on the other, offer plenty of opportunities for decisive [executive] action").

[11] *See* ABIGAIL A. GRABER, CONGRESSIONAL RESEARCH SERVICE, R46738, EXECUTIVE ORDERS: AN INTRODUCTION 2 (2021); Levinson and Balkin, *supra* note 10, at 1813.

2.2.1. Dictatorship in the Roman Republic

Attributing special capabilities to an authority was an available instrument for the Roman Republic to cope with emergencies.[12] Before a menace, "the Roman Senate could direct the consuls to appoint a dictator for a period of up to six months."[13] Then, it was up to him to promptly work around the threats with broad, though not unrestrained,[14] powers and restore the political system. Such an arrangement allegedly worked well, at least during the first centuries in which it was applied, from 501 to 202 B.C..[15] During the dictator's term, a kind of suspension of the normal order was in place.[16] The foundations of the Roman organization of that era, fostering collegiate decision-making and "responsibility to [S]enate and people" as a way "to prevent one man from gaining control of the state-power,"[17] were momentarily set aside.[18] For instance, for roughly two hundred years, "the dictator's decisions [were not] subject to the *provocatio ad populum*, the right of appeal from serious sentences to the popular assemblies," nor were they submitted to "the tribunes' veto."[19] The presumption was that the institutions or rules governing the polity in ordinary moments did not fit well in extraordinary situations.[20] There could simply be no time to wait for decisions taken under regular processes, where the discharge of public duties was divided among distinct incumbents.[21]

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[12] *See* Marc de Wilde, *The Dictator's Trust: Regulating and Constraining Emergency Powers in the Roman Republic*, 33 HISTORY OF POLITICAL THOUGHT 555 (2023).

[13] Ferejohn and Pasquino, *supra* note 3, at 212.

[14] Along with those explicitly or implicitly mentioned in these paragraphs, other limits upon the dictator existed, such as a mandate only for defensive, not offensive, military action and for deciding criminal cases, but possibly not civil ones. Besides, the Senate kept its authority over funding issues. Finally, moral and religious restraints seem to have played a crucial role in avoiding abusive behavior by dictators. *See* Wilde, *supra* note 12, at 557, 560–562.

[15] *See id.* at 555–556.

[16] *See* Vauchez, *supra* note 4, at 1799.

[17] D. Cohen, *The Origin of Roman Dictatorship*, 10 MNEMOSYNE 300, 303 (1957).

[18] Yet, though the dictator had ample command of his acts, he hardly disregarded the Senate's opinions or the popular pressure. *See* Wilde, *supra* note 12, at 562.

[19] *Id.* at 560 (emphasis in original).

[20] *See* Ferejohn and Pasquino, *supra* note 3, at 211–212.

[21] *See* NICCOLÒ MACHIAVELLI, DISCOURSES ON LIVY 95 (Julia Conaway Bondanella & Peter Bondanella trans., 1997) (ch. 34).

However, unique as they were, Roman dictatorships in place during the previously mentioned period were not illegitimate.[22] On the contrary, the legal framework of that time provided for its operation, the same way modern constitutional democracies are equipped with provisions explicitly designed for urgent circumstances.[23] The similarity between the ancient and present regimes in this regard is such that it led scholars to label current national provisions addressing exceptional threats as "neo-Roman."[24] Yet, a remarkable difference between the old and current emergency systems refers to the possibility of clearly distinguishing the state operation under extraordinary contingencies from its usual course of action. Typically, the Roman dictator was "not an active magistracy during the regular government."[25] Indeed, "a consul could not appoint himself, and only rarely was a magistrate in office appointed."[26] In addition, his term lasted only a short period, and it seldom overstayed the assigned lapse.[27] Nowadays, handling a threat or pressing scenario is generally the responsibility of the same authorities who ordinarily rule the nation, which somehow blurs the distinction between regular official acts and those destined to circumvent serious, uncommon problems. Typically, the duty of working around exceptional crises a nation may face lies primarily with the head of state or government.[28]

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[22] "Although the dictatorship was considered part of the republic's constitution, it was an exceptional institution in several respects." Wilde, *supra* note 12, at 558. Concerning the remark about the period, after 202 B.C., 120 years passed until another dictatorship was installed. This time, however, important deviations, such as a mandate to review the polity's laws and no time limit, mischaracterized the institution in comparison to its original model. See *id.* at 556.

[23] *See* Ferejohn and Pasquino, *supra* note 3, at 211.

[24] John Ferejohn & Pasquale Pasquino, *Emergency Powers*, *in* THE OXFORD HANDBOOK OF POLITICAL THEORY 333, 341 (John S. Dryzek, Bonnie Honig, & Anne Phillips eds., 2009).

[25] *Id.* at 338.

[26] Wilde, *supra* note 12, at 558.

[27] *See id.* at 556.

[28] *See* Ferejohn and Pasquino, *supra* note 24, at 338.

2.2.2. *Executive prerogatives in John Locke*

At the end of the seventeenth century, amidst his defense of liberal values, John Locke conjectured about prerogatives,[29] "an ancient claim to an undefined residuary power" available to the executive branch.[30] Writing in the context of the occurrences that led to the 1688-1689 English Revolution and its developments afterward, Locke's theory was twofold. On the one hand, he stood for the protection of individuals against arbitrariness,[31] where, for instance, "Prerogative was to be everything, Statutes nothing if they were not the liking of the King."[32] On the other hand, he conceived robust governmental tools that would eventually equip the newborn British "fiscal-military state" toward its "global reach."[33]

Locke defined prerogative as the executive's "power to act according to discretion for the public good, without the prescription of the law and sometimes even against it."[34] Such a formulation went hand in hand with a 1292 decision in which "the judges declared that the king's prerogative set him above the law, *pro communi utilitate* [for the common good]."[35] In Locke's view, there were a few reasons why governments should count on such a faculty. One referred to the possibility of the legislature not being regularly in session,[36] which made sense in

[29] *See* JOHN LOCKE, TWO TREATISES OF GOVERNMENT 203–207 (Thomas I. Cook ed., 1947) (Second Treatise, ch. XIV, §§ 159-158).

[30] G. M. TREVELYAN, THE ENGLISH REVOLUTION, 1688-1689 33 (1938).

[31] *See* Mark Goldie, *Locke and Executive Power*, *in* THE LOCKEAN MIND 446, 446–447, 453 (Jessica Gordon-Roth & Shelley Weinberg eds., 2021).

[32] TREVELYAN, *supra* note 30, at 37 (the passage refers to James II's reign).

[33] Goldie, *supra* note 31, at 453.

[34] LOCKE, *supra* note 29, at 204 (Second Treatise, ch. XIV, § 160).

[35] ENGLISH CONSTITUTIONAL DOCUMENTS, 1307-1485, 2 (Eleanor C. Lodge & Gladys A. Thornton eds., 1st paperback ed. 2015). The original passage of interest in said decision is the following: "Et licet prefatis Johanni et aliis Magnatibus expositum fuisset quod nullus in hac parte potest habere Marchiam Domini Regis qui, pro communi utilitate, per prerogativam suam in multis casibus est supra leges et consuetidines in regno suo usitatas . . . ." ("And although it had been explained to the aforesaid John and other Magnates that no one in this part can have the March of the Lord the King, who, for the common good, by his prerogative is in many cases above the laws and customs customary in his kingdom . . . ."). I ROTULI PARLIAMENTORUM, 71 (John Strachey ed., 1767), https://babel.hathitrust.org/cgi/pt?id=pst.000020573621&seq=1 (last visited Jan. 6, 2024) (translation from Google Translate).

[36] *See* LOCKE, *supra* note 29, at 204 (Second Treatise, ch. XIV, § 160).

his epoch but not so much nowadays. Two others, however, are still typically present. First, he mentioned that the legislative "is usually too numerous and so too slow for the dispatch requisite to execution."[37] Second, he was aware that "it is impossible to foresee, and so by laws to provide for all accidents and necessities that may concern the public."[38] In Locke's reasoning, then, the government should count on expedited instruments that allowed for immediate action, bypassing the challenges that real life imposes on the lawmaking process.

Despite the wide "latitude" at the executive's disposal,[39] such a power finds restraints under the Lockean approach. First, the executive shall only use it for the sake of the public.[40] If the purpose is to advance a value other than the general welfare, the resort to prerogative is unjustifiable.[41] Second, in the face of an illegitimate objective behind the recourse to prerogative, the populace may "appeal to heaven."[42] This entitlement is read as the people's right to be the matter's ultimate arbiter, exercising a kind of judgment that is political in nature, not legal.[43] Such a capacity may translate into the "right to resistance"[44] in the form of a revolutionary or constitutional moment, in more severe cases, or of prosaic means of influencing decisions within the polity, like "elections and the operation of public opinion."[45] Summing up, Locke advocates for vast executive powers, though only for protecting the public good and subject to the people's scrutiny.

Locke's approach raises questions as to the limitations he conceives.[46] Part of the criticism refers to the broadness and subjectivism behind the concept of "public

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[37] *Id.*

[38] *Id.*

[39] *See id.*

[40] *See id.* at 203–207 (Second Treatise, ch. XIV, §§ 160-168).

[41] *See id.*; Philipp Schönegger & Henrik Skaug Sætra, *Locke on Prerogative: Democracy, Libertarianism, and Proto-Utilitarianism*, 23 LOCKE STUDIES 1, 12 (2023).

[42] LOCKE, *supra* note 29, at 207 (Second Treatise, ch. XIV, § 168).

[43] *See* Goldie, *supra* note 31, at 452.

[44] Schönegger and Sætra, *supra* note 41, at 15. *See also* Pasquale Pasquino, *Locke on King's Prerogative*, 26 POLITICAL THEORY 198, 205 (1998) ("right to resist").

[45] Goldie, *supra* note 31, at 453.

[46] *Cf.* Sean Mattie, *Prerogative and the Rule of Law in John Locke and the Lincoln Presidency*, 67 THE REVIEW OF POLITICS 77, 87 (2005) ("The possibility of the abuse of prerogative raises serious theoretical and practical dilemmas.").

good."[47] First, it may be hard to discern private from public interests. Second, recourse to the public good might help transform prerogative into the standard government mechanism. After all, the executive may justify any of its acts, not only those coping with emergencies, under the common welfare blanket.[48] Accordingly, in the Lockean perspective, any "concrete situation carries in itself the threat of transforming itself into an exceptional case."[49] Finally, taking the advancement of general goals as the ultimate ratio against which officials and citizens shall assess governments' moves may easily leave the way open for the violation of individuals' or minor groups' rights.[50] In conclusion, taking the "public good" as the central paradigm may not be the most appropriate means to check the executive's use of prerogative.

One may see Locke's conception of prerogative as a path to authoritarianism.[51] Reversely, others may approach it as a theory that takes unescapable legal-political struggles seriously and "finds a way to maintain liberal constitutionalism."[52] Under the former strand, the complaint puts Locke's theorization close to Carl Schmitt's defense of attributing unlimited powers to the head of government or state in the face of emergencies.[53] Under the latter, more condescending thread, the diagnosis points out that, like Schmitt but roughly two centuries earlier, Locke just foresaw that the rule of law could not offer responses for all situations.[54] In parallel, the same analysis makes the case that the two philosophers stood apart from each other in their

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[47] *Cf.* Schönegger and Sætra, *supra* note 41, at 12 (claiming that "the public good . . . harshly restricts its [prerrogative's] scope").

[48] *See* EDWARD S. CORWIN, THE PRESIDENT, OFFICE AND POWERS, 1787-1957 147–148 (4th revised ed. 1957); Schönegger and Sætra, *supra* note 41, at 4,15.

[49] Pasquino, *supra* note 44, at 202.

[50] *See* Schönegger and Sætra, *supra* note 41, at 18, 20.

[51] *See* Goldie, *supra* note 31, at 453; Mattie, *supra* note 46, at 78.

[52] Douglas Casson, *Emergency Judgment: Carl Schmitt, John Locke, and the Paradox of Prerogative*, 36 POLITICS & POLICY 944, 953 (2008).

[53] *See* Goldie, *supra* note 31, at 453.

[54] *See* Casson, *supra* note 52, at 952–953; Pasquino, *supra* note 44, at 202, 205. But notice that one of Schimtt's target in his demur toward constitutional liberalism and the rule-of-law paradigm was Locke himself.

approach to broad executive powers, placing Locke away from arbitrariness.[55] Delineating Schmitt's ideas may shed light on the comparison.

2.2.3. The exception in Carl Schmitt

A vastly influential account of the relationship between the law and highly pressing situations is given by Carl Schmitt.[56] According to his reasoning, emergencies are unavoidable and represent a threat to states.[57] Since, through a legal norm, it is not possible to foresee what is necessary to do in a crisis,[58] the solution is to rely on the nation's leader as the one who can promptly adopt the appropriate steps to work around the risks.[59] On Schmitt's account, that is so because the legislature, naturally devoted to endless deliberations, on the one hand, or profoundly marked by countless cleavages, on the other, would not be equipped with the tools to act urgently.[60]

Schmitt's conclusions take his reflections on sovereignty as a starting point. He links such a concept with the capacity to decide what shall be done to preserve the order.[61] Notably, the conservative aspect of his theorization refers to the state, not the legality in place.[62] In ordinary times, the law serves the purpose of maintaining things according to its dictates.[63] Hence, a legal order stands. Under threats to the

[55] *See* Casson, *supra* note 52, at 947–949; Vicente Medina, *Locke's Militant Liberalism: A Reply to Carl Schmitt's State of Exception*, 19 HISTORY OF PHILOSOPHY QUARTERLY 345, 345–346 (2002); Pasquino, *supra* note 44, at 205.

[56] *See* GIORGIO AGAMBEN, STATE OF EXCEPTION 32 (Kevin Attell tran., 2005); Vauchez, *supra* note 4, at 1796; Lars Vinx, *Carl Schmitt*, THE STANFORD ENCYCLOPEDIA OF PHILOSOPHY (Edward N. Zalta ed., Fall 2019 ed.), https://plato.stanford.edu/archives/fall2019/entries/schmitt/ (last visited Oct. 26, 2023) (section 1, last paragraph).

[57] *See* William E. Scheuerman, *Survey Article: Emergency Powers and the Rule of Law After 9/11*, 14 JOURNAL OF POLITICAL PHILOSOPHY 61, 62–63 (2006).

[58] *See* CARL SCHMITT, POLITICAL THEOLOGY 6 (George Schwab tran., 1985).

[59] *See* Carl Schmitt, *The Guardian of the Constitution: Schmitt on Pluralism and the President as the Guardian of the Constitution*, *in* THE GUARDIAN OF THE CONSTITUTION: HANS KELSEN AND CARL SCHMITT ON THE LIMITS OF CONSTITUTIONAL LAW 125 (Lars Vinx ed., 2015).

[60] *See* SCHMITT, *supra* note 58, at 59; Schmitt, *supra* note 59, at 136–144.

[61] *See* SCHMITT, *supra* note 58, at 12.

[62] *See id.*

[63] *Cf. id.* at 13 (stating that, "[f]or a legal order to make sense, a normal situation must exist").

state organization, the notion of "legal" decouples from that of "order" (or state order).[64] Such an outcome flows from the impossibility of predicting an exception or, at least, all exceptional scenarios.[65] As neither all urgent moments nor all circumventing measures can be previously translated into legal provisions,[66] setting existing norms aside may show up as an utmost necessity,[67] leaving room for decisions that will tackle the case threatening the state and keep order.[68] As long as no legal limits apply,[69] a new legality ultimately emerges.[70] In this sense, the decision under unexpected circumstances reveals itself as the actual source of the law.[71] If sovereignty relates to the ability to settle the rules within a polity,[72] the sovereign, in Schmitt's theory, "is he who decides on the exception."[73]

Schmitt opposes the personalism and decisionism that characterize his approach to the absence of such elements in the "liberal constitutional tradition."[74] In this regard, his criticism of Hans Kelsen's conceptualization of the law draws particular attention.[75] Kelsen depicts the law as a set of oughts (prescriptions) stating

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[64] *See id.* at 12.

[65] *See id.* at 6–7.

[66] *See id.* at 13.

[67] Schmitt refers to the suspension of "valid law" (*see id.* at 9). However, I prefer to avoid using the term "suspension" here since it evokes the notion of norms whose applicability is to be restored in the future. On Schmitt's approach, such a restoration may not take place since the decisions dealing with the exceptional situation may give rise to another legal order (*see infra* note 119; Ferejohn and Pasquino, *supra* note 3, at 219.). In the presence of a novel legal order, the case, then, would be one of revocation of the old one, not merely of its suspension.

[68] *See* SCHMITT, *supra* note 58, at 12.

[69] *See id.* at 6–7. *See also id.* at 12 (posing that "[t]he decision frees itself from all normative ties and becomes in the true sense absolute").

[70] *Cf.* SCHMITT, *supra* note 58, at 15 (stating that the exception "confirms not only the rule but also its existence, which derives only from the exception").

[71] *See id.* at 10.

[72] *Cf.* Daniel Philpott, *Sovereignty*, THE STANFORD ENCYCLOPEDIA OF PHILOSOPHY (Edward N. Zalta ed., Fall 2020 ed.), https://plato.stanford.edu/archives/fall2020/entries/sovereignty/ (last visited Jan. 13, 2024) (defining sovereignty as the "supreme authority within a territory").

[73] SCHMITT, *supra* note 58, at 5.

[74] *See id.* at 30.

[75] *See id.* at 19, 21, 29, 41, 42, 49, 50.

what should happen, through human action or omission, given an event.[76] For instance, a statute may determine that someone who received an amount featured as income must pay a tax calculated as a percentage of these specific earnings. Whether the subject of the obligation will comply with it or not, this uncertainty belongs in the real world. Notwithstanding, in Kelsen's view, another mark of the law is the possibility of rule enforcement through sanctions.[77] In the previous example, seizing part of the debtor's property or even incarceration might be enforcing mechanisms. Finally, and most importantly concerning the contrasts between the two scholars' views, there rests the question about the law's fundament of validity. According to Kelsen, a legal provision is valid if it finds support in a superior norm.[78] As such, an executive decree (say, an order for property seizure) would only stand if backed by a statute (in the example, a tax law). In this scheme, the ultimate legal source of authority lies with the constitution or, more precisely, with the "basic norm,"[79] a hypothetical provision stating that "the . . . constitution is to be obeyed."[80] Kelsen's characterization,[81] devoid of any personalistic element, thus fits well in a fundamental liberal proposition, that according to which power shall be exercised under the rule of law, not pursuant to a personal will.[82]

The notion of the rule of law and, in particular, the Kelsenian model of legal authority emulate the nineteenth century's scientific approach to natural phenomena. "The general validity of a legal prescription has become identified with the lawfulness of nature, which applies without exception."[83] According to a mechanical understanding, immutable and universal laws would govern nature, admitting no deviation. Instead of obeying a superior being, nature would run by itself. As such,

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[76] *See* HANS KELSEN, TEORIA PURA DO DIREITO [PURE THEORY OF LAW] 33–37 (João Baptista Machado tran., 7th ed. 2006).

[77] *See id.*

[78] *See* HANS KELSEN, INTRODUCTION TO THE PROBLEMS OF LEGAL THEORY 63–64 (Bonnie Litschewski Paulson & Stanley L. Paulson trans., 1992).

[79] *Id.*

[80] Leslie Green & Thomas Adams, *Legal Positivism*, THE STANFORD ENCYCLOPEDIA OF PHILOSOPHY (Edward N. Zalta ed., Winter 2019 ed.), https://plato.stanford.edu/archives/win2019/entries/legal-positivism/ (last visited Nov. 8, 2021).

[81] For a similar summary of Kelsen's description of the law, *see supra* Part I, Section 3.2.

[82] *Cf.* Casson, *supra* note 52, at 952 (stating that Schmitt places Kelsen among those philosophers who try "to avoid arbitrary rule by insisting on the sovereignty of law and the absolute distinction between law and power").

[83] SCHMITT, *supra* note 58, at 48.

justifying abnormal events as if a ruler miraculously intervened in this world would no longer be plausible since anomalies could not exist. Before the imponderable, the case would be that of discovering an explanation through reason. From the liberal perspective, a polity could operate similarly, managing its problems on its own.[84] The same way the universe would comply with natural laws, societies would abide by the rule of law.[85] Through critical thinking and deliberation, it would be possible to codify the solutions for all problems humans could face.[86] Pursuant to this novel viewpoint, unimaginable situations would no longer defy the legal realm.[87] As in science, the extraordinary would be displaced. Consequently, there would be no need to recur to a personified ruler whose authoritative decision, like a deity gracefully conceding a miracle, would save terrified citizens from an unknown challenge.[88]

Developing his reflections amidst the rubble of World War I, in a Germany grasping with deep economic problems and social turmoil,[89] Schmitt was skeptical about the promises of the liberal-constitutional theory.[90] The conundrum, he proposed, was that such an ideology's pretense that the legal-political dominium could mimic a self-governing natural realm would be unrealistic. First, because banishing the exception from the real world would not be an option. Accordingly, as already mentioned, Schmitt stated that predicting all menaces and translating them into codes, with their respective solutions, would be an unattainable goal.[91] Hence, dealing with extraordinary times would be unavoidable. Second, because, in these moments, legislatures, the organizations embodying societies' aspiration to self-government, would fall short of the necessary efficiency to deliver timely responses. According to Schmitt, in a crisis, the parliamentary inherent drive to endless conversation would only serve to evade a decision that should come "without delay

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[84] *See id.*

[85] *See id.* at 22.

[86] See *id.* at 42.

[87] *See id.* at 41.

[88] *Cf. id.* at 48, 51 (stating that "the nineteenth-century theory of the state" eliminated "[t]he decisionistic and personalistic element in the concept of sovereignty" and "theistic and transcendental conceptions").

[89] *See* Vauchez, *supra* note 4, at 1799.

[90] *See* DAVID DYZENHAUS, LEGALITY AND LEGITIMACY: CARL SCHMITT, HANS KELSEN AND HERMANN HELLER IN WEIMAR 58 (Reprinted 2003 ed. 1997).

[91] *See* SCHMITT, *supra* note 58, at 6–7.

and without appeal."[92] Such a characteristic would be reinforced by the multiple interests represented in the course of the legislative process, mirroring, to a certain extent, those found among the citizenry.[93] As sharply divided spaces, parliaments would lack the capacity to personify the unity necessary to tackle pressing circumstances.

From this summary, it is possible to notice that Locke and Schmitt share their assessment of the rule-of-law promises and constitutional liberalism in at least two aspects. First, both doubt the legislative can give prompt responses to circumstances demanding immediate action. Recall that Locke complained that a legislature may be "too numerous and so too slow" to tackle these situations.[94] Second, according to both philosophers, it might be said that "the branch that exercises the executive function is not reducible to a machine that applies the law."[95] Somehow, Locke anticipated part of Schmitt's diagnosis.

Seemingly, however, their resemblance does not go further. Unlike the Schmittian perspective, in Locke's view, "the executive is a trustee of political power and not its owner."[96] Indeed, referring to the executive's wide latitude for action, the English philosopher poses that "prerogative can be nothing but the people's permitting their rulers to do several things of their own free choice where the law was silent, and sometimes, too, against the direct letter of the law, for the public good, and their acquiescing in it when so done."[97] Where Schmitt does not see a restraint on a decision to address an exceptional event, Locke conceives a political check on the government, keeping away from any sort of decisionism.[98] In this case, another philosopher is possibly closer to Locke than the German. It is time now to turn to the Italian jurist Santi Romano.

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[92] *See id.* at 56, 59 (translating and quoting 2 JOSEPH MARIE DE MAISTRE, OEUVRES COMPLETES DE J. DE MAISTRE (1928) (chapter 1)).

[93] *See* Schmitt, *supra* note 59, at 143–144.

[94] LOCKE, *supra* note 29, at 204 (Second Treatise, ch. XIV, § 160).

[95] Pasquino, *supra* note 44, at 202.

[96] Casson, *supra* note 52, at 955. *See also* Pasquino, *supra* note 44, at 205 (mentioning "a relationship of trust and not one of subordination or slavery").

[97] LOCKE, *supra* note 29, at 205 (Second Treatise, ch. XIV, § 164).

[98] *See* Pasquino, *supra* note 44, at 205.

2.2.4. The state of necessity in Santi Romano

Concerning the fundaments behind fast-track legislative procedures in the face of pressing circumstances, it is especially worth visiting Italian jurist Santi Romano's writings. Of particular interest is his essay "On the Decree Laws and the State of Siege During the Earthquakes in Messina and Reggio Calabria."[99] The cataclysms to which it refers hit the mentioned regions in December 1908.[100] Its analysis relates to the subsequent Italian authorities' response "to remedy the dissolution of every social and political organization that has occurred due to [the] completely involuntary and natural phenomenon."[101] At the time, decrees with the force of law established a "civil state of siege" in the affected areas, though such a measure found no direct support in the existing legal framework.[102] Recurring to analogy, the government based its action on provisions regulating war affairs, affirming that the situation posed similar challenges to those regarding belligerent moments.[103] Assessing the case, Romano concluded that this justification was not necessary. For him, the government could address the emergency requiring its intervention in spite of any previous legal regulation.[104] On his account, the real basis for immediate state action relied solely on the "state of necessity."[105]

For Romano, necessity is the ultimate foundation of the legal order.[106] His conception, to a certain extent, resembles the Kelsenian one. Indeed, he thinks that the validity of a norm depends on a prior one, "establishing what bodies are authorized to enact it [the more recent norm] as well as their powers."[107] The search for previous grounds goes on like a regression till there is nothing beyond that which sustains the whole edifice.[108] At this moment, Romano's articulation crucially moves away from the one proposed by Kelsen. For the latter, the ultimate legal source is

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[99] Romano, *supra* note 5.

[100] *See id.* at 25.

[101] *Id.* at 26.

[102] *See id.* at 24–26.

[103] *See id.* at 25 (quoting the Italian government's justification).

[104] *See id.* at 29.

[105] *See id.*

[106] *See id.* at 35–36.

[107] *Id.* at 36.

[108] *See id.*

the theoretical proposition commanding obedience to the constitution.[109] For the former, necessity is the original fountain, present or not an urgent situation.[110] Thus, the need for inaugurating a new order would be the source of legitimacy (or validity) of this same order. Such a need could result, for instance, from a revolutionary moment, like the U.S. independence, or from a political compromise leaving behind an authoritarian epoch, like the Brazilian re-democratization in the eighties.[111] However, according to Romano, "what occurs at the initial moment of a given regime can also be repeated, albeit exceptionally and with more attenuated characteristics, even when it has stabilized and regulated its own fundamental institutions."[112] Such a remark refers to emergencies, circumstances in which necessity appears again as a founding element of legality.

In the case of a pressing scenario, Romano affirms that necessity imposes a modification on the competencies of state agents.[113] Under normality, the traditional distribution of powers between the executive and legislative branches may work well. The procedures in place for delivering public services and new legislation might comply with values related to democratic participation in decision-making. Typically, there will be time for discussions, within society or parliaments, and amendments before lawmakers or agencies reach a final solution for a given issue. Reversely, waiting will not be an option in the face of an emergency. In such an event, immediate actions shall take place resorting to novel provisions.[114] It is possible that issuing new legislation may not be necessary, as it happens when the existing one already provides the appropriate support for urgent measures. Nevertheless, as Locke and Schmitt, Romano also doubts a legal system can predict all extraordinary circumstances that may arise and, consequently, all corresponding responses.[115] Hence, in extenuating moments, "establish[ing] a procedure that is not the usual procedure" would be mandatory simply because there would be no way out.[116] The implication of such a conclusion would be the attribution of the

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[109] *See* Green and Adams, *supra* note 80.

[110] *See* Romano, *supra* note 5, at 35.

[111] *Cf. id.* at 36 (making reference to revolutions).

[112] *Id.* at 36.

[113] *See id.* at 40.

[114] *See id.* at 31–32.

[115] *See id.* at 35, 38.

[116] *Id.* at 31–32.

legislative function to the government, as in the case of the decrees with the force of law addressing the earthquakes to which Romano refers.[117]

Extraordinary responses to a pressing event, in Romano's view, are legal and illegal at the same time. They are legal because they derive from necessity, the ultimate source of the law. As such, the issuance by the executive, in lieu of the parliament, of a decree law or a similar instrument addressing the emergency would be as legitimate as the enactment of a statute through the regular legislative process. On the other hand, they are *contra legem* since they find no support in previous legislation.[118] In other words, the new provisions are valid because they are grounded in a state of necessity, the origin of legality *par excellence*, though they stand against the ones that were already in place. Such a clash, however, does not threaten the previous legal order. Differently from the Schmittian approach, Romano does not separate the concept of "legality" from that of "order." For Schmitt, according to his reasoning in the "Political Theology," in the face of an urgent situation, the purpose is to preserve the order, regardless of which legality emerges thereafter.[119] For Romano, the case is that of temporarily suspending (or derogating) the legal order so that the measures adopted can restore it.[120] In this regard, his "picture does not involve any decisionism, let alone any demiurge,"[121] and expresses deference to the institutions that can square the novel legislation within the one that existed beforehand.

In Romano's view, the way the extraordinary acts tackling an emergency may be reconciled with the juridical order is through conversion.[122] In his theory, this concept refers to the submission of said acts to the legislature's analysis, somehow reestablishing the original state agents' competencies.[123] Accordingly, the conversion procedure is an opportunity to hold the executive branch accountable. In this case, lawmakers can scrutinize whether the circumstances leading to the

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[117] *See id.*

[118] *See id.* at 37.

[119] *Cf.* Mariano Croce, *Santi Romano Before Legal Institutionalism: The Order Above and Beyond Positive Law*, *in* LAW, NECESSITY, AND THE CRISIS OF THE STATE: THE EARLY WRITINGS OF SANTI ROMANO 1, 14 (Mariano Croce ed., 1st ed. 2023) (labelling Schmitt's position as "radical and extreme," though conceding that he softened it in his further works).

[120] *See* CESARIS, *supra* note 7, at 5–6.

[121] Croce, *supra* note 119, at 14.

[122] *See* Romano, *supra* note 5, at 41.

[123] *See id.* at 40.

government's exceptional reaction really amount to a state of necessity.[124] In addition, the conversion permits that "the legislative bodies manifest their will by means of a statute."[125] Even after the unexpected event's immediate impacts cease, the measures addressing them might generate persisting consequences.[126] The legislators' examination is then necessary to appropriately evaluate the matter, such that the measures initially adopted, with or without amendments, accord with the legal order.[127] Finally, and as a result of the two ways by which the state powers' functions are restored, the legislature's involvement serves the utmost important objective of "distinguish[ing] genuine necessity from arbitrariness."[128]

From these considerations, it seems that Santi Romano's perspective, diverging from Schmitt's, comes close to that of Locke in at least two points. One refers to how Romano and Locke understand that an exceptional act may be illegal but, at the same time, legitimate. For the former, that is possible because such an act finds support in necessity, the ultimate legal source. Similarly, for the latter, that source is the public good, "the foundation and end of all laws," attributing legitimacy to the extraordinary measure.[129] This comparison might suffice to demonstrate the convergence regarding this point. Still, the case may be clearer if the simple reference to "public good" or "necessity" is replaced by "the necessity of preserving the public good." Possibly, the substitution would compromise neither philosopher's speculations. Lastly, the other point of similarity has to do with the check on the executive. For Locke, such a task lies with the people. For Romano, overseeing the government is primarily a duty for the legislature through the conversion process. For both, then, exceptional measures oversight mainly belongs to the political realm. Summing up, Santi Romano and Locke seem to converge on how they legitimize the attribution of broad lawmaking powers to the executive and characterize the nature of the controlling efforts over that branch.

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[124] *See id.* at 41.

[125] *Id.*

[126] *See id.*

[127] *See id.*

[128] *Id.* at 43.

[129] LOCKE, *supra* note 29, at 206 (Second Treatise, ch. XIV, § 165).

2.2.5. *Final remarks and link to the next section*

Recourse to extraordinary measures has long been recognized as a valid tool to cope with pressing circumstances. In the modern and contemporary ages, Locke, Schmitt, and Santi Romano delved into the topic. Despite the differences in their theories, these philosophers remarkably saw the head of government or state as the official who should tackle, under no legal restraints, a severe crisis. In the ancient Roman Republic, the instrument worked distinctly. The applicable arrangement, though leaving the dictator, the authority in charge of circumventing the menace, with vast powers, found boundaries in the legal-constitutional framework. Noticeably, the exceptional regime was limited in time. Besides, it typically vested the dictatorship in someone not performing ordinary official duties and reserved the capacity of declaring the emergency to another authority. Seemingly, both accounts influence present societies' approach to the matter.

Generally, current constitutional democracies have been trying to reach a compromise between the ancient and the modern perspectives. On the one hand, they usually assign to the head of the executive the mission of deciding whether a situation is alarming enough to trigger an unorthodox act and the task of using such an instrument. On the other hand, to varying degrees and with distinct solutions, they also try to curb the government, defining thresholds to protect rights and the separation of powers. Notwithstanding, complaints regarding the abuse or misuse of emergency tools abound. In the next section, this text particularly targets cases involving expedited lawmaking procedures under urgent conditions. More specifically, it exams the institutes of provisional measures and decree laws, in Brazil and Italy, and executive orders or, more broadly, presidential directives in the United States.

3. Using urgent or emergency lawmaking procedures to circumvent the burdens of the regular legislative process

The legislative process is not straightforward. This feature results from its political nature. There are potentially infinite outcomes for a question demanding legal design. For instance, a legislator may adopt a more conservative family law approach, whereas another may be more liberal. A third one may focus on children's rights, while a fourth might be more prone to women's empowerment. Religious considerations may influence some, while others may prefer leaving religion out of

the discussions. Still, the formers' positions may be strikingly distinct depending on their affiliations. Therefore, it is reasonable to expect countless comings and goings in a process dealing with a subject as debatable as family law. Possibly, such a process may last years or be even unfruitful (with no legislation passing).[130] In a democracy, there is no way out but to cope with the burdens of lawmaking. The problem, however, is that this fate may be highly frustrating. Lawmakers, then, might be willing to find shortcuts.

3.1.From an extraordinary to an ordinary technique

Fast-track legislative procedures related to emergencies may serve as shortcuts. Legislating through this route may be so attractive that it may even become a governmental default technique.[131] Obviously, the reason behind such expeditious procedures lies in a circumstance demanding urgent action. Civil unrest, as long as it seriously jeopardizes the legal order, may figure as such a circumstance. Likewise, a war or a significant natural catastrophe might be cases justifying the adoption of legislation through a short-circuited process. Apart from such events, taking advantage of this form of lawmaking as an ordinary mechanism cannot but only be seen as abusive, "normaliz[ing] the rhetoric of emergency."[132] Depending on the procedural norms at stake, it may even be illegal, if it relates to legislatures' internal regulations, or unconstitutional.[133] Indeed, what matters here is compliance with due process of lawmaking for the sake of fairness among legislators, supposing that the rules and principles governing the legislative business, theoretically at least, promote a fair game.[134] This conclusion holds regardless of the process's outcome.

Notwithstanding, the outcome may also be an issue of concern. Such a remark applies to any situation, but it seems to be more impacting in the case of emergencies. In these circumstances, state action is more likely to put fundamental rights at risk. Citizens may not be allowed to participate in reunions or demonstrations. Freedom

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[130] *See* DAVIS, *supra* note 2.

[131] *Cf.* AGAMBEN, *supra* note 56, at 2, 6–7 (addressing states of exception as a standard form of government).

[132] Ackerman, *supra* note 3, at 1040.

[133] *See supra* Part I.

[134] *See supra* Part II, Section 2.1. *See also* Hans A. Linde, *Due Process of Lawmaking*, 55 NEBRASKA LAW REVIEW 197, 239–242 (1976) (stating that the due process of lawmaking entails compliance with legislatitve procedural rules).

of speech may be abridged. Guarantees protecting citizens from surveillance and incarceration might be weakened. Curfews and quarantines might restrain the freedom to come and go, as well as the free exercise of professional occupations or economic activities.[135] Plainly, a real case of necessity may justify these and similar measures. However, a serious problem arises when the scenario is not so pressing or

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[135] In the context of the Covid-19 pandemic, *see, e.g.,* Suspension of Entry as Immigrants and Nonimmigrants of Persons Who Pose a Risk of Transmitting 2019 Novel Coronavirus and Other Appropriate Measures To Address This Risk, Proclamation No. 9984, 85 Fed. Reg. 6709 (Jan. 31, 2020); Decreto-Legge 23 febbraio 2020, n. 6, G.U. Feb. 23, 2020, n. 45 [Decree-Law n. 6, Feb. 23, 2020] [D.L. n. 6/2020] (It.), https://www.normattiva.it/esporta/attoCompleto?atto.dataPubblicazioneGazzetta=2020-02-23&atto.codiceRedazionale=20G00020 (last visited Jan. 10, 2024) (providing some of the legal basis for restrictions); EDWARD C. LIU, CONGRESSIONAL RESEARCH SERVICE, LSB 10415, COVID-19: FEDERAL TRAVEL RESTRICTIONS AND QUARANTINE MEASURES (2020), https://crsreports.congress.gov/product/pdf/LSB/LSB10415 (last visited Jan. 10, 2024) (providing and overview of those restrictions and measures). In Brazil, the initial legal basis for acts restricting rights was the object of a statute whose origin was not a provisional measure, but a bill proposed by the government in the beginning of 2020. Anyhow, the bill's approval occurred under a more than expedited process. Indeed, the executive proposed the bill on February 4, the Chamber of Deputies passed it on the same day, and the Senate passed it on the following day. After the presidential sanction, the resulting statute entered into force on its publication date, February 7. The disease would only strike the country on February 26, 2020. Apart from said statute and possibly a few others, the executive consistently recurred to provisional measures regulating social and economic relations or appropriating budgetary resources during the sanitary emergency. For the statute, *see* LEI NO. 13979, DE 2020 [L. 13979/2020] [LAW NO. 13979, 2020] (Braz.), https://www.planalto.gov.br/ccivil_03/_ato2019-2022/2020/lei/l13979.htm (last visited Jan. 10, 2024). For its legislative steps, *see PL 23/2020*, CÂMARA DOS DEPUTADOS [*Bill No. 23, 2020*, CHAMBER OF DEPUTIES], https://www.camara.leg.br/proposicoesWeb/fichadetramitacao?idProposicao=2236343 (last visited Jan. 10, 2024); *Projeto de Lei No. 23, de 2020*, SENADO FEDERAL [*Bill No. 23, 2020*, FEDERAL SENATE], https://www25.senado.leg.br/web/atividade/materias/-/materia/140490 (last visited Jan. 10, 2024). For the date the disease officially struck the country, *see* Edlaine Faria De Moura Villela et al., *COVID-19 Outbreak in Brazil: Adherence to National Preventive Measures and Impact on People's Lives, an Online Survey*, 21 BMC PUBLIC HEALTH 152 (2021). For a list of norms dealing with the pandemic, *see Combate ao Coronavírus* [*Coronavirus Combat*], CÂMARA DOS DEPUTADOS [CHAMBER OF DEPUTIES], https://www.camara.leg.br/internet/agencia/infograficos-html5/procorona/executivo.html (last visited Jan. 10, 2024); *O Senado Federal no Combate à COVID-19,* SENADO FEDERAL [*The Federal Senate in the fight against COVID-19*, FEDERAL SENATE], https://www25.senado.leg.br/web/atividade/materia/covid-19 (last visited Jan. 10, 2024).

the burdens resulting from said measures are heavier or more enduring than necessary.[136]

Relatedly, can a government adopt an instrument with the force of law, thus bypassing the regular legislative process, to address a pressuring economic challenge?[137] The answer will probably depend on the nature of the case, its effects on the population and the legal order, and the costs that the remedying measures impose. Yet, past events help clarify the question. In the last two decades of the twentieth century, Brazil struggled with an inflationary spiral.[138] In January 1990, the inflation monthly rate was 68%. In February, 76%. In March, it reached 82%.[139] As soon as the then recently elected President of the Republic, Fernando Collor, took office in the middle of March, he adopted measures with the force of law to stabilize the country's economy.[140] One of them referred to the seizure of private financial assets, affecting companies and families,[141] as the truck driver's case at the beginning

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[136] *Cf.* Ackerman, *supra* note 3, at 1030 (stating that "emergency measures have a habit of continuing well beyond their time of necessity").

[137] The question derived from the following passage. "A liberal democratic regime can be threatened by a different kind of emergency: for example, an economic emergency that, in conjunction with a legislative gridlock, triggers urgent and exceptional measures. In this special case the executive power has to act in the absence of an explicit legislative delegation." Ferejohn and Pasquino, *supra* note 3, at 232.

[138] *See* Julia P. Araujo & Mauro Rodrigues, *Evidence on Search Costs Under Hyperinflaton in Brazil: The Effect of Plano Real*, 40 BRAZILIAN REVIEW OF ECONOMETRICS 75, 80 (2020).

[139] *Sistema Gerenciador de Séries Temporais* [*Time Series Management System*], BANCO CENTRAL DO BRASIL [CENTRAL BANK OF BRAZIL], https://www3.bcb.gov.br/sgspub/localizarseries/localizarSeries.do?method=prepararTelaLocalizarSeries (last visited Jan. 17, 2024) (click on "*Atividade econômica*" (economic activity), then on "*Preços*" (prices), then on "*Índices de preços ao consumidor*" (consumer price indexes), then select "433," then click on "*Consultar séries*" (consult series), then insert "01/01/1990" at the right of "*Período*" (period) and "31/03/1990" (Mar. 31, 1990) at the right of "*a*" (to), then click on "*Vizualizar valores*" (view values)). The figures refer to the Broad National Consumer Price Index (*Índice de Preço ao Consumidor Amplo*, I.P.C.A.). Since 1999, Brazil has set its annual inflation targets in terms of such an index. See *Inflation Targeting*, BANCO CENTRAL DO BRASIL [CENTRAL BANK OF BRAZIL], https://www.bcb.gov.br/en/monetarypolicy/Inflationtargeting (last visited Jan. 17, 2024).

[140] *See* Alexandre F. S. Andrada, *Quem, Afinal, Apoiou o Plano Collor?* [*Who supported the "Plano Collor"?*], 38 BRAZILIAN JOURNAL OF POLITICAL ECONOMY 781, 787–788 (2018).

[141] *See* MEDIDA PROVISÓRIA NO. 168, DE 1990 [M.P. 168/1990] [PROVISIONAL MEASURE NO. 168, 1990] (Braz.), https://www.planalto.gov.br/ccivil_03/mpv/1990-1995/168.htm (last visited Jan. 18, 2024); Luiz Carlos Bresser Pereira & Yoshiaki Nakano, *Hyperinflation and Stabilization in Brazil: The First Collor Plan*, *in* ECONOMIC PROBLEMS OF THE 1990'S: EUROPE, THE

of this text showed. In this case, the aim was to reduce liquidity, thus helping alleviate pressure over price levels.[142] The promise was that the restraint would be released at a certain point in time.[143] As a commentator remarks, "promises can do nothing but perplex those whose assets are seized."[144]

In the end, as the governmental plan failed,[145] people were doubly penalized. First, when their purchasing power kept being eroded due to resurging high inflation rates.[146] Second, when they were deprived of parts of their savings from one moment to another. Trauma was not neglectable.[147] Less than three years later, President Collor resigned from office amidst an impeachment trial fueled by his weak popularity (though the charges had nothing to do with the assets' seizure).[148] Later on, in 2001, the Brazilian Congress passed a constitutional amendment that, among other things, prohibited the executive from adopting measures with the force of law

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DEVELOPING COUNTRIES AND THE UNITED STATES 41, 49 (Paul Davidson & J.A. Kregel eds., 1991). For a version of this text in Portuguese, *see* Luiz Carlos Bresser Pereira & Yoshiaki Nakano, *Hiperinflação e Estabilização No Brasil: O Primeiro Plano Collor*, 11 BRAZILIAN JOURNAL OF POLITICAL ECONOMY 565 (1991).

[142] *See* Joao Ayres et al., *The History of Brazil*, *in* A MONETARY AND FISCAL HISTORY OF LATIN AMERICA, 1960–2017 133, 159 (Juan Pablo Nicolini & Timothy J. Kehoe eds., 2022); Pereira and Nakano, *Hyperinflation and Stabilization in Brazil*, *supra* note 141, at 49; Marcel Mérette, *Post-Mortem of a Stabilization Plan: The Collor Plan in Brazil*, 22 JOURNAL OF POLICY MODELING 417, 421 (2000).

[143] *See* M.P. 168/1990 (Braz.), *supra* note 141; Pereira and Nakano, *Hyperinflation and Stabilization in Brazil*, *supra* note 141, at 49.

[144] Mérette, *supra* note 142, at 425.

[145] *See* Pereira and Nakano, *Hyperinflation and Stabilization in Brazil*, *supra* note 141, at 62–64; Carlos Eduardo Carvalho, *O Fracasso Do Plano Collor: Erros de Execução Ou de Concepção?* [*The Failure of the Collor Plan: Errors of Execution or Design?*], 4 ECONOMIA [ECONOMY] 283 (2003); Mérette, *supra* note 142, at 418, 450. *See also* Rudiger Dornbusch & William R. Cline, *Brazil's Incomplete Stabilization and Reform*, 1997 BROOKINGS PAPERS ON ECONOMIC ACTIVITY 367, 369–374 (1997) (for an overview of failing stabilization plans in Brazil prior to 1994).

[146] *See* Pereira and Nakano, *Hyperinflation and Stabilization in Brazil*, *supra* note 141, at 62–64; Mérette, *supra* note 142, at 418, 450.

[147] *Cf.* James Brooke, *As Collor Completes First Year, Brazilians Write Off Their Highest Hopes*, THE NEW YORK TIMES, Mar. 14, 1991, at A3, https://www.nytimes.com/1991/03/14/world/as-collor-completes-first-year-brazilians-write-off-their-highest-hopes.html (last visited Jan 19, 2024) ("Most traumatic for the middle class was the freezing of virtually all bank accounts over $1,500.").

[148] *Cf.* Kurt Weyland, *The Rise and Fall of President Collor and Its Impact on Brazilian Democracy*, 35 JOURNAL OF INTERAMERICAN STUDIES AND WORLD AFFAIRS 1 (1993).

aiming at "the detention or seizure of goods, people's savings, or any other financial asset."[149] Plainly, regarding situations like that of 1990, the Brazilian political answer to the question opening the previous paragraph was a rotund "no."[150]

3.2.Decree laws and provisional measures in Brazil

Using extraordinary instruments with the force of law as an ordinary legislating route has been common in Brazil for a long time. In 1937, in the inauguration of President Getúlio Vargas's autocracy, the newly granted Constitution authorized him to enact decree laws in three cases. Firstly, according to the terms of the legislature's authorization.[151] Secondly, regardless of authorization, on subjects relating to the organization of the federal administration and the armed forces.[152] Thirdly, regardless of authorization, when the legislature was not working, if necessity demanded a fast response, save specific matters.[153] As the parliament remained closed from the beginning of the authoritarian regime until its end in 1946,[154] the

[149] C.F. 1988, *supra* note 4, art. 62, para. 1, II (Braz.); EMENDA CONSTITUCIONAL NO. 32, DE 2001 [E.C. 32/2001] [CONSTITUTIONAL AMENDMENT NO. 32, 2001] (Braz.), https://www.planalto.gov.br/ccivil_03/constituicao/Emendas/Emc/emc32.htm#art1 (last visited Jan. 19, 2024). As a justification for introducing such a provision in the Brazilian Constitution, some of its proponents explicitly mentioned the 1990 seizure of financial assets. *See* DIÁRIO DO CONGRESSO NACIONAL, Seção I, Ano L, No. 40, 15.3.1995 [D.C.N. I 40/1995] [GAZETTE OF THE NATIONAL CONGRESS, Section I, Year L, No. 40, Mar. 15, 1995] 3241 (Braz.), https://imagem.camara.gov.br/Imagem/d/pdf/DCD15MAR1995.pdf (last visited Jan. 19, 2024).

[150] But notice that the seizure had major support in Congress by the time it was launched. Less than one month later, legislators approved it. *Cf. Projeto de Lei de Conversão (CN) No. 31, de 1990*, SENADO FEDERAL [*Congress Conversion Bill No. 31, 1990*, FEDERAL SENATE], https://www25.senado.leg.br/web/atividade/materias/-/materia/31643 (last visited Jan. 19, 2024) (such a bill was the legislative instrument for the conversion of M.P. 168/1990, *supra* note 141, into law). Anyway, already by the end of 1990, "Congress was increasingly unwilling to be railroaded into abdicating its legislative functions in deference to Collor's emergency decrees." Ben Ross Schneider, *Brazil Under Collor: Anatomy of a Crisis*, 8 WORLD POLICY JOURNAL 321, 322 (1991).

[151] CONSTITUIÇÃO FEDERAL DE 1937 [C.F. 1937] [1937 FEDERAL CONSTITUTION] art. 12 (Braz.), https://www.planalto.gov.br/ccivil_03/constituicao/constituicao37.htm (last visited Jan. 29, 2024).

[152] *Id.* art. 14 (Braz.).

[153] *Id.* art. 13 (Braz.).

[154] *See* Inocêncio Mártires Coelho, *Prefácio* [*Preface*] of ARAÚJO CASTRO, A CONSTITUIÇÃO DE 1937 [THE 1937 CONSTITUTION] (2003), at XIII (fac-similar ed. 2003); GILMAR FERREIRA

distinctions were meaningless. The President ruled via decree laws throughout the whole period, entirely usurping the legislative branch's function.[155]

After roughly twenty years, the legal framework of a new despotic era, this time a military one, again admitted the issuance of exceptional norms. For most of the time, until a couple of years after the nondemocratic regime's end in 1985, constitutional provisions allowed the President of the Republic to adopt decree laws in cases of urgency or relevant public interest concerning any of the following matters: national security, public finance, and public jobs.[156] Congress could theoretically reject said decrees but not amend them.[157] Anyway, after sixty days, the novel legal text was considered approved upon Congress's inaction.[158] A broad scope attributed to "national security" concerns, together with a far-reaching interpretation of which situations were urgent or relevant to the public interest, made almost any subject fit in the emergency framework.[159] For its advantages for the executive, decree laws corresponded to a significant part of the innovation in the legal realm.[160] Indeed, in the period, while the legislative passed 2,917 statutes (counting not only those proposed by the executive but also by all actors who could

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MENDES & PAULO GUSTAVO GONET BRANCO, CURSO DE DIREITO CONSTITUCIONAL [CONSTITUTIONAL LAW COURSE] loc. ch. 9, sec. I, 5.3.1 (18th ed. 2023) (ebook).

[155] *See* Coelho, *supra* note 154, at XIII; MENDES & BRANCO, *supra* note 154, loc. ch. 9, sec. I, 5.3.1.

[156] *See* ATO INSTITUCIONAL NO. 2, DE 1965 [A.I. 2/1965] [INSTITUTIONAL ACT NO. 2, 1965] art. 30 (Braz.), https://www.planalto.gov.br/ccivil_03/ait/ait-02-65.htm (last visited Jan. 20, 1964) (mentioning the case of national security; this act amended the 1946 Constitution, in force at that time); CONSTITUIÇÃO FEDERAL DE 1967 [C.F. 1967] [1967 FEDERAL CONSTITUTION] art. 58 (Braz.), https://www.planalto.gov.br/ccivil_03/Constituicao/Constituicao67EMC69.htm (last visited Jan. 20, 2024) (mentioning the cases of national security and public finance); CONSTITUIÇÃO FEDERAL DE 1969 [C.F. 1969] [1969 FEDERAL CONSTITUTION] art. 55 (Braz.), http://www.planalto.gov.br/ccivil_03/constituicao/emendas/emc_anterior1988/emc01-69.htm (last visited Jan. 20, 2024) (mentioning all three matters; the 1969 Constitution was adopted as the Constitutional Amendment n. 1, 1969, which substituted the whole 1967 Constitution; none of these texts, including A.I. 2/1965, resulted from a democratic process, given that Brazil had been under an authoritarian regime since 1964).

[157] *See* C.F. 1967, *supra* note 156, art. 58, sole para. (Braz.); C.F. 1969, *supra* note 156, art. 55, para. 1 (Braz.).

[158] *See* C.F. 1967, *supra* note 156, art. 58, sole para. (Braz.); C.F. 1969, *supra* note 156, art. 55, para. 1 (Braz.).

[159] *See* MANOEL GONÇALVES FERREIRA FILHO, DO PROCESSO LEGISLATIVO [OF THE LEGISLATIVE PROCESS] 237 (6th rev. ed. 2007) (concerning the national security broadness).

[160] *See id.*

introduce a bill, including federal deputies and senators), successive presidents adopted 2,481 decree laws.[161]

Emergency legislative procedures remained appealing even after the promulgation of a new Constitution in 1988, which completed the re-democratization process. Under the emerging order, a new instrument, labeled "provisional measure," substituted for the old decree law.[162] Like the previous legal institute, the President of the Republic can adopt the novel one with the force of law, immediately submitting it to Congress.[163] Remarkably, however, its scope turned out to be more limited in two important aspects. First, relevance cannot stand alone as a justification. The measure's underlying motivation must also be urgent.[164] Second,

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[161] For the number of decree laws, s*ee 1965 a 1988 - Decretos-Leis*, *Portal da Legislação*, PORTAL DO GOVERNO BRASILEIRO [*1965 to 1988 - Decree-Laws*, *Legislation Portal*, BRAZILIAN GOVERNMENT PORTAL], https://www4.planalto.gov.br/legislacao/portal-legis/legislacao-1/decretos-leis/1965-a-1988-decretos-leis (last visited Jan. 20, 2024). The number of statutes refers to all types of laws: ordinary (requiring approval by simple majority), supplementary (in specific matters and demanding approval by absolute majority) and delegated (by a delegation of the National Congress, stating their topic and some requirements, to another authority, typically the President of the Republic). For a list of them, allowing for calculating their figures from October 27, 1965 (when the A.I. 2/1965, *supra* note 156, entered into force) to October 5, 1988, when the present Constitution entered into force, *see 1980 a 1960 - Leis Ordinárias*, *Portal da Legislação*, PORTAL DO GOVERNO BRASILEIRO [*1980 to 1960 - Ordinary Laws*, *Legislation Portal*, BRAZILIAN GOVERNMENT PORTAL], https://www4.planalto.gov.br/legislacao/portal-legis/legislacao-1/leis-ordinarias/1980-a-1960-leis-ordinarias (last visited Jan. 20, 2024); *1987 a 1981 - Leis Ordinárias*, *Portal da Legislação*, PORTAL DO GOVERNO BRASILEIRO [*1987 to 1981 - Ordinary Laws*, *Legislation Portal*, BRAZILIAN GOVERNMENT PORTAL], https://www4.planalto.gov.br/legislacao/portal-legis/legislacao-1/leis-ordinarias/1987-a-1981-leis-ordinarias (last visited Jan. 20, 2024); *1988 - Leis Ordinárias*, *Portal da Legislação*, PORTAL DO GOVERNO BRASILEIRO [*1988 - Ordinary Laws*, *Legislation Portal*, BRAZILIAN GOVERNMENT PORTAL], https://www4.planalto.gov.br/legislacao/portal-legis/legislacao-1/leis-ordinarias/1988 (last visited Jan. 20, 2024); *Leis Complementares*, *Portal da Legislação*, PORTAL DO GOVERNO BRASILEIRO [*Supplementary Laws*, *Legislation Portal*, BRAZILIAN GOVERNMENT PORTAL], https://www4.planalto.gov.br/legislacao/portal-legis/legislacao-1/leis-complementares-1/todas-as-leis-complementares-1 (last visited Jan. 20, 2024); *Leis Delegadas*, *Portal da Legislação*, PORTAL DO GOVERNO BRASILEIRO [*Delegated Laws*, *Legislation Portal*, BRAZILIAN GOVERNMENT PORTAL], https://www4.planalto.gov.br/legislacao/portal-legis/legislacao-1/leis-delegadas-1 (last visited Jan. 20, 2024). *See also* C.F. 69, *supra* note 156, art. 56 (Braz.) (stating which authorities could introduce a bill).

[162] *See* FERREIRA FILHO, *supra* note 159, at 237.

[163] *See* C.F. 1988, *supra* note 4, art. 62 (Braz.).

[164] See *id*. (Braz.).

a sunset clause applies.[165] Should Congress remain inert, the provisional measure's validity ceases after a specified time lapse (until September 11, 2001, 30 days; since then, up to 120 days).[166] By the time the 1988 Constitution entered into effect, the hope was that these limitations would suffice to constrain the use of the new mechanism.[167]

Such an expectation, though, vanished as soon as presidents and supporting legislators envisioned a way out.[168] They gave "urgency" a broad interpretation, encompassing virtually any case.[169] They also found a way to circumvent the sunset

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[165] In the current constitutional text, modified by amendments, *see id*. art. 62, para. 3 (Braz.). In the original 1988 text, look for art. 62, *parágrafo único* (sole paragraph). *See* DIÁRIO OFICIAL, REPÚBLICA FEDERATIVA DO BRASIL, Seção I, Ano CXXVI, No. 191-A, 5.10.1988 [D.O.U. I 191-A/1995] [OFFICIAL GAZETTE, FEDERATIVE REPUBLIC OF BRAZIL, Section I, Year CXXVI, No. 191-A, Oct. 5, 1988] 10-11, http://www.planalto.gov.br/ccivil_03/Constituicao/DOUconstituicao88.pdf (last visited Jan. 20, 2024).

[166] The original constitutional text established that "[t]he provisional measures will lose effectiveness, from the moment they are issued, if they are not converted into law within thirty days from their publication, and the National Congress must regulate the legal relations arising from them." D.O.U. I 191-A/1995, *supra* note 165, at 11 (art. 62, *parágrafo único* (sole paragraph); the translation is mine). Since the promulgation of Constitutional Amendment 32, 2001, provisional measures "shall lose effectiveness from the day of their issuance if they are not converted into law within a period of sixty days, which may be extended once for an identical period . . . , and the National Congress shall issue a legislative decree to regulate the legal relations arising therefrom." The counting period "shall be suspended while the National Congress is in recess." Additionally, "[i]f the legislative decree . . . is not issued within sixty days as of the date the provisional presidential decree [provisional measure] was rejected or lost its effectiveness, the legal relations constituted and arising from acts performed during its period of effectiveness shall still be regulated by such provisional decree [measure]." C.F. 1988, *supra* note 4, art. 62, paras. 3, 4, and 11 (Braz.).

[167] *See generally* DIÁRIO DA ASSEMBLÉIA NACIONAL CONSTITUINTE, REPÚBLICA FEDERATIVA DO BRASIL, No. 209, 19.3.1988 [D.A.N.C. 209/1988] [GAZETTE OF THE NATIONAL CONSTITUTIONAL ASSEMBLY, FEDERATIVE REPUBLIC OF BRAZIL, No. 209, Mar. 19, 1988] 267-269, https://www.senado.leg.br/publicacoes/anais/constituinte/N015.pdf?_gl=1*16tji3c*_ga*NDU4NTg3NjA5LjE3MDI2MjAyNjM.*_ga_CW3ZH25XMK*MTcwNTg4MDg1Ni45LjEuMTcwNTg4MDkwNi4wLjAuMA.. (last visited Jan. 21, 2024) (according to speeches in favor of provisional measures from representatives Egídio Ferreira Lima, Nelson Jobim, and Bernardo Cabral). *But see generally id.* (according to speeches against provisional measures from representatives Adylson Motta and Michel Temer).

[168] *See* FERREIRA FILHO, *supra* note 159, at 238–239.

[169] *See id.*

clause.[170] Imaginatively, they stated that the President could indefinitely re-enact a provisional measure that had expired due to Congress's inaction.[171] For instance, one of the provisional measures instituting the successful economic plan that ultimately overcame the Brazilian hyperinflation process was monthly re-enacted from June 1994 until June 1995, when it was finally converted into a statute by Congress.[172] Interestingly, the Brazilian Federal Supreme Court (*Supremo Tribunal Federal*, S.T.F.) upheld what seemed to be a general abusive tactic.[173] Thus, despite the burial of the country's decree laws, a way to work around the normal process's obstacles survived through emergency fast-track procedures.

In 2001, a constitutional reform imposed further restraints on the issuance of provisional measures,[174] but such legal instruments kept attractive as a governmental technique. Two changes are worth mentioning. First, said measures could no longer deal with specific matters, such as criminal law, civil and criminal procedures, political rights, election law, and, as already mentioned, financial asset seizures.[175] Second, the sunset clause became meaningful as a new provision forbade re-

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[170] *See id.*

[171] *See id.*

[172] For a list of the related provisional measures (*medida provisórias*, M.Ps.) and the statute (an ordinary law, *lei*, L.), *see Medidas Provisórias Anteriores à Emenda Constitucional No. 32* [1992 a 1995], *Portal da Legislação*, PORTAL DO GOVERNO BRASILEIRO [*Provisional Measures Prior to Constitutional Amendment No. 32*, 1992 to 1995, *Legislation Portal*, BRAZILIAN GOVERNMENT PORTAL], https://www4.planalto.gov.br/legislacao/portal-legis/legislacao-1/medidas-provisorias/1992-a-1995 (last visited Jan. 21, 2024) (on the left column, look for M.P. 1027, 20.6.1995 (Jun. 20, 1995); the right column shows its previous editions: M.Ps. 542, 566, 596, 635, 681, 731, 785, 851, 911, 953, 978, and 1004; for the statute, look for L. 9069, 1995, on the central column).

[173] *See, e.g.,* Supremo Tribunal Federal [S.T.F.], Súmula [Summula] 651, https://jurisprudencia.stf.jus.br/pages/search/seq-sumula651/false (last visited Apr. 20, 2024) (stating that "until E.C. 32/2001, a provisional measure lacking a verdict from the National Congress could be reissued within its effective period of thirty days, keeping the force of law since the first edition;" the translation is mine).

[174] *See* E.C. 32/2001, *supra* note 149, (Braz.).

[175] *See* C.F. 1988, *supra* note 4, art. 62, para. 1 (Braz.). Concerning the regulation before the 2001 reform, commentators stressed their perplexity about the possibility of addressing any matter, including criminal law and judicial procedures (topics that, "throughout history, always gave rise to revolutions"), via provisional measures. NELSON NERY COSTA & GERALDO MAGELA ALVES, CONSTITUIÇÃO FEDERAL ANOTADA E EXPLICADA [FEDERAL CONSTITUTION ANNOTATED AND EXPLAINED] 201 (3d ed. 2005) (the translation is mine).

enactment following expiration.[176] Although these limits have been obeyed, they have not altogether barred the use of the mechanism as a form of overcoming political struggles. Indeed, from 1988 to 2000, the executive branch introduced 738 bills in Congress, whereas it adopted 581 original provisional measures (not counting the re-enacted ones).[177] In 2001, the year of the reform, which became effective in September, the figures were 68 and 54, respectively.[178] From 2002 to 2019, the numbers amounted to 630 bills proposed by the executive and 897 provisional measures adopted.[179] In proportional terms, original provisional measures corresponded to 44% of the total before the reform. After that, until 2019, their share increased to 59%.[180] Summing up, even the significant constraints introduced by the 2001 reform could not reduce the controversial use of expeditious legislative procedures designed for emergencies in Brazil.

Several reasons might explain the provisional measures' persisting appeal as a lawmaking instrument. Despite the 2001 changes, the executive conserved its advantage as a "first-mover,"[181] not only because it could initiate the legislative process but, more importantly, because it kept the prerogative of innovating in the

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[176] *See* C.F. 1988, *supra* note 4, art. 62, para. 10 (Braz.).

[177] From 1988 to 2000, there were 5038 re-enactments of provisional measures. In 2001, re-enactments totalized 457. For all the data, s*ee* NEWTON TAVARES FILHO, CONSULTORIA LEGISLATIVA, EDIÇÃO DE MEDIDAS PROVISÓRIAS [LEGISLATIVE ADVISORY OFFICE, ENACTMENT OF PROVISIONAL MEASURES] 16, 25–26 (2021), https://bd.camara.leg.br/bd/handle/bdcamara/40521 (last visited Oct. 12, 2023).

[178] S*ee id.* at 25–26.

[179] S*ee id.*

[180] In 2020, 18 bills were introduced by the executive, and 108 provisional measures were adopted (s*ee id.*) The shares of each of them were 14% and 86% respectively. The discrepancy was possibly due to the Covid-19 pandemic, which demanded rapid state responses. Yet, even in that year, the government allegedly used the emergency instrument to regulate matters that could be subjected to the regular legislative process. *See, e.g.,* Murillo Giordan Santos, *Medida Provisória 979/2020: Inconstitucionalidade Da Nomeação de Reitores Pelo Ministro Da Educação Sem Consulta à Comunidade Universitária* [*Provisional Measure 979/2020: Unconstitutionality of Universities' Presidents' Nomination by the Minister of Education Without Consultation with the University Community*], ESTADÃO (2020), https://www.estadao.com.br/politica/gestao-politica-e-sociedade/medida-provisoria-979-2020-inconstitucionalidade-da-nomeacao-de-reitores-pelo-ministro-da-educacao-sem-consulta-a-comunidade-universitaria/ (last visited Jan. 22, 2024).

[181] Brandice Canes-Wrone, William G. Howell & David E. Lewis, *Toward a Broader Understanding of Presidential Power: A Reevaluation of the Two Presidencies Thesis*, 70 THE JOURNAL OF POLITICS 1 (2008).

legal order before Congress's scrutiny.[182] Moreover, the possibility of legislating through such a path remained open in topics as vast as tax law (with some restrictions), socio-economic programs, environmental protection, labor law, and administrative law.[183] In addition, the broad approach stayed in play since no test for assessing the urgency requirement has ever been adequately defined,[184] except for provisional measures dealing with extraordinary appropriations (as explained ahead). Finally, a provision designed to force the examination of the matter, avoiding Congress' inaction and somehow compensating for the prohibition of successive re-enactments, helped keep the attractiveness of the instrument. Accordingly, forty-five days after its publication, a provisional measure "shall subsequently be forwarded to urgent consideration in each House of the National Congress, and the deliberation of all other legislative matters shall be suspended in the House where it is under consideration, until voting is concluded."[185] Although, since 2009, this command has been read as applying only to bills whose content can also be the object of a provisional measure, thus excluding other legislative proposals (amendments to the Constitution, resolutions, bills dealing with subjects that a provisional measure cannot rule, etc.),[186] it strengthened the executive' agenda power.[187] In sum,

[182] *See* C.F. 1988, *supra* note 4, art. 62 (Braz.).

[183] *See id.,* art. 62, para. 1 (Braz.) (listing the matters that cannot be the object of provisional measures; reversely, all those not listed can). *See also id.*, art. 62, para. 2 (Braz.) (limiting the effects of provisional measures regarding tax law).

[184] *See* FERREIRA FILHO, *supra* note 159, at 242 (foreseeing such an outcome).

[185] C.F. 1988, *supra* note 4, art. 62, para. 6. (Braz.).

[186] *See, e.g.,* S.T.F., Mandado de Segurança [M.S.] No. 27931, Medida Cautelar [M.C.], Relator: Ministro [Min.] Celso de Mello (decisão monocrática), 27.3.2009, DIÁRIO DA JUSTIÇA ELETRÔNICO [D.J.E.] No. 62, 1.4.2009 (publicação) [Federal Supreme Court, Writ of Mandamus No. 27931, Precautionary Measure, Rapporteur: Justice Celso de Mello (monocratic decision), Mar. 27, 2009, ELECTRONIC JUDICIARY GAZETTE No. 62, Apr. 1, 2009 (publication)] 43–47 (Braz.), https://www.stf.jus.br/arquivo/djEletronico/DJE_20090331_062.pdf (last visited Jan. 22, 2024) (denying to strike down a March 2009 decision of the Speaker of the Chamber of Deputies adopting the mentioned interpretation). In 2017, the full court, by majority, definitely upheld the interpretation. *See* S.T.F., M.S. No. 27931, Relator: Min. Celso de Mello (tribunal pleno), 29.6.2017, D.J.E. No. 259, 28.10.2020 (publicação) [S.T.F., M.S. No. 27931, Rapporteur: Justice Celso de Mello (full court), Jun. 29, 2017, D.J.E. No. 259, Oct. 28, 2020 (publication)] 126–127 (Braz.), https://www.stf.jus.br/arquivo/djEletronico/DJE_20201027_259.pdf (last visited Jan. 22, 2024).

[187] *See* Carlos Pereira, Timothy J. Power & Lucio R. Rennó, *Agenda Power, Executive Decree Authority, and the Mixed Results of Reform in the Brazilian Congress*, 33 LEGISLATIVE STUDIES QUARTERLY 5, 25 (2008).

provisional measures remain an irresistible lawmaking instrument in Brazil for their advantages over the regular legislative process.

The model that served as an inspiration for the provisional measure was found in Italy.[188] In its original version, article 62 of the Brazilian Constitution, regulating said mechanism, was almost a translation of the corresponding lines figuring in article 77 of the Italian Constitution.[189] The debates concerning the matter in the Brazilian 1988 Constituent Assembly evolved around the hazards and benefits of introducing or not such an emergency instrument in the new legal order. Those in favor alleged that the government could not give up the device at the risk of being impotent in a time of necessity. In response to the skeptics, who stressed the peril of perpetuating, under another label, something that so well served as legislative shortcuts during authoritarian regimes, defenders stated that the new model provided Congress with the appropriate overseeing tools.[190] A closer look at the Italian experience would have evidenced that opponents had good reasons to be skeptical.

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[188] *See* D.A.N.C. 209/1988, *supra* note 167, at 269 (representative Bernardo Cabral's speech); COSTA AND ALVES, *supra* note 175, at 201; PINTO FERREIRA, CURSO DE DIREITO CONSTITUCIONAL [CONSTITUTIONAL LAW COURSE] 389 (7th ed. 1995); FERREIRA FILHO, *supra* note 159, at 237.

[189] *Compare* D.O.U. I 191-A/1995, *supra* note 165, at 10-11 (article 62 in the original version of the 1988 Brazilian Constitution, stating that "[i]n case of relevance and urgency, the President of the Republic may adopt provisional measures, with the force of law, and must immediately submit them to the National Congress, which, being in recess, will be summoned extraordinarily to meet within a period of five days," and that "[t]he provisional measures will lose effectiveness, from the moment they are issued, if they are not converted into law within thirty days from their publication, and the National Congress must regulate the legal relations arising from them") (the translation is mine) *with* art. 77 Cost. (It.), *supra* note 8 (stating that "[w]hen the Government, in case of necessity and urgency, adopts under its own responsibility a temporary measure, it shall introduce such measure to Parliament for transposition into law," that "[d]uring dissolution, Parliament shall be convened within five days of such introduction," that "[s]uch a measure shall lose effect from the beginning if it is not transposed into law by Parliament within sixty days of its publication," and that "[p]arliament may regulate the legal relations arisen from the rejected measure"). Notice that the current Brazilian regulation no longer demands summoning Congress. After Constitutional Amendment 32, 2001, the validity period of a provisional measure does not run whilst Congress is in recess. Thus, legislators start or resume the scrutiny of the matter after returning to regular work. *See* C.F. 1988, *supra* note 4, art. 62, *caput* and para. 4 (Braz.); E.C. 32/2001, *supra* note 149, (Braz.).

[190] *See* D.A.N.C. 209/1988, *supra* note 167, at 267-269.

3.3.Decree laws in Italy

The abusive adoption of decrees with the force of law has also been standard in Italy. To start, regulation on the matter only appeared in the 1920s,[191] though legislating via said or similar instruments had been in place since the middle of the nineteenth century.[192] Allegedly, part of the doctrine provided the phenomenon with theoretical support, developing upon concepts like "state of siege," "implicit delegation," or, as in Santi Romano, "state of necessity."[193] Through time, the mechanism turned from an exceptional to a habitual tool, "so much so that it reached the number of 1,043 decrees in 1919 alone."[194] To make things worse, introducing it in parliament was not a common practice.[195] In 1926, legal provisions demanded that the government should submit a decree law to the legislature for scrutiny on the requirements of necessity and absolute urgency as well as for conversion into statute.[196] If lawmakers rejected the matter or did not pass it in two years, the examined decree law would generate no other effects except those already produced.[197] In 1939, further rules restrained the issuance of decree laws to "war or urgent financial or tax measures" or situations when legislative committees did not comply with their duties in the assigned time.[198] Altogether, the regulations were an attempt to limit the excess and attribute overseeing capacity to the legislative.

[191] *See* CESARIS, *supra* note 7, at 10–11; Alfonso Celotto, *Parlamento e Poteri Legislativi del Governo in Italia: L'Abuso del Decreto d'Urgenza (Decreto-Legge)* [*Parliament and Legislative Powers of the Government in Italy: The Abuse of the Emergency Decree (Decree-Law)*], 55 DERECHO PUCP 55, 75 (2002) (in this source, unless otherwise stated, the references come from the version translated to Spanish by Ivon Ascorra).

[192] *See* I ALFONSO CELOTTO, L'ABUSO DEL DECRETO-LEGGE [THE ABUSE OF THE DECREE-LAW] 189–191 (1997); CESARIS, *supra* note 7, at 4.

[193] CESARIS, *supra* note 7, at 4–5 (the translation is mine).

[194] *Id.* at 8 (the translation is mine).

[195] *See* Romano, *supra* note 5, at 42.

[196] *See* Legge 31 gennaio 1926, n. 100, G.U. Feb. 1, 1926, n. 25 [Law n. 100, Jan. 31, 1926] [L. n. 100/1926] art. 3 (It.), https://www.gazzettaufficiale.it/eli/gu/1926/02/01/25/sg/pdf (last visited Nov. 11, 2023). Addressing said law's content, s*ee also* Celotto, *supra* note 191, at 75; CESARIS, *supra* note 7, at 10–11.

[197] *See* L. n. 100/1926, *supra* note 196, art. 3 (It.).

[198] Legge 19 gennaio 1939, n. 129, G.U. Feb. 14, 1939, n. 37 [Law n. 129, Jan. 19, 1939] [L. n. 129/1939] art. 18 (It.), https://www.gazzettaufficiale.it/eli/gu/1939/02/14/37/sg/pdf (last visited Nov. 11, 2023). *See also* CESARIS, *supra* note 7, at 11 (addressing said law's content).

Nonetheless, the government kept using the alternative route extensively instead of regular lawmaking procedures.[199] As a response to the phenomenon, the Constitution adopted in 1947 was provided with rules upon the issuance of decree laws in extraordinary cases "of necessity and urgency," though without further specifications.[200] In other words, the then-new constitutional text did not incorporate descriptions of which circumstances would fit in the emergency provisions, moving away from the 1939 solution. Notwithstanding, it kept the parliamentary checking role in place through the conversion process.[201] Finally, the novel text established a stricter validity term, fixing it in sixty days after the publication of a decree law.[202] Absent transposition into statute, the act should be deemed effectless from its origin.[203] Plainly, the constitutional regulations were another effort to avoid using decree laws as an ordinary legislating tool.[204]

Despite these constraints, the emergency instrument turned again into an appealing device for general lawmaking some years later. Allegedly, flexible interpretation of the constitutional requirements of urgency and necessity became more common.[205] Furthermore, there was the case of successive decree laws' re-enactment in the absence of conversion into statute.[206] As a result, in contrast to 29 decree laws enacted during Legislature I (May 8, 1948, to June 24, 1953), roughly 0.5 each month, 124 were adopted during Legislature VI (May 25, 1972, to July 4, 1976), an average of about 2.6 per month.[207] During Legislature IX (July 12, 1983, to July 1, 1987), the total number of decree laws increased to 302, approximately 6.3 monthly. In the first three legislatures, from May 8, 1948, to May 15, 1963, there was no re-enaction. In the following four, from May 16, 1963, to June 19, 1979, the percentage of re-enacted decree laws in relation to the total in each legislature was never above 6%. However, this ratio reached around 26% in Legislature VIII (June 20, 1979, to July 11, 1983) and 44% in Legislature IX. In the opposite movement, conversion became less and less frequent in proportional terms. Indeed, the relation

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[199] *See* Celotto, *supra* note 191, at 75; CESARIS, *supra* note 7, at 12.

[200] *See* art. 77 Cost. (It.), *supra* note 8.

[201] *See id.*

[202] *See id.*

[203] See *id.*

[204] *See* CESARIS, *supra* note 7, at 13–14.

[205] *See* Celotto, *supra* note 191, at 76.

[206] *See id.*

[207] For the data in this paragraph, *see infra* Table 1.

between converted decree laws and enacted ones plunged from more than 90% in the first five legislatures to 45% in the legislature ending in 1987. Finally, taking the proportion between decree laws and approved statutes (including those resulting from the conversion process), the figures increased almost steadily from 1% in Legislature I (starting in 1948) to 38% in Legislature IX (ending in 1987). Summing up, these data reveal a progressive utilization of the emergency mechanism even after the option for regulating the matter in the constitutional text.

In 1988, a statute imposed additional limits on the government's capacity to legislate via the urgency path.[208] One of its clauses foreclosed decree laws' edition concerning "constitutional and electoral matters, delegating legislation, ratification of international treaties and the approval of budgets and accounts."[209] Another prohibited renewing "decree laws' provisions whose conversion into law had been denied,"[210] aiming at the successive re-enactment practice. Still, the executive issued 466 decree laws in Legislature X (July 2, 1988, to April 22, 1992), close to 10 per month, 490 in the short Legislature XI (April 23, 1992, to April 14, 1994), around 20 each month, and 718 in the also short Legislature XII (April 15, 1994, to May 8, 1996).[211] In the latter period, there were roughly 29 decree laws per month or, astonishingly, almost 1 per day. In all three periods, the rate of re-enactment continued the growth tendency, as well as the proportion between decree laws and passed statutes (including those emanating from conversion). In the former case, the figures were equal to 48%, 67%, and 76%, respectively. In the latter, they were 43%, 156%, and 243%, respectively. Meanwhile, the conversion rate as a percentage of the total number of decree laws in each period kept diminishing, equaling 40%, 24%, and 17%, respectively. Clearly, the 1988 provisions did not suffice to reverse or even bar the increasing preference for lawmaking through the instrument designed for extraordinary circumstances.

Two impactful criticisms arose from the analysis of the use of decree law in Italy until the mid-1990s. Both referred to the loss of the mechanism's essential

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[208] *See* Legge 23 agosto 1988, n. 400, G.U. Sep. 12, 1988, n. 37 [Law n. 400, Aug. 23, 1988] [L. n. 400/1988] art. 15 (It.), https://www.gazzettaufficiale.it/eli/gu/1988/09/12/214/so/86/sg/pdf (last visited Nov. 16, 2023).

[209] *See id.* art. 15, 2(b) (It.). For the quoted passage, art. 72 Cost. (It.), *supra* note 8. For a discussion on doctrinal and case law interpretation regarding Law n. 400's material limits' reach and efficacy on decree laws' discipline, *see* Franco Modugno, *Le Fonti del Diritto* [*The Sources of Law*], *in* DIRITTO PUBBLICO [PUBLIC LAW] 101, 172–175 (Franco Modugno ed., 3d ed. 2017).

[210] L. n. 400/1988, *supra* note 208, art. 15, 2(c) (It.) (the translation is mine).

[211] For the data in this paragraph, *see infra* Table 1.

features. First, according to one observation, the recurrent practice of re-enactment "gave rise to a new and particular alternative procedure of legal production," one that decisively moved the emergency device away from its "natural transience."[212] Second, regarding the habitual recourse to the instrument, another remark posed that "the decree law – from an exceptional source or, at least, an alternative and parallel one in legislation production – became the main, almost exclusive, source of law production, so much so that it came to surpass the parliamentary one."[213] In other words, the decree law ceased to be an extraordinary and temporary tool, as Santi Romano theorized or as the Italian constitutional framework required, to turn into a standard and permanent mode of lawmaking. Ultimately, "the effect over the [legal] sources' system was devastating."[214]

In 1996, a decision of the Italian Constitutional Court put an end to the abusive recourse to decree laws' re-enactment. The Court declared that the practice was illegitimate "in the absence of new (and supervening) extraordinary conditions of necessity and urgency."[215] Modulating its effects, the decision expressly saved past decree laws for the sake of legal certainty, avoiding what could otherwise provoke unbearable juridical instability.[216] For the future, however, the political system could adapt itself, which seems to have occurred to a certain extent. Indeed, the recurrent practice of re-enactment vanished.[217] Relatedly, from the peak of around 29 decree laws adopted per month, including re-enaction, in Legislature XII (April 15, 1994, to May 8, 1996), the monthly average reduced to less than 4 in Legislature XIV (May 30, 2001, to April 27, 2006), and to at most 2 in Legislatures XV, XVI, and XVII (spanning from April 28, 2006, to March 22, 2018). Only more recently, in Legislature XVIII (March 23, 2018, to October 12, 2022), did the average increase to roughly 3 per month, probably due to emergency acts addressing the Covid-19 pandemic. In parallel to the decrease in the number of decree laws, the conversion rate significantly increased to the point of achieving more than 90% in Legislature XIV (May 30, 2001, to April 27, 2006), despite a recent reduction in such a metric.

[212] Celotto, *supra* note 191, at 81 (the translation is mine).

[213] *Id.* at 79 (the translation is mine).

[214] *Id.* at 86 (the translation is mine).

[215] Corte Cost., 17 ottobre 1996, n. 360, G.U. 1996, I, 44, 41 (It.), https://www.gazzettaufficiale.it/eli/gu/1996/10/30/44/s1/pdf (last visited Jan. 24, 2024) (the translation is mine).

[216] *See id*.

[217] For the data in this paragraph, *see infra* Table 1.

At least in terms of the totals involved, the 1996 Constitutional Court's finding seems to have had a non-neglectable effect on the Italian lawmaking process.[218]

Notwithstanding, the misuse of decree laws continues to be an issue of concern in Italy. In spite of the overall diminution, the extraordinary mechanism still represents a great portion of the government's legislative initiative. Although information in this regard for Legislatures XV and XVI (from April 28, 2006, to March 14, 2013) was not found, data for the remaining periods in this century reveal that the executive resorted to decree laws on more than a third of the occasions in which it began a parliamentary procedure to pass a statute.[219] In Legislature XVIII, this share corresponded to 59%, an augmentation possibly attributable to the Covid-19 pandemic.[220] Moreover, the scholarship refers to other intriguing aspects in relation to the topic. One refers to implementing macroeconomic and fiscal austerity measures extensively via the emergency lawmaking route, even more so after the 2008 global crisis, enhancing the executive's technocracy to the detriment of the legislature.[221] Another focuses on decree laws' or their corresponding statutes' long extension and heterogeneity, with countless provisions dealing fragmentedly with multiple matters, furthering the problem of legal uncertainty.[222] Concededly, such a problem may also affect regular lawmaking. Nevertheless, the expedited conversion calendar exacerbates drafting and political coordination struggles in the case of decree laws. Summing up, even though a significant reduction in the number of such

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[218] *See* Modugno, *supra* note 209, at 171.

[219] For the data in this paragraph, *see infra* Table 1.

[220] For the data in this paragraph, *see id*.

[221] *See* Adriano Cozzolino, *Reconfiguring the State: Executive Powers, Emergency Legislation, and Neoliberalization in Italy*, 16 GLOBALIZATIONS 336, 336–338 (2019). Interestingly, for Schmitt, the case in that regard, in Italy or elsewhere, would not be "the result of arbitrary exercises of power." It would merely derive from "the turn that the legislative state takes toward the economic state, and that can no longer be followed by a pluralistically divided parliament." Schmitt, *supra* note 59, at 150.

[222] *See* Alberto Parra, L'Utilizzo del Decreto Legge nell'Esperienza delle Ultime Legislature [The Use of the Decree Laws in the Experience of the Recent Legislatures] 52–70 (2018–2019) (tesi di Laurea Magistrale in Scienze delle Pubbliche Amministrazioni, Università di Pisa, Italia [Master's thesis in Public Administration Sciences, University of Pisa, Italy]), https://etd.adm.unipi.it/theses/available/etd-06032019-201301/unrestricted/TESI_A.Parra_120619.pdf (last visited Jan. 25, 2024); Alfonso Celotto, *Mattarella e l'Abuso del Decreto-Legge* [*Mattarella and the Abuse of the Decree-Law*], FORMICHE (2023), https://formiche.net/2023/02/mattarella-abuso-decreto-celotto/ (last visited Nov. 16, 2023).

acts has been in place since the mid-1990s, the extraordinary route continues to play an important and distorted role in the Italian legislative process.

Table 1. Decree Laws (DLs) and Statutes in Italy (author's elaboration; "?" indicates data not found)[223]

	A	*B*	*C*	*D*	*E*	*F*	*G*	*H*	*I*	*J*	*K*	*L*	*M*
	Leg.	Dates	Total of Statutes	Statutes Converted from DLs	Executive Initiative	Total of DLs	(*F/C*)	DLs/ month	(*D/F*)	Original DLs (excluding re-enactments) (*F - L*)	(*J/E*)	DLs Re-enacted	(*L/F*)
1	I	May 8, 1948- Jun 24, 1953	2316	28	?	29	1%	0.5	97%	29	?	0	0.0%
2	II	Jun 25, 1953-Jun 11, 1958	1896	60	?	60	3%	1.0	100%	60	?	0	0.0%
3	III	Jun 12, 1958-May 15, 1963	1795	28	?	30	2%	0.5	93%	30	?	0	0.0%
4	IV	May 16, 1963-Jun 4, 1968	1765	89	?	94	5%	1.6	95%	93	?	1	1.1%
5	V	Jun 5, 1968-May 24, 1972	839	66	?	69	8%	1.4	96%	65	?	4	5.8%
6	VI	May 25, 1972-Jul 4, 1976	1128	108	?	124	11%	2.6	87%	120	?	4	3.2%
7	VII	Jul 5, 1976-Jun 19, 1979	666	136	?	167	25%	4.6	81%	158	?	9	5.4%
8	VIII	Jun 20, 1979-Jul 11, 1983	963	169	?	275	29%	5.7	61%	204	?	71	25.8%
9	IX	Jul 12, 1983-Jul 1, 1987	792	136	?	302	38%	6.3	45%	168	?	134	44.4%
10	X	Jul 2, 1987-Apr 22, 1992	1076	185	704	466	43%	9.7	40%	242	34%	224	48.1%
11	XI	Apr 23, 1992-Apr 14, 1994	314	118	231	490	156%	20.4	24%	162	70%	328	66.9%
12	XII	Apr 15, 1994-May 8, 1996	295	122	261	718	243%	28.7	17%	172	66%	546	76.0%
13	XIII	May 9, 1996-May 29, 2001	906	174	697	369	41%	6.1	47%	204	29%	165	44.7%
14	XIV	May 30, 2001-Apr 27, 2006	686	200	539	216	31%	3.7	93%	216	40%	0	0.0%
15	XV	Apr 28, 2006-Apr 28, 2008	112	?	?	48	43%	2.0	?	48	?	0	0.0%
16	XVI	Apr 29, 2008-Mar 14, 2013	391	106	?	118	30%	2.0	90%	118	?	0	0.0%
17	XVII	Mar 15, 2013-Mar 22, 2018	379	83	282	100	26%	1.7	83%	100	35%	0	0.0%
18	XVIII	Mar 23, 2018-Oct 12, 2022	315	104	249	146	46%	2.8	71%	146	59%	0	0.0%

[223] For the data, s*ee* CAMERA DEI DEPUTATI, SERVIZIO STUTI, XVIII LEGISLATURA, LA PRODUZIONE NORMATIVA: CIFRE E CARATTERISTICHE [CHAMBER OF DEPUTIES, RESEARCH SERVICE, XVIII LEGISLATURE, REGULATORY PRODUCTION: FIGURES AND CHARACTERISTICS], https://www.camera.it/temiap/documentazione/temi/pdf/1105144.pdf?_1699941916387 (last visited Nov. 13, 2023) (data on C18, D18, E18 (calculated as D18 plus 145, the number of statutes resulting from governmental initiative, except the cases of decree laws conversion), and F18); I CELOTTO, *supra* note 192, at 279 (data on C1-C9, D1-D9, F1-F12, H1-H12, and L1-L12).; *Leggi Pubblicate: Tipo di Iniziativa* [*Published Laws: Type of Initiative*], https://leg14.camera.it/_dati/leg14/lavori/datistatistici/attivitalegislativa/datleg8.1.asp?Nas=1 (last visited Nov. 14, 2023) (data on C10-C12, D10-D14, and E10-E14); *Produzione Normativa per Tipo di Atto* [*Legislative Production by Type of Act*], https://leg15.camera.it/_dati/leg15/lavori/datistatistici/attivitalegislativa/datleg8.1.asp?Nas=1 (last visited Nov. 14, 2023) (data on C13-C15, F13-F15, J13, and L13 (calculated as F13 minus J13)); *Temi dell'Attività Parlamentare, La Produzione Normativa: Cifre e Caratteristiche, XVII Legislatura*, CAMERA DEI DEPUTATI [*Topics of Parliamentary Activity, Legislative Production: Figures and Characteristics, XVII Legislature*, CHAMBER OF DEPUTIES], https://www.camera.it/leg17/465?tema=la_produzione_normativa_nella_xvii_legislatra (last visited Nov. 13, 2023) (data on C16-C17, D16-D17, E17, F16 (calculated as 14.37% x (391/47.62%), where 391 is the total of statutes obtained from the disc graph for Legislature XVI on the source, and the percentages are shares of decree laws and statutes, respectively), and F17). Data for Hx, where x varies from 13 to 18, equals Fx divided by the number of months of

3.4.Similar concerns in the United States

In the United States, lawmaking disbalance in favor of one of the branches refers to broad presidential powers to enact directives.[224] A few instruments, like a proclamation and an executive order, may serve the purpose.[225] Typically, the former addresses individuals or private entities, whereas the latter conveys guidance or commands to personnel in the executive.[226] Such a distinction, however, is not straightforward because no binding substantive definition applies to the different forms of directives, which are often used interchangeably.[227] More importantly, citizens' lives are inevitably affected by the actions of governmental officials abiding by executive orders.[228] Anyway, the recourse to directives, regardless of the form, is a significant way U.S. presidents deliver their policies in the face of emergencies or legislative knots.[229]

The crucial aspect of these devices is that, in the American legal system, they have the force of law whenever they rest upon an acknowledged source.[230] The ultimate one is the Constitution, particularly article II, delineating the President's powers and duties. Generally, and to a certain extent, presidential actions handling military issues and foreign affairs derive their authority directly from the

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the corresponding legislature. Lz, where z varies from 14 to 18, is zero because there were no more re-enactments after Legislature XIII.

224 *Cf.* WILLIAM G. HOWELL, POWER WITHOUT PERSUASION: THE POLITICS OF DIRECT PRESIDENTIAL ACTION 3 (2015) (mentioning "a propensity of presidents . . . to unilaterally impose their will on the American public").

225 *See* GRABER, *supra* note 11, at 20.

226 *See id.* at 20–21.

227 *See id.* at 21; Tara Leigh Grove, *Presidential Laws and the Missing Interpretive Theory*, 168 UNIVERSITY OF PENNSYLVANIA LAW REVIEW 877, 884–885 (2020).

228 *See* GRABER, *supra* note 11, at 20–21.

229 *See* WILLIAM J. OLSON & ALAN WOLL, THE CATO INSTITUTE, POLICY ANALYSIS NO. 358, EXECUTIVE ORDERS AND NATIONAL EMERGENCIES: HOW PRESIDENTS HAVE COME TO "RUN THE COUNTRY" BY USURPING LEGISLATIVE POWER (1999), https://www.cato.org/sites/cato.org/files/pubs/pdf/pa358.pdf (last visited Sep. 18, 2023); Tara L. Branum, *President or King? The Use and Abuse of Executive Orders in Modern-Day America*, 28 JOURNAL OF LEGISLATION 1, 2 (2002).

230 *See* KENNETH R. MAYER, WITH THE STROKE OF A PEN: EXECUTIVE ORDERS AND PRESIDENTIAL POWER 35 (2002).

constitutional text.[231] In many situations, however, the legal source for the executive's move lies more immediately on a legislative delegation.[232] Though the legislature cannot limit nor repeal directives that directly rest on a constitutional mandate, it can do so when such instruments result from delegation.[233] Still, this faculty faces robust thresholds. Along with parliamentary procedural struggles, a proposal for curtailing the executive is subject to a presidential veto.[234] Though the last word on the matter belongs to legislators, overturning a veto is unlikely since it requires a two-thirds supermajority in each chamber.[235] With such a framework, U.S. law offers presidents powerful unilateral governing mechanisms.

The conclusion makes more sense in the face of what "delegation" entails. In American law, the concept is not strict. It does not refer solely to an explicit parliamentary authorization that confers lawmaking powers to the government in a specific topic and for a determined period.[236] The U.S. concept is broad, also encompassing the fact that any statute may demand further rules detailing how officials shall apply its provisions.[237] Furthermore, delegation may either operate retroactively, when Congress passes legislation (even in the form of budgetary appropriation) ratifying an already adopted directive,[238] or be implied from

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[231] *See* U.S. CONST. art. II, § 2. *See also* GRABER, *supra* note 11, at 5 ("[e]xecutive orders premised at least in part upon the President's constitutional authority often involve foreign relations or military matters"). But, for instance, declarations of war and appropriations are typically matters for Congress. *See* U.S. CONST. art. I, § 8, cl. 11, and § 9, cl. 7.

[232] *See* GRABER, *supra* note 11, at 2; Levinson and Balkin, *supra* note 10, at 1813.

[233] *See* GRABER, *supra* note 11, at 17–18.

[234] *See id.* at 18; HOWELL, *supra* note 224, at 15.

[235] *See* GRABER, *supra* note 11, at 18; HOWELL, *supra* note 224, at 15.

[236] In France, for instance, "[i]n order to implement its programme, the Government may ask Parliament for authorization, for a limited period, to take measures by Ordinance that are normally the preserve of statute law." 1958 CONST. art. 38 (Fr.), translated in *Constitution of 4 October 1958*, CONSEIL CONSTITUTIONNEL, https://www.conseil-constitutionnel.fr/en/constitution-of-4-october-1958 (last visited Jan. 25, 2024).

[237] *See* FERREIRA FILHO, *supra* note 159, at 160–166; Levinson and Balkin, *supra* note 10, at 1813.

[238] *Cf., e.g.,* Isbrandtsen-Moller Co. v. United States, 300 U.S. 139, 146-48 (1937) (addressing a challenge on whether a 1933 executive order could transfer to the Department of Commerce attributions that once were under the responsibility of the Shipping Board, the Court stated that "Congress appears to have recognized the validity of the transfer and ratified the President's action by the appropriation acts of April 7, 1934, March 22, 1935, and May 15, 1936;" additionally, remarking that "by the Merchant Marine Act of 1936, § 204(a), the functions of the

legislators' inaction.[239] The latitude of the concept is then way wide, though Supreme Court decisions have been trying to narrow it, demanding previous express legislative authorization for "major questions," those involving considerable political and economic impact.[240]

Attributing "the force of law" to directives possibly resulted from concerns related to emergencies combined with the expansion of the administrative and regulatory state.[241] Pursuant to the separation of powers' original scheme, the executive shall not have lawmaking powers but shall carry out laws passed by representatives.[242] Concretely, however, general prescriptions established in statutes typically leave several questions open as to their implementation.[243] It is then necessary to issue further guidance to officials and citizens, a task that rests primarily on the head of the government.[244] Ideally, executive directives shall not innovate

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former Shipping Board are referred to as 'now vested in the Department of Commerce pursuant to § 12 of the President's Executive Order No. 6166'").

[239] *See* GRABER, *supra* note 11 (at the summary).

[240] For a critique of the approach toward delegation in the United States, *see generally* Gary Lawson, *The Rise and Rise of the Administrative State*, 107 HARVARD LAW REVIEW 1231 (1994). For the Major Question Doctrine, *see* West Virginia v. Environmental Protection Agency, 597 U.S. 697 (2022); BOWERS, K.R., CONGRESSIONAL RESEARCH SERVICE, IF12077, THE MAJOR QUESTIONS DOCTRINE (2022), https://crsreports.congress.gov/product/pdf/IF/IF12077 (last visited Apr. 21, 2024); Kevin Tobia, Daniel E. Walters & Brian Slocum, *Major Questions, Common Sense?*, 97 SOUTHERN CALIFORNIA LAW REVIEW (forthcoming 2024) (Aug. 18, 2023 manuscript at 3) (on file with authors).

[241] *Cf.* Levinson and Balkin, *supra* note 10, at 1813 (stating that "[b]oth the administrative and regulatory state on the one hand, and the National Security State, on the other, offer plenty of opportunities for decisive [executive] action").

[242] *See* CHARLES DE SECONDAT, BARON DE MONTESQUIEU, THE SPIRIT OF THE LAWS 156–166 (Anne M. Cohler, Basia Carolyn Miller, & Harold Samuel Stone trans., 1989) (bk. 11, ch. 6) (but notice that, at p. 164, Montesquieu concedes that the executive shall have veto powers); Goldie, *supra* note 31, at 447; Peter L. Strauss, *The Place of Agencies in Government: Separation of Powers and the Fourth Branch*, 84 COLUMBIA LAW REVIEW 573, 596 (1984).

[243] *Cf.* JAMES M. LANDIS, THE ADMINISTRATIVE PROCESS 51 (1938) (referring to legislation's "vague phraseology").

[244] *Cf.* Steven G. Calabresi & Saikrishna B. Prakash, *The President's Power To Execute the Laws*, 104 THE YALE LAW JOURNAL 541, 593 (1994) (stating that "the text of the Constitution confers on the President the exclusive power to superintend the execution of all federal laws"); Elena Kagan, *Presidential Administration*, 114 HARVARD LAW REVIEW 2245, 2249 ("Clinton regularly issued formal directives to the heads of executive agencies to set the terms of administrative action and prevent deviation from his proposed course."). *But cf.* Lawrence Lessig & Cass R. Sunstein, *The President and the Administration*, 94 COLUMBIA LAW REVIEW 1, 2

beyond the framework that emanates from the legislature.[245] For instance, a statute might fix an income tax according to a specific formula but might not state how and when citizens must abide by such an obligation. In this case, a presidential act may stipulate the form and moment of accomplishment but cannot create another duty, like a property tax. In this sense, the executive performs a regulatory or administrative function, not a lawmaking one.

Nonetheless, as societies grew in size and complexity, so did the need for countless rules addressing such a reality.[246] Generally, on the one hand, parliaments' ability to deliver legislation dealing with vast and intricate topics faces restrictions.[247] The limits refer to the nature of the legislative business, which is more akin to prolonged discussions among equals, often with opposing and non-specialized approaches to matters under scrutiny. On the other hand, expertise and a more vertical structure tend to favor administrative or regulatory agencies and personnel in handling some contemporary problems.[248] Consequently, while statutes may become too generic or leave too many holes, directives may expand to fill the gaps.[249] Ultimately, the regulatory or administrative activity may invade the lawmaking function, blurring the distinction between them.[250]

(1994) (claiming that the view according to which the U.S. President holds control over all the executive branch does not find support in the Constitution, as the existence of "special counsels, independent agencies, and other such exceptions" would demonstrate).

[245] *See* FERREIRA FILHO, *supra* note 159, at 160–161.

[246] *Cf.* Mistretta v. United States, 488 U.S. 361, 372 ("our jurisprudence has been driven by a practical understanding that in our increasingly complex society, replete with ever changing and more technical problems, Congress simply cannot do its job absent an ability to delegate power under broad general directives").

[247] *Cf. id.*

[248] Referring to expertise, *see* LANDIS, *supra* note 243, at 23–24.

[249] *See* MORTON J. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW, 1870-1960 223 (1992).

[250] *Cf.* William N. Eskridge Jr. & John Ferejohn, *Making the Deal Stick: Enforcing the Original Constitutional Structure of Lawmaking in the Modern Regulatory State*, 8 THE JOURNAL OF LAW, ECONOMICS, AND ORGANIZATION 165, 165 (1992) ("Today, most national public policy is made by administrative agency regulations and not by direct statutory enactment. The lawmaking role of agencies has complicated American constitutional law generally, presenting issues not anticipated by the framers of the Constitution."); *id.* at 167 ("[A]gencies are themselves greatly influenced or even controlled by the president, the dynamics of statutory policy evolution – whether through agency lawmaking or interpretation – will be more heavily weighted toward the president's political preferences than is indicated by the structure of Article I, Section 7 [of the

Such a development is not foreign to other legal systems but might have had a more significant impact in the United States.[251] There may be at least three reasons behind such an outcome. First, passing legislation through ordinary means seems exceedingly challenging in the country. Thus, for example, "[a]fter losing major legislative battles, Clinton repeatedly rebounded with a series of steady, incremental reforms, each unilaterally imposed."[252] Notably, the filibuster – a rule requiring the agreement of a 60% supermajority in the Senate for a bill to proceed from deliberation to the voting stage – poses a considerable obstacle to the legislative process, even more so in times of intense polarization.[253] Second, the Constitution provides no emergency instruments like decree laws or provisional measures.[254] Finally, the constitutional text is generic, lacking specific provisions on the regulatory or administrative functions.[255] All in all, the room was open for a kind of interpretive imagination that empowered the U.S. executive branch through the route of presidential directives.

Pressing circumstances have decisively enhanced the trend. In the nineteenth century, President Lincoln largely took advantage of his unilateral prerogatives to cope with the Civil War on the basis of necessity.[256] Later, amidst the 1930s

Constitution]. This phenomenon risks giving the president more lawmaking power than the Constitution contemplates.").

[251] *See* FERREIRA FILHO, *supra* note 159, at 163.

[252] HOWELL, *supra* note 224, at 5.

[253] *See* STANDING RULES OF THE SENATE r. XXII(2), S. DOC. NO. 113-18 (2013), https://www.rules.senate.gov/imo/media/doc/CDOC-113sdoc18.pdf (last visited Jan. 5, 2023); Sanford Levinson & Jack M. Balkin, *Democracy and Dysfunction: An Exchange*, 50 INDIANA LAW REVIEW 281, 325 (2016); Gillian E. Metzger, *Agencies, Polarization, and the States*, 115 COLUMBIA LAW REVIEW 1739, 1745, 1748, and 1757 (2015).

[254] *See* HOWELL, *supra* note 224, at 7; Levinson and Balkin, *supra* note 10, at 1810.

[255] *See* Tom Ginsburg, *Written Constitutions and the Administrative State: On the Constitutional Character of Administrative Law*, *in* COMPARATIVE ADMINISTRATIVE LAW 60, 66–67 (Susan Rose-Ackerman, Peter L. Lindseth, & Blake Emerson eds., 2017); Emily S. Bremer, *The Unwritten Administrative Constitution*, 66 FLORIDA LAW REVIEW 1215, 1217, 1221–1222 (2014); Gillian E. Metzger, *Embracing Administrative Common Law*, 80 GEORGE WASHINGTON LAW REVIEW 1293, 1336–1337 (2012); Strauss, *supra* note 242, at 597–598.

[256] *Cf.* JAMES G. RANDALL, CONSTITUTIONAL PROBLEMS UNDER LINCOLN 26 (1926) ("The inevitable appeal from law to necessity was, of course, frequently presented during the Civil War."); *id.* at 513–514 ("Probably no President . . . carried the power of presidential proclamation and executive order so far as did Lincoln. . . . It thus appears that the President, while greatly enlarging his executive powers, seized also legislative and judicial functions as well."); CLINTON L. ROSSITER, CONSTITUTIONAL DICTATORSHIP 233 (1948) ("It appears that he

economic crisis (following the 1929 crash) and World War II, the Franklin Roosevelt era, with the blessing of the Supreme Court,[257] consolidated the pattern of governing through original (directly derived from the Constitution) or delegated emergency powers.[258] More recently, President G.W. Bush's measures after the attacks on September 11, 2001, also offered a good example of the phenomenon.[259] Invariably, executive acts raise founded concerns as to their legality, like in the case of the "war on terror," including the creation of a court system where trials could be held out of public scrutiny, and suspects were devoid of the "protections afforded most individuals accused of crime."[260] Governmental recourse to extraordinary (and often controversial) faculties has been so emblematic in the United States that it raises fears of "demagoguery, political failure, or both," risking sliding its emergency regime "into patently unconstitutional dictatorship."[261]

As previously mentioned, such a regime differs from its ancient Roman counterpart in at least two fundamental aspects.[262] In Rome, the authority exercising exceptional powers, the dictator, was not the same in charge of declaring the emergency, a task that rested upon the Senate. Additionally, the assignment of exceptional powers was valid for a fixed and relatively short period. Generally, these restrictions do not apply to modern democracies, and the American one is no exception.[263] In 1976, the National Emergencies Act, still in force, imposed some

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[Lincoln] considered himself constitutionally empowered to do just about anything that the necessities of the military situation demanded."); *id.* at 234 ("[H]e went further and asserted his competence to do things in an emergency that Congress could never do at all."); Levinson and Balkin, *supra* note 10, at 1815 ("Until recent times, the clearest example of a constitutional dictator was Abraham Lincoln."). *But cf.* Mattie, *supra* note 46, at 81 (claiming that "Lincoln not only sought to secure the conditions for the rule of law but also acted to a great degree according to the law").

[257] *Cf.* CLIFF SLOAN, THE COURT AT WAR: FDR, HIS JUSTICES, AND THE WORLD THEY MADE 6 (1st ed. 2023) (addressing the Court's fidelity to the then President).

[258] *See* Levinson and Balkin, *supra* note 10, at 1835–1836.

[259] *See* HOWELL, *supra* note 224, at 4; Levinson and Balkin, *supra* note 10, at 1837.

[260] HOWELL, *supra* note 224, at 2.

[261] Levinson and Balkin, *supra* note 10, at 1851, 1866. An "unconstitutional dictatorship" obviously stands in opposition to a constitutional one. The latter serves "as the general descriptive term for the whole gamut of emergency powers and procedures in periodical use in all constitutional countries." ROSSITER, *supra* note 256, at 5.

[262] *See supra* Section 2.2.1.

[263] *See id.*

boundaries on the executive.[264] Among other measures, the statute established that an emergency declaration is valid for a year and that Congress can propose its earlier end.[265] Yet, the efficacy of such provisions is disputable for two reasons. First, concerning the one-year term, the President can renew it as many times as she deems it necessary.[266] Second, the legislature's intervention is subject to the presidential veto.[267] As already noticed, such a fact considerably limits representatives' and senators' ability to check on an action from the executive.[268] In light of these considerations, it seems that further arrangements would be necessary to restrain the U.S. government's unilateral powers.

In Brazil, Italy, and the United States, there are concerns as to the misuse or abuse of fast-track lawmaking procedures under emergencies. Despite varying degrees of limitation upon the executive's capacity to enact new legislation, all three countries face political and legal challenges concerning the matter. In the next section, this text will deliver an assessment of the situation in light of the legal nature of the legislative process.

4. Assessment and Remedies

4.1. Incompatibility between the misuse of emergency lawmaking and the legal nature of the legislative process

The misuse of expedited procedures is not compatible with the legal nature of the legislative process.[269] Although they may look like the only solution to advance

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[264] *See* 50 U.S.C. §§ 1601-1651 (2021), https://www.govinfo.gov/app/details/USCODE-2021-title50/USCODE-2021-title50-chap34 (last visited Jan. 16, 2024) (henceforth, the online source is omitted); L. ELAINE HALCHIN, CONGRESSIONAL RESEARCH SERVICE, 98-505, NATIONAL EMERGENCY POWERS 8–11 (2021).

[265] *See* 50 U.S.C. § 1622(a), (d); HALCHIN, *supra* note 264, at 11.

[266] *See* 50 U.S.C. § 1622(d); HALCHIN, *supra* note 264, at 11.

[267] *See* 50 U.S.C. § 1622; HALCHIN, *supra* note 264, at 11, 20.

[268] *See* GRABER, *supra* note 11, at 18; HOWELL, *supra* note 224, at 15.

[269] This statement applies not only to emergencies but also any situation where timing is sensitive, as is the case of the budget process, where typically appropriations demand annual legislative consent. For an account of worldwide preference for annual budget cycles instead of larger periods, *see* AMAN KHAN, FUNDAMENTALS OF PUBLIC BUDGETING AND FINANCE 155 (2019); RICHARD KOGAN, ROBERT GREENSTEIN & JAMES HORNEY, CENTER ON BUDGET AND POLICY PRIORITIES, BIENNIAL BUDGETING: DO THE DRAWBACKS OUTWEIGH THE ADVANTAGES?

a public policy, their use for objectives they are not drawn to equals arbitrary manipulation. As such, their wrong application is not fair concerning opposing lawmakers.[270] Concededly, some may think the other way around, arguing that what is unfair is having no possibility of passing a right cause.[271] However, a cause's righteousness is usually disputable.[272] Additionally, one who deems it appropriate to take unduly advantage of fast-track procedures for a specific purpose may well complain when the same strategy serves a policy she does not defend.[273] Moreover, even before not-so-controversial issues, people may disagree about the legal solutions to tackle them, which may require more time to reach a deal or to improve the wording. This latter justification may seem silly, but it is paramount. As long as expedited lawmaking puts drafters and politicians in a hurry, dubious or imprecise provisions may result. In conclusion, the unjustified use of expeditious procedures may undermine legal certainty and the legislative process's fairness regarding opposing legislators.

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4 (2012), https://www.cbpp.org/research/biennial-budgeting-do-the-drawbacks-outweigh-the-advantages#:~:text=Proponents%20of%20biennial%20budgeting%20present,an%20unwise%20course%20to%20pursue. (last visited Jul. 30, 2023); Guohua Huang & Holger van Eden, *The Timing of the Government's Fiscal Year*, I.M.F.: PUBLIC FINANCIAL MANAGEMENT BLOG (Oct. 20, 2016), https://blog-pfm.imf.org/en/pfmblog/2016/10/the-timing-of-the-governments-fiscal-year (last visited Aug. 11, 2023).

[270] For complaints about the misuse of expeditious procedures, *see* FERREIRA FILHO, *supra* note 159, at 237 (on the use of decree laws or provisional measures in Brazil)]; WALTER J. OLESZEK ET AL., CONGRESSIONAL PROCEDURES AND THE POLICY PROCESS 57, 72–74 (11th ed. 2020] (on the U.S. federal budget].

[271] About general legislative affairs, not only those dealing with fast-track procedures, c*f.*, *e.g.*, Thomas B. Reed, *Reforms Needed in the House*, 150 THE NORTH AMERICAN REVIEW 537, 538 (1890) ("When, in 1881, the members of the Home-Rule party [an Irish party] for forty-one hours had exercised their undoubted parliamentary privileges of addressing the [British House of Commons] and making motions, and had for forty-one hours stopped the business of the country, the Speaker refused longer to entertain motions unquestionably parliamentary, refused even the right of debate, and summarily broke up the obstruction. He did it without the action of the House, with no precedent in his favor, and nothing to sustain him but the common-sense of the English people."). Notice that Thomas B. Reed was the then Speaker of the U.S. House. After his remark about the British case, he asked: "[W]hy could not an American presiding officer without reproach do the same?" *Id.* at 538.

[272] *See* Jeremy Waldron, *Principles of Legislation*, *in* THE LEAST EXAMINED BRANCH 15, 16–17, 26 (Richard W. Bauman & Tsvi Kahana eds., 2006).

[273] *Cf.* Jonathan S. Gould, *Law Within Congress*, 129 THE YALE LAW JOURNAL 1946, 1958 (2020) (pointing that "today's majority might well be tomorrow's minority").

In cases where the executive is in charge of taking the lead by adopting measures (provisional ones, decrees, presidential directives, executive orders, or anything alike) with the force of law, there is a natural disbalance in its favor.[274] To a certain extent, empowering a leader to work around extraordinary risks[275] is justified since emergencies are unavoidable and may represent a threat.[276] Moreover, it is not possible to foresee, through regular prior legislation, what is necessary to do in every crisis.[277] Therefore, it is plausible to cede power to the executive branch in cases such as a terrorist attack or a pandemic. However, along with preserving some fundamental rights, such a cession should be limited to the alarming situation.[278] Consequently, legislating via emergency shortcuts cannot become a permanent governmental technique by transforming alleged extreme necessities into a source of the law (in lieu of the regular legislative process),[279] increasing procedural unfairness (in relation to opposing lawmakers), and legal uncertainty (for the citizenry as a whole).[280]

4.1.1. Misusing or abusing emergency lawmaking tools is unlawful

These introductory lines point out that legislating through urgency mechanisms may be grounded in law, on the one hand, but be unlawful on the other hand. A similar statement has already appeared in this text, but the issue here is different. Previously, it was remarked that an exceptional act having the force of law is "legal and illegal at the same" time, according to Santi Romano.[281] In his approach, such an act might not find support in or might even run against the current juridical framework. Notwithstanding, its legality would lie on necessity (or the public good

[274] *See* AGAMBEN, *supra* note 56, at 7; FERREIRA FILHO, *supra* note 159, at 237; HOWELL, *supra* note 224, at 1–4.

[275] *See* Schmitt, *supra* note 59.

[276] *See* Scheuerman, *supra* note 57, at 62–63.

[277] *See* SCHMITT, *supra* note 58, at 6.

[278] *Cf.* AGAMBEN, *supra* note 56, at 25 (referring to "a particular case"); Ferejohn and Pasquino, *supra* note 24, at 334 (stating that where the matter is regulated, "constitutions only authorize the invocation of [emergency] regimes if a certain factual circumstance has occurred").

[279] *See* AGAMBEN, *supra* note 56, at 6–7.

[280] *Cf.* FERREIRA FILHO, *supra* note 159, at 239 (stating that provisional measures in Brazil became a source of "very serious legal uncertainty") (the translation is mine).

[281] *See supra* Section 2.2.4.

if the theoretical foundation comes from Locke), the law's ultimate source.[282] Alternatively, as per Carl Schmitt's rationale, the act, a decision addressed to the state's preservation, would also stand valid *contra legem*, eventually founding a new legal regime.[283] Under those or resemblant theories, the emergency measure's lawfulness derives from its acceptance as a legitimate lawmaking route regardless of regulations on the matter. Under a wholly distinct viewpoint, the claim now flips the argument upside down. Accordingly, the extraordinary measure is lawful only if legal provisions uphold it. By the time the act extrapolates its foundations' limits, lawfulness vanishes even if necessity would recommend adopting it.

Such a formulation corresponds to the rule-of-law perspective applied to extraordinary circumstances.[284] As anteriorly explained, Schmitt built his theory concerning the state of exception by questioning the liberal suppositions that the law could encompass all situations affecting human life and operate by itself, dispensing the need for reliance on a decision-maker hovering above disputes within society.[285] In other words, he doubted the legal realm could work as the natural world, where, according to science, events occur under established rules and, as such, do not depend on any outside intervention.[286] Sounding as it may be, this skepticism towards the liberal paradigm, coupled with doctrines taking decisionism, necessity, or the public good as fundamental legal sources, might end up justifying or fostering authoritarian or totalitarian governments, as in Nazi Germany. In the face of such a hazard, legal liberalism reinforced its standing by proposing that the legal framework incorporates emergency regimes.[287] Generally, where such a movement translates into written provisions, states count on constitutional or statutory clauses regulating the state of war, the state of siege, and the like. Regarding the legislative function, such clauses typically rule expedited procedures, sometimes subverting the separation of powers and attributing the primacy in lawmaking to the executive, as in the case of decrees or measures with the force of law. All in all, the purpose is to leave no situation, even extraordinary ones, out of the rule of law's range.

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[282] *See id.*

[283] *See supra* Section 2.2.3.

[284] *See* Vauchez, *supra* note 4, at 1802.

[285] *See supra* Section 2.2.3.

[286] *See id*.

[287] *See* Vauchez, *supra* note 4, at 1802.

4.1.2. Machiavelli on the risks that unlawful emergency measures pose

Way before Locke's, Carl Schmitt's, or Santi Romano's theorizations, Machiavelli had already diagnosed the perils that modern societies would witness and sketched the rule-of-law approach to emergencies. Praising ancient Rome's arrangement, he claimed that "the dictatorship, as long as it was bestowed in accord with public laws and not by private authority, always benefited the city." Referring to acts that do not find support in the applicable legal framework, he stated that "in a republic, it is not good for anything to happen which requires governing by [unlawful] measures."[288] On the one hand, he conceded that an illegal move "may be beneficial at a certain moment."[289] On the other hand, he remarked that such exceptionalism "nevertheless causes harm, because if one establishes the habit of breaking the laws for good reasons, later on, under the same pretext, one can break them for bad reasons."[290] Then, he anticipated the liberal perspective on the matter, noticing that "no republic will ever be perfect unless its laws contain a provision for everything and establish a remedy for every circumstance and set up a means for dealing with it."[291] Summing up, Machiavelli's conclusion was twofold. First, he realized that it is "the granting of power by [unlawful] means which harm republics, not those which are created by [legal] means."[292] Then, he proposed "that those republics which have no recourse during the most pressing dangers either to a [constitutional] dictator or to some similar authority will always come to ruin during serious misfortunes."[293]

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[288] MACHIAVELLI, *supra* note 21, at 95 (ch. 34). Machiavelli uses "extraordinary measures" in lieu of "unlawful measures." I replaced one adjective with the other to avoid confusion. After all, I refer to extraordinary measures that count with legal support. The difference between them and ordinary ones is that the former, though also lawful, shall only apply to exceptional circumstances.

[289] *Id.*

[290] *Id.* at 95.

[291] *Id.*

[292] *Id.* at 94 (ch. 34).

[293] *Id.* at 95–96 (ch. 34).

4.1.3. The recourse to lawmaking tools under emergencies is appealing

The problem with the rule-of-law solution is that it may be difficult to define clear boundaries for using exceptional tools. For instance, the Brazilian and Italian constitutional provisions giving heads of the executive power to enact measures with the force of law refer to "urgency," "necessity," and "relevance."[294] Although it may be undoubtful that such concepts evoke gravity, people may well disagree whether a circumstance is severe enough to unleash the emergency curatives. Divergence might be even deeper concerning the extent to which governments may use these instruments. Possibly, almost no one would deny that a war against a powerful enemy would justify the recourse to extravagant legal mechanisms, albeit one could pose that terrorism would only require softer versions of them.[295] Still, in both cases, there could be a lot of opposition to acts that eventually compromise fundamental guarantees, such as due process or *habeas corpus*. A further instance relates to diseases. Many understood that the Covid-19 pandemic could actually trigger unorthodox remedies, but the case would be way distinct if the infirmity were less dangerous. Besides, criticism of curfews and other impositions was not neglectable.[296] On the one hand, these examples show how construing emergency provisions may be challenging. On the other hand, they also reveal ample room for

[294] C.F. 1988, *supra* note 4, art. 62 (Braz.); art. 77 Cost. (It.), *supra* note 8.

[295] *See* Ackerman, *supra* note 3, at 1037, 1040.

[296] *See generally* GIORGIO AGAMBEN, WHERE ARE WE NOW? THE EPIDEMIC AS POLITICS 7–10 (Valeria Dani tran., 2021) (referring to the health protection measures in Italy during the Covid-19 pandemic as a "sanitation terror"); Nicola Canestrini, *Covid-19 Italian Emergency Legislation and Infection of the Rule of Law*, 11 NEW JOURNAL OF EUROPEAN CRIMINAL LAW 116 (2020) (addressing the risk of rights violation, especially concerning criminal law); Amanda L. Tyler, *Judicial Review in Times of Emergency: From the Founding Through the Covid-19 Pandemic*, 109 VIRGINIA LAW REVIEW 489, 593 (2023) (mentioning that the U.S. Supreme Court, though inconsistently, struck down several regulations addressing Covid-19, "most especially those involving religious freedom claims"). *But see* JOELLE GROGAN, EUROPEAN PARLIAMENT, POLICY DEPARTMENT FOR ECONOMIC, SCIENTIFIC AND QUALITY OF LIFE POLICIES, STUDY REQUESTED BY THE COVI COMMITTEE, IMPACT OF COVID-19 MEASURES ON DEMOCRACY AND FUNDAMENTAL RIGHTS 37 (2022), https://www.europarl.europa.eu/thinktank/en/document/IPOL_STU(2022)734010 (last visited Jan. 10, 2024) (finding that "[w]hile concerns for the misuse or abuse of emergency powers are well founded, there is no clear or evidenced connection in EU [European Union] Member States between the use of emergency powers and practices detrimental to fundamental rights and the rule of law").

obtaining advantages from the tools originally designed to tackle pressuring scenarios.

Notably, there seems to be a vast opportunity to legislate through the urgency regime. The immediate benefit resides in avoiding the burdens of regular legislative procedures. In a democratic environment, governments (or representatives on their behalf) proposing a bill typically need to negotiate its content with lawmakers.[297] The bargain usually evolves around several questions: personal preferences, constituents' or the society's interests, party leaders' standing, electoral campaigns' funding, previous commitments, and so on.[298] It can include favor exchanges concerning different amendments or bills (when a politician votes for a matter under the promise that a peer will vote for another one), budget execution (when a lawmaker exchanges a favorable vote for disbursement aiding her constituency), or nominations for specific positions in the public administration.[299] Additionally, illegal practices such as bribery may play a role in the business.[300] Summarizing, dependence on a parliament might be emotionally and politically costly for those mostly willing to pass new legislation. Therefore, legislating through the emergency track seems resistless. After all, an act equivalent to a statute arises from a decision whose enactment depends exclusively or almost exclusively on a single person. Even though confirmation from the legislature may be necessary to maintain such an act effective after a given period, the advantages for the executive and its allies are glaring.

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[297] *Cf.* WILLIAM N. ESKRIDGE JR., ABBE R. GLICK & VICTORIA F. NOURSE, STATUTES, REGULATION, AND INTERPRETATION 2, 11, 17 (2014) (generically referring to compromise amidst the production of legislation); Eric C. Alston, Lee J. Alston & Bernardo Mueller, *New Institutional Economics and Cliometrics*, loc. C (National Bureau of Economic Research, Working Paper No. 30924, 2023) (stating that "[i]n many countries the interaction between the Executive and the Legislative branch is the main determinant of the nature and quality of laws and policy").

[298] *Cf.* Ittai Bar-Siman-Tov, *Lawmakers as Lawbreakers*, 52 WILLIAM AND MARY LAW REVIEW 805, 828 (2010) (mentioning an assumption according to which legislators pursue multiple goals in lawmaking); Jonathan S. Gould, *The Law of Legislative Representation*, 107 VIRGINIA LAW REVIEW 765, 776 (2021) (describing legislators as responsive to "constituents, interest groups, and party leaders").

[299] *See, e.g.,* Lee J. Alston & Bernardo Mueller, *Pork for Policy: Executive and Legislative Exchange in Brazil* (National Bureau of Economic Research, Working Paper No. 11273, 2005).

[300] *Cf, e.g.*, THOMAS E. MANN & NORMAN J. ORNSTEIN, THE BROKEN BRANCH: HOW CONGRESS IS FAILING AMERICA AND HOW TO GET IT BACK ON TRACK 3–4 (2008) (referring to bribery accusations in the U.S. Congress).

4.1.4. Harming the due process of lawmaking

Notwithstanding, measures adopted with the force of law by the head of government or state should only be an exception. Otherwise, a thorough subversion of the separation-of-powers principle and its checks-and-balance corollary occurs. Concededly, a disbalance in favor of the executive may be less troublesome where legislatures somehow maintain an overseeing capacity via strict delegation (where they strictly define the executive's action's reach in advance), conversion (where they approve or reject the action after its enactment), or the like. Nonetheless, habitual recourse to the expedited regime, as if the nation were in a permanent state of alarm,[301] seriously risks furthering the democratic deficit and legal uncertainty.[302] Concerning the former risk, that is so because the government's measures may seem or be arbitrary.[303] Regarding the latter, doubt may often arise as to the validity and meaning of the resulting provisions, adopted suddenly or in a rushed fashion and for a limited time.[304] For these reasons, ordinary resort to emergency lawmaking tools does not seem to fit well in the democratic rule-of-law paradigm.[305]

Relatedly, and more specifically, the abuse of these instruments risks compromising the due process of lawmaking. Along with threats to the legal order, the concepts of "necessity" or "emergency" may end up encompassing ordinary governmental programs or agendas.[306] Truly, there may be a sense of hurry to address social needs, even more so if the electoral calendar is pressing. There is nothing illegitimate in this regard. However, democracy and the rule of law demand compliance with procedures for the sake of broad participation in decision-making

[301] *See* AGAMBEN, *supra* note 56, at 2, 6–7.

[302] *Cf.* Pierre de Montalivet, *L'Inflation Des Ordonnances* [*The Inflation of Ordinances*], 133 REVUE DU DROIT PUBLIC 37, 43–44 (2017) (addressing the French case, where ordinances are not limited to emergencies; of course, the criticism can extend to instruments whose use is even more restricted).

[303] *See* Ackerman, *supra* note 3, at 1044.

[304] About the subject, a scholar remarks that "a new area of knowledge was created in Brazilian law, provisional law. Hence, which statutes are in force on each day of the year is not known, since everything can be modified, as in the blink of a light." COSTA AND ALVES, *supra* note 175, at 201 (the translation is mine).

[305] *Cf.* AGAMBEN, *supra* note 56, at 7 (affirming that abusing emergency powers threatens democracy); Vauchez, *supra* note 4, at 1819 (stating that "contemporary SOEs [states of emergency] deserve to be included in the vast array of those 'abusive' forces that threaten the ideal of liberal constitutionalism from the inside").

[306] *See supra* Section 3.

and fairness among contenders.[307] Concededly, election or lawmaking rules may fall short of effectively transforming overall aspirations into legislation or public policies.[308] Nevertheless, in such a case, the solution would be fixing representation channels, not unduly short-circuiting allegedly flawed processes.[309] In light of the legal nature of the legislative process, misusing the expedited route seems not only inappropriate but unlawful, and politicians should avoid the practice, exercising self-control.[310]

4.1.5. A challenge for legislatures

Admittedly, a plea for compliance with procedural rules may not suffice. Some lawmakers may prefer to ride a fast-track opportunity.[311] Others may be tied by partisan commitments to the forces bypassing the regular path.[312] Others still may not be powerful enough to impose the proper route.[313] Whatever the reason, the legal nature of the legislative process demands rule enforcement tools. In part 2, some were proposed: non-partisan chairing, advice provided by tenured experts counting on freedom of speech, parliamentarians counting on similar guarantees, and maybe offering opinions on a collective basis. Such solutions serve for lawmaking procedures in general and, obviously, for expedited ones. Likewise, sometimes it may also be necessary to resort to the judicial branch.[314] Concededly, adjudicating in the case of emergencies may be particularly challenging because it may demand

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[307] *See supra* Part II, Sections 2.1 and 2.2.

[308] *See id.*

[309] *But see* Marc Guillaume, *Les Ordonnances: Tuer ou Sauver la Loi?* [*The Ordinances: Kill or Save the Law?*], 114 POUVOIRS 117, 128–129 (2005) (stating that ordinances based on article 38 of the French Constitution, acts similar to delegated legislation, may be an alternative to regular lawmaking in a time where parliaments are overwhelmed by numerous and complex issues).

[310] *Cf.* Montalivet, *supra* note 302, at 45 (stating that a behavioral change seems to be the best remedy to circumvent the misuse of alternative lawmaking instruments, like the French ordinances).

[311] *Cf.* OLESZEK ET AL., *supra* note 270, at 57 (referring to riding opportunities in the budget process).

[312] *See* Bar-Siman-Tov, *supra* note 298, at 843–848.

[313] *See id.* at 865.

[314] *See* Ferejohn and Pasquino, *supra* note 24, at 342–347; FERREIRA FILHO, *supra* note 159, at 238, 242.

a kind of assessment that some would deem as typically political.[315] However, even in this case, the situation is not merely political, and there may be room for the courts' evaluation.[316]

Decree laws, provisional measures, or the like are particularly challenging regarding compliance with procedural regulations. Specifically, the cornerstone is whether an urgent intervention is really necessary. In the first moment, the decision-making authority over such an issue lies outside the legislature, depending almost entirely on the executive chief's evaluation. Plainly, lawmakers can assess the case afterward, but the question is twofold. First, those instruments have the force of law. In other words, they produce legal effects, like statutes, immediately after their enactment, before any discussion in parliament. Second, though possibly in the short run, legislators' final say will only take place after a couple of days or months, depending on the applicable procedural rules. These considerations are even more striking where no sunset clauses apply, as in the case of Brazil prior to 1988, or successive re-enactments occur, as in Italy and Brazil before 1996 and 2001, respectively.[317] Anyway, the government rests in a very advantageous position where the initial appraisal of the circumstances justifying lawmaking through emergency instruments is its attribution. Ultimately, barring the abuse or misuse of such mechanisms may be relatively complicated for the legislature.

4.2.Possible political and judicial remedies

4.2.1. Possible political remedies for the United States, according to the scholarship

In the United States, the initial version of the 1976 National Emergencies Act provided legislators with greater overseeing capacity. Originally, Congress could finish a declared state of emergency with no presidential assessment.[318] However, in 1983, the Supreme Court concluded that the legislative could not unilaterally

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[315] *See* Ferejohn and Pasquino, *supra* note 24, at 342–347; FERREIRA FILHO, *supra* note 159, at 238, 242.

[316] *See* Ferejohn and Pasquino, *supra* note 24, at 342–347; FERREIRA FILHO, *supra* note 159, at 238, 242.

[317] *See supra* Sections 3.2 and 3.3.

[318] *See* 50 U.S.C. § 1622 (editorial notes); HALCHIN, *supra* note 264, at 11, 20.

overcome a measure from the executive.[319] In light of such a case law, that statute was amended in 1985, granting the President veto power over lawmakers' decision to terminate the state of emergency.[320] Plainly, reinstating the earliest statutory text would re-empower Congress, but this solution would depend on a change of the Supreme Court's position concerning "legislative vetoes." As this topic is broad, encompassing any governmental act, an eventual change seems less likely than if the issue were strictly about alarming scenarios. That is so because a general re-evaluation of the branches' relationship, particularly addressing the presentment clause,[321] would be at stake, not simply emergency declarations. Therefore, reformers would probably need to find another way to constrain the executive.

Relatedly, the scholarship proposes mechanisms to enhance non-judicial checks on the U.S. government's use of exceptional faculties. On the one hand, a suggestion refers to "the creation of an Emergency Council whose consent would be required to declare the existence of a state of emergency."[322] To keep the body away from partisan disputes, the proponents of the idea state that "[t]he model might be the Federal Reserve Board, which is relatively independent from the President and Congress, and uses its expertise to manage the money supply in the public interest."[323] To make such an intent feasible, the council should possibly count with "bipartisan support" as to its composition and operation design.[324] This proposal would privilege a more technocratic solution in comparison to a political one.

On the other hand, an option could be directly empowering the legislative. One alternative would consist in reducing the maximum period of the state of emergency and demanding that its extension could only occur upon Congress's consent.[325] Under such a mechanism, lawmakers would have an opportunity to assess the situation, for instance, every other bimester, trimester, or the like, according to the novel maximum term.[326] Still, a further procedural check should be introduced to avoid the risk of successive renewals resulting just from political conveniences but no more from pressing circumstances, as in the cases of the Brazilian and Italian

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[319] *See* Immigration and Naturalization Service v. Chadha, 462 U.S. 919 (1983).

[320] *See* 50 U.S.C. § 1622 (editorial notes); HALCHIN, *supra* note 264, at 11, 20.

[321] *See* U.S. CONST. art. I, § 7, cl. 2.

[322] Levinson and Balkin, *supra* note 10, at 1864.

[323] *Id.*

[324] *Id.* at 1864–1865.

[325] *See* Ackerman, *supra* note 3, at 1047–1048.

[326] *See id.*

experiences concerning provisional measures or decree laws. The additional check would be that "an escalating cascade of supermajorities" should be necessary to approve the continuation of the exceptional regime.[327] Supposing that emergency could be valid for no longer than a bimester, the arrangement could require, for example, "sixty percent for the next two months; seventy for the next; eighty thereafter."[328] Allegedly, with such thresholds, the legislature could maintain effective oversight of executive acts in the United States.[329]

4.2.2. Possible remedies in the cases of decree laws or provisional measures

Legislative arrangements

Other types of arrangements could be in place where decree laws or equivalent tools trigger a legislative process of conversion into statute. In these cases, a form of enhancing lawmakers' oversight capacity could be anticipating scrutiny of the conditions that led to the enactment of the emergency legal act in the first place. In Brazil, a controversial practice has arisen. On a few occasions, the President of the Senate, acting as President of Congress, refused provisional measures, alleging that they did not fulfill the requirements of relevance and urgency.[330] Concretely, except for some tortuous interpretations of these measures' regulations, such a solution finds no support in the country's legal framework.[331] Notwithstanding, the unorthodox (to say the least) move points to a way of empowering the legislative.

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[327] *Id.*

[328] *Id.*

[329] *See id.*

[330] *See* Fernando Lagares Távora, *Medida Provisória: Reflexões e Debate para Arquitetura de um Novo Rito Constitucional de Análise* [*Provisional Measure: Reflections and Debate for the Design of a New Constitutional Rite of Analysis*] 36–48 (Núcleo de Estudos e Pesquisas da Consultoria Legislativa, Senado Federal [Legislative Advisory Office Studies and Research Center, Federal Senate], Texto para Discussão [Working Paper] No. 325, 2023), https://www12.senado.leg.br/publicacoes/estudos-legislativos/tipos-de-estudos/textos-para-discussao/td325 (last visited Jan. 26, 2024).

[331] *See id*. *But see* S.T.F., Ação Direta de Inconstitucionalidade [A.D.I.] No. 6991, M.C., Relatora: Min. Rosa Weber (decisão monocrática), 14.9.2021, D.J.E. No. 185, 16.9.2021 (publicação) [S.T.F., Direct Action of Unconstitutionality No. 6991, M.C., Rapporteur: Justice Rosa Weber (monocratic decision), Sep. 14, 2021, D.J.E. No. 185, Sep. 14, 2021 (publication)] 72 (Braz.), https://www.stf.jus.br/arquivo/djEletronico/DJE_20210915_185.pdf (last visited Jan.

A kind of immediate assessment of the pressing scenario by Congress could be introduced in Brazilian law (and possibly other systems). On the one hand, attributing such a task to Congress' presiding officer would align with the rapidness that the case would theoretically demand.[332] Yet, it does not seem to fit the collegiate principle inherent to parliament.[333] On the other hand, constitutional and internal provisions could state that all legislators (by simple majority, absolute majority, or supermajority) should evaluate if the circumstances were alarming enough to trigger the enactment of a provisional measure within a few hours or days of its publication. Their manifestation would simply consist of agreeing or not with the executive's justification. In the former case, the measure would start producing legal effects, and the conversion process would proceed as it occurs nowadays, with a reassessment of the triggering circumstances and thorough scrutiny of the measure's content. In the latter hypothesis, that of a negative, nothing else would happen except a communication declaring the measure's invalidity. This formulation would be the basis of a proposal to discourage undue recourse to provisional measures.

Of course, the suggestion requires improvements. The lack of any verdict in the assigned time should be equivalent to a refusal. To avoid such an outcome when lawmakers were not able to reunite, as in the Covid-19 pandemic, a clause could authorize online voting on the matter or waive its immediate assessment whenever neither in-person nor remote options would be feasible. If an initial manifestation were impossible, the provisional measure would immediately enter into force. In the face of disagreement about whether the situation amounted to an emergency, the new regulation could authorize the executive to restart the process without delay, re-submitting the issue to Congress with the same or distinct justification. To be clear, this authorization would not be equivalent to a revival of the ancient practice of successive re-enactments following a provisional measure's expiration or its unsuccessful conversion into statute. Instead, it would only allow the executive to provoke lawmakers to perform a new initial evaluation of the alleged urgent circumstances.

Finally, criticism may pose that the proposal would go too far to constrain the misuse of provisional measures. Some could argue that a side-effect would be making the head of the executive easy prey for a hostile Congress. Accordingly, she

26, 2024) (suggesting that the President of the National Congress could refuse a provisional measure).

[332] *Cf.* TAVARES FILHO, *supra* note 177, at 57 (mentioning that such a solution could be adopted by an amendment to the Constitution).

[333] *See supra* Part II, Section 1.

could end up devoid of the appropriate lawmaking tool to address an alarming scenario.[334] To circumvent such an undesirable outcome, clauses regulating a specific case may inspire an option. The Brazilian Constitution states that provisional measures may also define budgetary appropriations should the situation be urgent and unforeseeable.[335] Additionally, it gives instances of such an event, referring to "war, internal commotion or public calamity."[336] Then, the alternative could be establishing that, for all cases (not only appropriations), there would be no initial legislative assessment, as herein proposed, if the emergency comprised any of the three examples that the constitutional text lists. Summing up, in the face of "war, internal commotion or public calamity," nothing would change compared to current rules. A provisional measure would have the force of law since its enactment to tackle any of these extreme occurrences, and legislative scrutiny of the matter would take place along the conversion process.

Concededly, such an alternative could reopen the road to abuse. After all, even the three listed concepts would be subject to imaginative interpretation. For instance, "internal commotion" would hardly encompass ordinary strikes or demonstrations, at least as circumstances justifying emergency actions. These events could be a political or electoral threat to a group in power, but, as such, they should not suffice to trigger extraordinary measures. However, governments could treat them as a serious menace to the legal order, taking the chance to legislate through the urgent track. Hence, those implementing the proposal herein sketched should weigh the pros and cons of waiving the initial assessment by the legislature in the face of "war, internal commotion or public calamity." At least under a first approach, deferring to the executive in these situations seems wise. If abuse continued, lawmakers could reconsider the issue. Of course, a second opportunity for modifying the rules could be unlikely, and such a perspective should also be taken into account. Anyway, an aspect to keep in mind refers to the possibility of judicial assessment of the conditions leading to the adoption of provisional measures.

Judicial oversight

If the oversight of emergency acts is challenging for legislators, the diagnosis is not different for judges. Actually, the case may be even more difficult for the

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[334] Cf. Levinson and Balkin, *supra* note 10, at 1863 (stating that requiring legislative authorization may be problematic in the face of real emergencies).

[335] *See* C.F. 1988, *supra* note 4, art. 167, para. 3 (Braz.).

[336] *Id.*

judiciary, which may end up engaging in political queries more suited to the other branches and, for this reason, may prefer to show deference.[337] Yet, in the face of abuse, there is room for judicial assessment of exceptional measures, be they a concrete order (like investigations and detainments) or general legislation. Relative to the former, adjudication deals with the protection of citizen's fundamental rights.[338] Concerning the latter, the question for courts' scrutiny refers to lawmaking procedures,[339] including the circumstances that may trigger the adoption of decree laws or similar instruments. In Brazil and Italy, the supreme courts admit reviewing the legitimacy of such tools' enactment whenever constitutional requirements are evidently missing.[340] In this regard, their position is somehow close to that of Santi Romano, for whom a judge shall not invade "the competence of the government," except "when the act qualified as a decree of necessity includes in its intrinsic and objective elements something that allows the judge to ascertain that the decree is not

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[337] "SOEs [states of emergency] typically threaten to lower the standards of judicial review. Echoing other scholarly voices, Bruce Ackerman has insisted that judges always defer to the executive in times of emergency." Vauchez, *supra* note 4, at 1813 (referring to BRUCE A. ACKERMAN, BEFORE THE NEXT ATTACK: PRESERVING CIVIL LIBERTIES IN AN AGE OF TERRORISM (2006)).

[338] *See, e.g.*, Ackerman, *supra* note 3, at 1067 (affirming that "[j]udicial intervention on the merits should be reserved only for the most egregious cases"); David Cole, *Judging the Next Emergency: Judicial Review and Individual Rights in Times of Crisis*, 101 MICHIGAN LAW REVIEW 2565, 2566 (2003) (stating that, although courts may not effectively protect rights under emergencies due to excessive deference to the executive, "judicial decisions offer an opportunity to set the terms of the next crisis" [emphasis omitted]); Fiona de Londras & Fergal F. Davis, *Controlling the Executive in Times of Terrorism: Competing Perspectives on Effective Oversight Mechanisms*, 30 OXFORD JOURNAL OF LEGAL STUDIES 19 (2010) (standing for a dialogue between the judicial and legislative branches to protect rights under emergencies).

[339] *See* Ackerman, *supra* note 3, at 1067 (stating that "the constitutional court does have a crucial backstopping role on more procedural matters").

[340] *See* CORTE COSTITUZIONALE, SERVIZIO STUDI NO. 304, LA DECRETAZIONE D'URGENZA NELLA GIURISPRUDENZA COSTITUZIONALE [CONSTITUTIONAL COURT, RESEARCH SERVICE, THE EMERGENCY DECREE IN CONSTITUTIONAL JURISPRUDENCE], 22–23 (Riccardo Nevola ed., 2017), https://www.cortecostituzionale.it/documenti/convegni_seminari/STU_304_Decretazione_urgenza.pdf (last visited Jan. 27, 2024) (referring to a series of decisions addressing the constitutional requirements for the enactment of decree laws); *A Constituição e o Supremo*, SUPREMO TRIBUNAL FEDERAL [*The Constitution and the Supreme Court*, FEDERAL SUPREME COURT], https://portal.stf.jus.br/constituicao-supremo/artigo.asp?abrirBase=CF&abrirArtigo=62&abrirTipoItem=INC&abrirItem= (last visited Jan. 27, 2024) (quoting a series of the Supreme Court's decisions about provisional measures in the part referring to art. 62 of the Brazilian Constitution).

actually based on necessity."[341] Notwithstanding, both courts acknowledge that the margin for a politician's appreciation of concepts such as necessity and urgency is wide,[342] making the judiciary's task far from trivial.

Now, the proposal to limit the circumstances in which the adoption of exceptional legislation would produce immediate effects could make judicial review of the matter less defiant. That is so because more specific expressions may help text construing compared to less specific terminology. At least, that was the opinion of the Federal Supreme Court of Brazil when, on two different occasions, it examined provisional measures (and the laws resulting from their conversion) establishing budgetary appropriations.[343] As already mentioned, the constitutional text lists "war, internal commotion or public calamity" as instances of unforeseeable and urgent situations justifying the enactment of such measures.[344] For the court, the three examples give "unpredictability and urgency . . . normative densification," constituting interpretive "vectors."[345] In the end, the majority suspended the effects of extraordinary appropriations that, in fact, addressed solely regular expenses, with no relation to the mandatory constitutional requirements for recourse to the exceptional route.[346] In light of these findings, it seems pertinent to state that the judiciary could better approach queries about emergency lawmaking if suggestions such as the one herein offered were implemented.

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[341] Romano, *supra* note 5, at 47–48.

[342] *See* CORTE COSTITUZIONALE, SERVIZIO STUDI NO. 304, LA DECRETAZIONE D'URGENZA NELLA GIURISPRUDENZA COSTITUZIONALE [CONSTITUTIONAL COURT, RESEARCH SERVICE, THE EMERGENCY DECREE IN CONSTITUTIONAL JURISPRUDENCE], *supra* note 340, at 22–23.; *A Constituição e o Supremo* [*The Constitution and the Supreme Court*], *supra* note 340.

[343] *See* S.T.F., A.D.I. No. 4048-1, M.C., Relator: Min. Gilmar Mendes, 14.5.2008, DIÁRIO DA JUSTIÇA ELETRÔNICO No. 157, 22.8.2008 (publicação) [S.T.F., A.D.I. No. 4048-1, M.C., Rapporteur: Justice Gilmar Mendes, May 14, 2008, D.J.E. No. 157, Aug. 22, 2008 (publication)] 23 (Braz.), https://www.stf.jus.br/arquivo/djEletronico/DJE_20080821_157.pdf (last visited Apr. 20, 2022); S.T.F., A.D.I. No. 4049-9, M.C., Relator: Min. Carlos Britto, 5.11.2008, D.J.E. No. 84, 8.5.2009 (publicação) [S.T.F., A.D.I. No. 4049-9, M.C., Rapporteur: Justice Carlos Britto, Nov. 5, 2008, D.J.E. No. 84, May 8, 2009 (publication)] 32 (Braz.), https://www.stf.jus.br/arquivo/djEletronico/DJE_20090507_084.pdf (last visited Apr. 20, 2022). In these actions, the Federal Supreme Court struck down, respectively, Provisional Measures No. 405/2007 (which was converted in Law No. 11658/2008) and No. 402/2007 (which was converted in Law No. 11656/2008), both on federal budgetary appropriations.

[344] *See* C.F. 1988, *supra* note 4, art. 167, para. 3 (Braz.).

[345] *See* S.T.F., A.D.I. No. 4048-1, M.C., *supra* note 343, (Braz.).

[346] *See id.*

5. Conclusion

Emergencies or pressing circumstances threatening societies defy states' regular operation. If the situation is serious enough, on the one hand, it may be necessary to set aside some guarantees or rights. On the other hand, there may be no time available to wait for deliberation on the matter. To cope with these challenges, modern constitutional democracies generally attribute extraordinary powers to the executive branch, trying to maintain a minimum set of restrictions upon its course of action.

In the ancient Roman Republic, the task of dealing with threats rested upon the dictatorship. The dictator was someone who counted on a broad capability to handle menaces. Nevertheless, his authority was not unrestrained. Remarkably, his mandate was time-limited, and the Senate conserved the power to declare an emergency. Moreover, upon the declaration, the dictator was typically assigned among people who performed no official duties at regular times.

In the modern age, some influential approaches to the topic doubted legal boundaries could square state action under a crisis. In Locke's view, the head of state or government should rely on vast prerogatives to tackle a situation demanding urgent intervention, even against the law. According to Schmitt, a nation's leader shall decide on the exception to keep order (not necessarily the legal order). Although Schmitt's theory resembles that of Locke, a fundamental difference lies in how the two philosophers conceive checks on extraordinary measures. For Schmitt, no limits apply. For Locke, though legal provisions cannot offer feasible constraints, the people shall monitor whether the executive acts benefit the public good. Similarly, Santi Romano thinks that, even though governments might act *contra legem* under necessity, a type of political control stays in place. In cases where the executive invades the legislative function, it is up to the legislature to reinstate the regular legal order through the conversion process.

The problem with these approaches is that they leave too much room for the misuse or abuse of extraordinary lawmaking routes. Whether in the form of provisional measures, decree laws, or presidential directives, the cases of Brazil, Italy, and the United States evidenced that governments usually resort to these mechanisms to work around legislatures' struggles. In light of the legal nature of the legislative process, the incumbent authorities in all three branches should join efforts to avoid perpetuating such a practice. In this regard, the legislative could enhance political restraints, aiding the judiciary in the legal scrutiny of the matter.

Bibliography

Legal texts (norms)

Brazil

ATO CONJUNTO DAS MESAS DA CÂMARA DOS DEPUTADOS E DO SENADO FEDERAL NO. 1, DE 2020 [A.C.M. 1/2020] [JOINT ACT OF THE BOARDS OF THE CHAMBER OF DEPUTIES AND THE FEDERAL SENATE NO. 1, 2020] (Braz.), https://legis.senado.leg.br/norma/32032762/publicacao/32033423 (last visited Jun. 29, 2023)

ATO CONJUNTO DAS MESAS DA CÂMARA DOS DEPUTADOS E DO SENADO FEDERAL NO. 2, DE 2020 [A.C.M. 2/2020] [JOINT ACT OF THE BOARDS OF THE CHAMBER OF DEPUTIES AND THE FEDERAL SENATE NO. 2, 2020] (Braz.), https://legis.senado.leg.br/norma/32040643/publicacao/32041455 (last visited Jun. 29, 2023)

ATO CONJUNTO DAS MESAS DA CÂMARA DOS DEPUTADOS E DO SENADO FEDERAL NO. 1, DE 2021 [A.C.M. 1/2021] [JOINT ACT OF THE BOARDS OF THE CHAMBER OF DEPUTIES AND THE FEDERAL SENATE NO. 1, 2021] (Braz.), https://www25.senado.leg.br/documents/59501/119895056/Ato+Conjunto+das+Mesas+1+de+2021/28e48918-667e-4d76-a9aa-43ab53f376a7 (last visited May 9, 2023)

ATO DA COMISSÃO DIRETORA DO SENADO FEDERAL NO. 7, DE 2020 [A.T.C. 7/2020-SF] [FEDERAL SENATE EXECUTIVE COMMITTEE ACT NO. 7, 2020] (Braz.), https://www12.senado.leg.br/noticias/materias/arquivos/2020/03/17/ato-da-comissao-diretora-no-7-de-2020 (last visited Jun. 29, 2023)

ATO DA MESA DA CÂMARA DOS DEPUTADOS No. 12, de 2021 [ACT OF THE BOARD OF THE CHAMBER OF DEPUTIES No. 12, 2021] (Braz.), https://www2.camara.leg.br/legin/int/atomes/2021/atodamesa-212-3-novembro-2021-791936-publicacaooriginal-163733-cd-mesa.html (last visited Nov. 18, 2021)

ATO DA MESA DA CÂMARA DOS DEPUTADOS NO. 123, DE 2020 [ATO DA MESA 123/2020-CD] [CHAMBER OF DEPUTIES BOARD ACT NO. 123, 2020] (Braz.), https://www2.camara.leg.br/legin/int/atomes/2020/atodamesa-123-20-marco-2020-789867-norma-cd-mesa.html (last visited Jun. 29, 2023)

ATO DAS DISPOSIÇÕES CONSTITUCIONAIS TRANSITÓRIAS [A.D.C.T.] [TEMPORARY CONSTITUTIONAL PROVISIONS ACT], https://www.planalto.gov.br/ccivil_03/constituicao/constituicao.htm#adct (last visited Apr. 19, 2024)

ATO DO PRESIDENTE DA MESA DO CONGRESSO NACIONAL NO. 155, DE 2020 [A.P.N. 155/2020] [ACT OF THE PRESIDENT OF THE BOARD OF THE NATIONAL CONGRESS NO. 155, 2020] (Braz.), https://www.camara.leg.br/internet/comissao/index/mista/orca/ldo/LDO2021/crono/Ato-155.pdf (last visited Jun. 30, 2023)

ATO INSTITUCIONAL NO. 2, DE 1965 [A.I. 2/1965] [INSTITUTIONAL ACT NO. 2, 1965] (Braz.), https://www.planalto.gov.br/ccivil_03/ait/ait-02-65.htm (last visited Jan. 20, 1964)

CÓDIGO CIVIL [C.C.] [CIVIL CODE] (Braz.), https://www.planalto.gov.br/ccivil_03/leis/2002/l10406compilada.htm (last visited Feb. 27, 2023)

CÓDIGO PENAL [C.P.] [CRIMINAL CODE] (Braz.), https://www.planalto.gov.br/ccivil_03/decreto-lei/del2848compilado.htm (last visited Feb. 27, 2023)

CONSTITUIÇÃO FEDERAL DE 1937 [C.F. 1937] [1937 FEDERAL CONSTITUTION] (Braz.), https://www.planalto.gov.br/ccivil_03/constituicao/constituicao37.htm (last visited Jan. 29, 2024)

CONSTITUIÇÃO FEDERAL DE 1967 [C.F. 1967] [1967 FEDERAL CONSTITUTION] (Braz.), https://www.planalto.gov.br/ccivil_03/Constituicao/Constituicao67EMC69.htm (last visited Jan. 20, 2024)

CONSTITUIÇÃO FEDERAL DE 1969 [C.F. 1969] [1969 FEDERAL CONSTITUTION] art. 55 (Braz.), http://www.planalto.gov.br/ccivil_03/constituicao/emendas/emc_anterior1988/emc01-69.htm (last visited Jan. 20, 2024)

CONSTITUIÇÃO FEDERAL DE 1988 [C.F. 1988] [1988 FEDERAL CONSTITUTION] (Braz.), https://www.planalto.gov.br/ccivil_03/constituicao/constituicao.htm (last visited Jan. 20, 2024)

CONSTITUTION OF THE FEDERATIVE REPUBLIC OF BRAZIL, (2020), http://www.stf.jus.br/arquivo/cms/legislacaoConstituicao/anexo/brazil_federal_constitution.pdf (last visited Nov. 16, 2021)

CONSTITUTION OF THE FEDERATIVE REPUBLIC OF BRAZIL, (2022), https://www.stf.jus.br/arquivo/cms/legislacaoConstituicao/anexo/Brazil_Federal_Constitution_EC_125.pdf (last visited Sep. 14, 2022)

EMENDA CONSTITUCIONAL NO. 106, DE 2020 [E.C. 106/2020] [CONSTITUTIONAL AMENDMENT NO. 106, 2020] (Braz.), https://www.planalto.gov.br/ccivil_03/constituicao/emendas/emc/emc106.htm (last visited May. 27, 2023)

EMENDA CONSTITUCIONAL NO. 113, DE 2021 [E.C. 113/2021] [CONSTITUTIONAL AMENDMENT NO. 113, 2021] (Braz.), http://www.planalto.gov.br/ccivil_03/constituicao/emendas/emc/emc113.htm (last visited Mar. 4, 2022)

EMENDA CONSTITUCIONAL NO. 126, DE 2022 [E.C. 126/2022] [CONSTITUTIONAL AMENDMENT NO. 126, 2022] (Braz.), https://www.planalto.gov.br/ccivil_03/constituicao/emendas/emc/emc126.htm (last visited Feb. 27, 2023)

EMENDA CONSTITUCIONAL NO. 32, DE 2001 [E.C. 32/2001] [CONSTITUTIONAL AMENDMENT NO. 32, 2001] (Braz.), https://www.planalto.gov.br/ccivil_03/constituicao/Emendas/Emc/emc32.htm#art1 (last visited Jan. 19, 2024)

EMENDA CONSTITUCIONAL NO. 45, DE 2004 [E.C. 45/2004] [CONSTITUTIONAL AMENDMENT NO. 45, 2004] (Braz.), https://www.planalto.gov.br/ccivil_03/constituicao/Emendas/Emc/emc45.htm#art2 (last visited Jun. 9, 2023)

EMENDA CONSTITUCIONAL NO. 88, DE 2015 [E.C. 88/2015] [CONSTITUTIONAL AMENDMENT NO. 88, 2015] (Braz.), http://www.planalto.gov.br/ccivil_03/constituicao/emendas/emc/emc88.htm (last visited May 17, 2023)

EMENDA CONSTITUCIONAL NO. 95, DE 2016 [E.C. 95/2016] [CONSTITUTIONAL AMENDMENT NO. 95, 2016] (Braz.), https://www.planalto.gov.br/ccivil_03/constituicao/emendas/emc/emc95.htm (last visited Feb. 27, 2023)

LEI COMPLEMENTAR NO. 101, DE 2000 [L.C. 101/2000] [SUPPLEMENTARY LAW NO. 101, 2000] (Braz.), http://www.planalto.gov.br/ccivil_03/leis/lcp/lcp101.htm (last visited Mar. 21, 2022)

LEI COMPLEMENTAR NO. 200, DE 2023 [L.C. 200/2023] [SUPPLEMENTARY LAW NO. 200, 2023] (Braz.), https://www.planalto.gov.br/ccivil_03/leis/lcp/lcp200.htm (last visited May 1, 2024)

LEI DE DIRETRIZES ORÇAMENTÁRIAS PARA 2023 [L.D.O. 2023] [BUDGET DIRECTIVES LAW 2023], LEI NO. 14436, DE 2022 [L. 14436/2022] [LAW NO. 14436, 2022] (Braz.), https://www.planalto.gov.br/ccivil_03/_ato2019-2022/2022/lei/l14436.htm (last visited Apr. 13, 2024)

LEI NO. 1079, DE 1950 [L. 1079/1950] [LAW NO. 1079, 1950] (Braz.), https://www.planalto.gov.br/ccivil_03/leis/l1079.htm (last visited Apr. 13, 2024)

LEI NO. 13979, DE 2020 [L. 13979/2020] [LAW NO. 13979, 2020] (Braz.), https://www.planalto.gov.br/ccivil_03/_ato2019-2022/2020/lei/l13979.htm (last visited Jan. 10, 2024)

Lei No. 4320, de 1964 [L. 4320/1964] [Law No. 4320, 1964] (Braz.), https://www.planalto.gov.br/ccivil_03/leis/l4320.htm (last visited Feb. 15, 2023)

MEDIDA PROVISÓRIA NO. 168, DE 1990 [M.P. 168/1990] [PROVISIONAL MEASURE NO. 168, 1990] (Braz.), https://www.planalto.gov.br/ccivil_03/mpv/1990-1995/168.htm (last visited Jan. 18, 2024)

REGIMENTO COMUM DO CONGRESSO NACIONAL [R.C.C.N.] [JOINT REGULATIONS OF THE NATIONAL CONGRESS] (Braz.), https://www25.senado.leg.br/documents/59501/97171143/RCCN.pdf/ (last visited Apr. 19, 2024)

REGIMENTO INTERNO DA CÂMARA DOS DEPUTADOS [R.I.C.D.] [INTERNAL REGULATIONS OF THE CHAMBER OF DEPUTIES] arts. 103 and 107, para. 1 (Braz.), https://www2.camara.leg.br/atividade-legislativa/legislacao/regimento-interno-da-camara-dos-deputados/ (in Part I, last visited Oct. 27, 2022; in Part II, last visited May 16, 2023)

REGIMENTO INTERNO DO SENADO FEDERAL [R.I.S.F.] [INTERNAL REGULATIONS OF THE FEDERAL SENATE] (Braz.), https://www25.senado.leg.br/documents/12427/45868/RISF+2018+Volume+1.pdf/cd5769c8-46c5-4c8a-9af7-99be436b89c4 (in Part I, last visited Mar. 12, 2022; in Part II, last visited May 5, 2023)

RESOLUÇÃO DA CÂMARA DOS DEPUTADOS NO. 14, DE 2020 [R.C.D. 14/2020] [CHAMBER OF DEPUTIES RESOLUTION NO. 14, 2020] (Braz.), https://www2.camara.leg.br/legin/fed/rescad/2020/resolucaodacamaradosdeputados-14-17-marco-2020-789854-publicacaooriginal-160143-pl.html (last visited Jun. 29, 2023)

RESOLUÇÃO DO CONGRESSO NACIONAL NO. 1, DE 2002 [R.C.N. 1/2002] [NATIONAL CONGRESS RESOLUTION NO. 1, 2002] (Braz.), https://www2.camara.leg.br/legin/fed/rescon/2002/resolucao-1-8-maio-2002-497942-norma-pl.html (last visited Feb. 27, 2023)

RESOLUÇÃO DO CONGRESSO NACIONAL NO. 1, DE 2006 [R.C.N. 1/2006] [NATIONAL CONGRESS RESOLUTION NO. 1, 2006] (Braz.), https://www2.camara.leg.br/legin/fed/rescon/2006/resolucao-1-22-dezembro-2006-548706-normaatualizada-pl.html (last visited Mar. 3, 2022)

European Union

Consolidated Version of the Treaty on the Functioning of the European Union, Jun. 7, 2016, 2016 O.J. (C 202) 44

France

1958 CONST. (Fr.)

Constitution of 4 October 1958, CONSEIL CONSTITUTIONNEL, https://www.conseil-constitutionnel.fr/en/constitution-of-4-october-1958 (last visited Jan. 25, 2024)

Italy

CONSTITUTION OF THE ITALIAN REPUBLIC, https://www.senato.it/documenti/repository/istituzione/costituzione_inglese.pdf (last visited Mar. 16, 2022)

Costituzione [Cost.] [Constitution] (It.), https://www.senato.it/istituzione/la-costituzione (last visited Jan. 29, 2024)

Decreto-Legge 23 febbraio 2020, n. 6, G.U. Feb. 23, 2020, n. 45 [Decree-Law n. 6, Feb. 23, 2020] [D.L. n. 6/2020] (It.), https://www.normattiva.it/esporta/attoCompleto?atto.dataPubblicazioneGazzetta=2020-02-23&atto.codiceRedazionale=20G00020 (last visited Jan. 10, 2024)

Legge 19 gennaio 1939, n. 129, G.U. Feb. 14, 1939, n. 37 [Law n. 129, Jan. 19, 1939] [L. n. 129/1939] art. 18 (It.), https://www.gazzettaufficiale.it/eli/gu/1939/02/14/37/sg/pdf (last visited Nov. 11, 2023)

Legge 23 agosto 1988, n. 400, G.U. Sep. 12, 1988, n. 37 [Law n. 400, Aug. 23, 1988] [L. n. 400/1988] art. 15 (It.), https://www.gazzettaufficiale.it/eli/gu/1988/09/12/214/so/86/sg/pdf (last visited Nov. 16, 2023)

Legge 31 gennaio 1926, n. 100, G.U. Feb. 1, 1926, n. 25 [Law n. 100, Jan. 31, 1926] [L. n. 100/1926] art. 3 (It.), https://www.gazzettaufficiale.it/eli/gu/1926/02/01/25/sg/pdf (last visited Nov. 11, 2023)

United Kingdom

BILL OF RIGHTS 1689 (Engl. and Wales)

United States

50 U.S.C. §§ 1601-1651 (2021), https://www.govinfo.gov/app/details/USCODE-2021-title50/USCODE-2021-title50-chap34 (last visited Jan. 16, 2024)

Clean Air Act Amendments of 1977, Pub. L. No. 95-95 (1977)

H.J. Res. 184, 68th Cong. (1924)

H.R. 895, 110th Cong. (2008)

RULES OF THE HOUSE OF REPRESENTATIVES, 118TH CONGRESS, https://rules.house.gov/sites/republicans.rules118.house.gov/files/documents/Rules%20and%20Resources/118-House-Rules-Clerk.pdf (last assessed Apr. 5, 2023)

STANDING RULES OF THE SENATE, S. DOC. NO. 113-18 (2013), https://www.rules.senate.gov/imo/media/doc/CDOC-113sdoc18.pdf (last visited Jan. 5, 2023)

Suspension of Entry as Immigrants and Nonimmigrants of Persons Who Pose a Risk of Transmitting 2019 Novel Coronavirus and Other Appropriate Measures To Address This Risk, Proclamation No. 9984, 85 Fed. Reg. 6709 (Jan. 31, 2020)

U.S. CONST.

Case law and related materials

Brazil

Note on abrreviations: S.T.F., *Supremo Tribunal Federal*, Federal Supreme Court; M.S., *Mandado de Segurança*, Writ of Mandamus; A.D.P.F., *Arguição de Descumprimento de Preceito Fundamental*, Claim of Non-Compliance with a Fundamental Precept; Min., *Ministro* or *Ministra*, Justice; A.D.I., *Ação Direta de Inconstitucionalidade*, Direct Action of Unconstitutionality; D.J.e., *Diário da Justiça Eletrônico*, Electronic Judiciary Gazette; M.C., *medida cautelar*, precautionary measure.

Initial Applications filed before the S.T.F., M.S. No. 38300 (Braz.), https://static.poder360.com.br/2021/11/mandado-seguranca-multipartidario-pec-precatorios-5nov2021.pdf (last visited Nov. 16, 2021); M.S. No. 38303 (Braz.), https://static.poder360.com.br/2021/11/peticao-pdt-pec-precatorios-4nov2021.pdf (last visited Nov. 16, 2021); and M.S. No. 38304 (Braz.), https://static.poder360.com.br/2021/11/Petic%CC%A7a%CC%83o-Inicial_-MS-PEC-23.2021-Dep.-Rodrigo-Maia-06.11.2021-_-VF.pdf (last visited Nov. 16, 2021)

S.T.F, A.D.P.F. No. 661, Relator: Min. Alexandre de Moraes (tribunal pleno, inteiro teor do acórdão), 8.9.2021 [S.T.F., A.D.P.F. No. 661, Rapporteur: Justice Alexandre de Moraes (full court, judgment's entire content), Sep. 8, 2021] (Braz.), https://portal.stf.jus.br/processos/downloadPeca.asp?id=15347785089&ext=.pdf (last visited Jun. 30, 2023)

S.T.F., A.D.I. No. 2971, Relator: Min. Celso de Mello, Agravo Regimental (tribunal pleno, inteiro teor do acórdão), 6.11.2014 [S.T.F., A.D.I. No. 2971, Rapporteur: Justice Celso de Mello, Specific Appeal (full court, whole content of the judgement), Nov. 11, 2014] (Braz.), http://redir.stf.jus.br/paginadorpub/paginador.jsp?docTP=TP&docID=7758406 (last visited Jul. 1, 2023)

S.T.F., A.D.I. No. 4029, Relator: Min. Luiz Fux (tribunal pleno), 8.3.2012, D.J.E. No. 125, 27.6.2012 (publicação) [S.T.F., A.D.I. No. 4029, Rapporteur: Justice Luiz Fux (full court), Mar. 8, 2012, D.J.E. No. 125, Jun. 27, 2012 (publication)] (Braz.), https://www.stf.jus.br/arquivo/djEletronico/DJE_20120626_125.pdf (last visited Jun. 30, 2023)

S.T.F., A.D.I. No. 4048-1, M.C., Relator: Min. Gilmar Mendes, 14.5.2008, D.J.E. No. 157, 22.8.2008 (publicação) [S.T.F., A.D.I. No. 4048-1, M.C., Rapporteur: Justice Gilmar Mendes, May 14, 2008, D.J.E. No. 157, Aug. 22, 2008 (publication)] (Braz.), https://www.stf.jus.br/arquivo/djEletronico/DJE_20080821_157.pdf (last visited Apr. 20, 2022)

S.T.F., A.D.I. No. 4049-9, M.C., Relator: Min. Carlos Britto, 5.11.2008, D.J.E. No. 84, 8.5.2009 (publicação) [S.T.F., A.D.I. No. 4049-9, M.C., Rapporteur: Justice Carlos Britto, Nov. 5, 2008, D.J.E. No. 84, May 8, 2009 (publication)] (Braz.), https://www.stf.jus.br/arquivo/djEletronico/DJE_20090507_084.pdf (last visited Apr. 20, 2022)

S.T.F., A.D.I. No. 6991, M.C., Relatora: Min. Rosa Weber (decisão monocrática), 14.9.2021, D.J.E. No. 185, 16.9.2021 (publicação) [S.T.F., A.D.I. No. 6991, M.C., Rapporteur: Justice Rosa Weber (monocratic decision), Sep. 14, 2021, D.J.E. No. 185, Sep. 14, 2021 (publication)] (Braz.), https://www.stf.jus.br/arquivo/djEletronico/DJE_20210915_185.pdf (last visited Jan. 26, 2024)

S.T.F., A.D.P.F. No. 661, M.C., Referendo, Relator: Min. Alexandre de Moraes (tribunal pleno, inteiro teor do acórdão), 21.12.2020 [S.T.F., A.D.P.F. No. 661, M.C., Endorsement, Rapporteur: Justice Alexandre de Moraes (full court, judgment's entire content), Dec. 21, 2020] (Braz.), https://portal.stf.jus.br/processos/downloadPeca.asp?id=15346108523&ext=.pdf (last visited Jun. 30, 2023)

S.T.F., A.D.P.F. No. 661, M.C., Relator: Min. Alexandre de Moraes (decisão monocrática), 27.3.2020, D.J.E. No. 78, 31.3.2020 (publicação) [S.T.F., A.D.P.F. No. 661, M.C., Rapporteur: Justice Alexandre de Moraes (monocratic decision), Mar. 27, 2020, D.J.E. No. 78, Mar. 31, 2020 (publication)] (Braz.), https://www.stf.jus.br/arquivo/djEletronico/DJE_20200330_078.pdf (last visited Jun. 30, 2023)

S.T.F., A.D.P.F. No. 854, M.C., Referendo, Relatora: Min. Rosa Weber (tribunal pleno), 11.11.2021, D.J.E. No. 225, 16.11.2021 (publicação) [S.T.F., A.D.P.F. No. 854, M.C., Endorsement, Rapporteur: Justice Rosa Weber (full court), Nov. 11, 2021, D.J.E. No. 225, Nov. 16, 2021 (publication)] (Braz.), https://www.stf.jus.br/arquivo/djEletronico/DJE_20211112_225.pdf (last visited Jun. 30, 2023)

S.T.F., A.D.P.F. No. 854, M.C., Relatora: Min. Rosa Weber (decisão monocrática), 5.11.2021, D.J.E. No. 221, 9.11.2021 (publicação) [S.T.F., A.D.P.F. No. 854, Precautionary Measure, Rapporteur: Justice Rosa Weber (monocratic decision), Nov. 5, 2021, D.J.E. No. 221, Nov. 9, 2021 (publication)] (Braz.), https://www.stf.jus.br/arquivo/djEletronico/DJE_20211108_221.pdf (last visited Feb. 27, 2023)

S.T.F., M.S. No. 27931, M.C., Relator: Min. Celso de Mello (decisão monocrática), 27.3.2009, D.J.E. No. 62, 1.4.2009 (publicação) [S.T.F., M.S. No. 27931, M.C., Rapporteur: Justice Celso

de Mello (monocratic decision), Mar. 27, 2009, D.J.E. No. 62, Apr. 1, 2009 (publication)] (Braz.), https://www.stf.jus.br/arquivo/djEletronico/DJE_20090331_062.pdf (last visited Jan. 22, 2024)

S.T.F., M.S. No. 27931, Relator: Min. Celso de Mello (tribunal pleno), 29.6.2017, D.J.E. No. 259, 28.10.2020 (publicação) [S.T.F., M.S. No. 27931, Rapporteur: Justice Celso de Mello (full court), Jun. 29, 2017, D.J.E. No. 259, Oct. 28, 2020 (publication)] (Braz.), https://www.stf.jus.br/arquivo/djEletronico/DJE_20201027_259.pdf (last visited Jan. 22, 2024)

S.T.F., M.S. No. 33697, Relator: Min. Gilmar Mendes (decisão monocrática), 15.2.2017, D.J.E. No. 33, 20.2.2017 (publicação), [S.T.F., M.S. No. 33697, Rapporteur: Justice Gilmar Mendes (monocratic decision), Feb. 15, 2017, D.J.E. No. 33, Feb. 20, 2017 (publication)] (Braz.), https://www.stf.jus.br/arquivo/djEletronico/DJE_20170217_033.pdf (last visited Nov. 16, 2021)

S.T.F., M.S. No. 34562, Relator Min. Alexandre de Moraes (decisão monocrática), 05.10.2017, D.J.E. NO. 231, 09.10.2017 (publicação) [S.T.F., M.S. No. 34562, Rapporteur Justice Alexandre de Moraes (monocratic decision), Oct. 5, 2017, D.J.E. NO. 231, Oct. 9, 2017 (publication)] (Braz.), https://www.stf.jus.br/arquivo/djEletronico/DJE_20171006_231.pdf (last visited Feb. 21, 2023)

S.T.F., M.S. No. 34562, Relator Min. Luís Roberto Barroso (decisão monocrática), 4.2.2017, D.J.E. NO. 24, 8.2.2017 (publicação) [S.T.F., M.S. No. 34562, Rapporteur Justice Luís Roberto Barroso (monocratic decision), Feb. 4, 2017, D.J.E. NO. 24, Feb. 8, 2017 (publication)] (Braz.), https://www.stf.jus.br/arquivo/djEletronico/DJE_20170207_024.pdf (last visited Feb. 21, 2023)

S.T.F., Súmula [Summula] 651, https://jurisprudencia.stf.jus.br/pages/search/seq-sumula651/false (last visited Apr. 20, 2024)

Italy

Corte Cost., 17 ottobre 1996, n. 360, G.U. 1996, I, 44 (It.), https://www.gazzettaufficiale.it/eli/gu/1996/10/30/44/s1/pdf (last visited Jan. 24, 2024)

United States

Baker v. Carr, 369 U.S. 186 (1962)

Bowsher v. Synar, 478 U.S. 714, 733 (1986)

Buckley v. Valeo, 424 U.S. 1 (1976)

Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984)

Church of the Holy Trinity v. United States, 143 U.S. 457 (1892)

Citizens United v. Federal Election Commission, 558 U.S. 310 (2010)

Coleman v. Miller, 307 U.S. 433 (1939)

Dillon v. Gloss, 256 U.S. (1921)

Doe v. McMillan, 412 U.S. 306 (1973)

Griswold v. Connecticut, 381 U.S. 479 (1965)

Immigration and Naturalization Service v. Chadha, 462 U.S. 919 (1983)

Isbrandtsen-Moller Co. v. United States, 300 U.S. 139, 146-48 (1937)

Marbury v. Madison, 5 U.S. 137 (1803)

Marshall Field & Co. v. Clark, 143 U.S. 649 (1892)

Mistretta v. United States, 488 U.S. 361, 372

Roe v. Wade, 410 U.S. 113 (1973)

United States v. Carolene Products Co, 304 U.S. 144 (1398)

United Steelworkers v. Weber, 443 U.S. 193 (1979)

West Virginia v. Environmental Protection Agency, 597 U.S. 697 (2022)

Official texts or webpages, including legislative materials

Brazil

1965 a 1988 - Decretos-Leis, *Portal da Legislação*, PORTAL DO GOVERNO BRASILEIRO [*1965 to 1988 - Decree-Laws*, *Legislation Portal*, BRAZILIAN GOVERNMENT PORTAL], https://www4.planalto.gov.br/legislacao/portal-legis/legislacao-1/decretos-leis/1965-a-1988-decretos-leis (last visited Jan. 20, 2024)

1980 a 1960 - Leis Ordinárias, *Portal da Legislação*, PORTAL DO GOVERNO BRASILEIRO [*1980 to 1960 - Ordinary Laws*, *Legislation Portal*, BRAZILIAN GOVERNMENT PORTAL], https://www4.planalto.gov.br/legislacao/portal-legis/legislacao-1/leis-ordinarias/1980-a-1960-leis-ordinarias (last visited Jan. 20, 2024)

1987 a 1981 - Leis Ordinárias, *Portal da Legislação*, PORTAL DO GOVERNO BRASILEIRO [*1987 to 1981 - Ordinary Laws*, *Legislation Portal*, BRAZILIAN GOVERNMENT PORTAL], https://www4.planalto.gov.br/legislacao/portal-legis/legislacao-1/leis-ordinarias/1987-a-1981-leis-ordinarias (last visited Jan. 20, 2024)

1988 - Leis Ordinárias, *Portal da Legislação*, PORTAL DO GOVERNO BRASILEIRO [*1988 - Ordinary Laws*, *Legislation Portal*, BRAZILIAN GOVERNMENT PORTAL], https://www4.planalto.gov.br/legislacao/portal-legis/legislacao-1/leis-ordinarias/1988 (last visited Jan. 20, 2024)

A Constituição e o Supremo, SUPREMO TRIBUNAL FEDERAL [*The Constitution and the Supreme Court*, FEDERAL SUPREME COURT], https://portal.stf.jus.br/constituicao-supremo/artigo.asp?abrirBase=CF&abrirArtigo=62&abrirTipoItem=INC&abrirItem= (last visited Jan. 27, 2024)

Câmara dos Deputados, Comissão Especial, Parecer, Proposta de Emenda à Constituição No. 565-C, de 2006 [P.E.C. 565-C/2006], DIÁRIO DA CÂMARA DOS DEPUTADOS, Ano LXVIII, No. 132, 7.8.2013 [D.C.D. 132/2013] [Chamber of Deputies, Special Committee, Opinion, Proposal of Constitutional Amendment No. 565-C, 2006, GAZETTE OF THE CHAMBER OF DEPUTIES, Year LXVIII, No. 132, Aug. 7, 2013] (Braz.), http://imagem.camara.gov.br/Imagem/d/pdf/DCD0020130807001320000.PDF#page=235 (last visited Feb. 27, 2023)

Combate ao Coronavírus [*Coronavirus Combat*], CÂMARA DOS DEPUTADOS [CHAMBER OF DEPUTIES], https://www.camara.leg.br/internet/agencia/infograficos-html5/procorona/executivo.html (last visited Jan. 10, 2024)

Composição Plenária Anterior, Período: 10/09/2014 a 15/06/2015, SUPREMO TRIBUNAL FEDERAL [*Previous Full Court Composition from Sep. 10, 2014, to Jun. 15, 2015*, FEDERAL SUPREME COURT], https://portal.stf.jus.br/ostf/plenario/visualizar.asp?id=1481 (last visited May 17, 2023)

Congresso Nacional, Comissão Mista de Planos, Orçamentos Públicos e Fiscalização, Parecer No. 74, de 2013-C.N., DIÁRIO DO SENADO FEDERAL, Ano LXVIII, Suplemento A, No. 181, 2.11.2013 [D.S.F. 181-A/2013] [National Congress, Joint Committee for Plans, Public Budgets, and Oversight, Opinion No. 74, 2013-C.N., GAZETTE OF THE FEDERAL SENATE, Year LXVIII, Supp. A, No. 181, Nov. 2, 2013] (Braz.), https://legis.senado.leg.br/diarios/BuscaPaginasDiario?codDiario=18717&paginaInicial=1&paginaFinal=10 (last visited Feb. 27, 2023)

Deputados Federais Questionam Projeto de Lei sobre Alteração da L.D.O., SUPREMO TRIBUNAL FEDERAL [*Federal Deputies question Bill Altering the Budget Directives Law*, FEDERAL SUPREME COURT], https://portal.stf.jus.br/noticias/verNoticiaDetalhe.asp?idConteudo=280714&ori=1 (last visited Mar. 2, 2023)

DIÁRIO DA ASSEMBLÉIA NACIONAL CONSTITUINTE, REPÚBLICA FEDERATIVA DO BRASIL, No. 209, 19.3.1988 [D.A.N.C. 209/1988] [GAZETTE OF THE NATIONAL CONSTITUTIONAL ASSEMBLY, FEDERATIVE REPUBLIC OF BRAZIL, No. 209, Mar. 19, 1988], https://www.senado.leg.br/publicacoes/anais/constituinte/N015.pdf?_gl=1*16tji3c*_ga*NDU4NTg3NjA5LjE3MDI2MjAyNjM.*_ga_CW3ZH25XMK*MTcwNTg4MDg1Ni45LjEuMTcwNTg4MDkwNi4wLjAuMA.. (last visited Jan. 21, 2024)

DIÁRIO DA CÂMARA DOS DEPUTADOS, Ano LXI, No. 103, 13.6.2006 [D.C.D. 103/2006] [GAZETTE OF THE CHAMBER OF DEPUTIES, Year LXI, No. 103, Jun. 13, 2006] (Braz.), http://imagem.camara.gov.br/Imagem/d/pdf/DCD13JUN2006.pdf#page= (last visited Mar. 6, 2022)

DIÁRIO DA CÂMARA DOS DEPUTADOS, Ano LXX, No. 70, 6.5.2015 [D.C.D. 70/2015] [GAZETTE OF THE CHAMBER OF DEPUTIES, Year LXX, No. 70, May 6, 2015] (Braz.), http://imagem.camara.gov.br/Imagem/d/pdf/DCD0020150506000700000.PDF#page= (last visited May 17, 2023)

DIÁRIO DO CONGRESSO NACIONAL, Seção I, Ano L, No. 40, 15.3.1995 [D.C.N. I 40/1995] [GAZETTE OF THE NATIONAL CONGRESS, Section I, Year L, No. 40, Mar. 15, 1995] 3241 (Braz.), https://imagem.camara.gov.br/Imagem/d/pdf/DCD15MAR1995.pdf (last visited Jan. 19, 2024)

DIÁRIO DO SENADO FEDERAL, Ano LVIII, No. 73, 3.6.2003 [D.S.F. 73/2003] [GAZETTE OF THE FEDERAL SENATE, Year LVIII, No. 73, Jun. 3, 2003] (Braz.), https://legis.senado.leg.br/diarios/ver/930?sequencia=113 (last visited Feb. 25, 2022)

DIÁRIO DO SENADO FEDERAL, Ano LXIX, No. 186, 14.11.2014 [D.S.F. 186/2014] [GAZETTE OF THE FEDERAL SENATE, Year LXIX, No. 186, Nov. 14, 2014] (Braz.), https://legis.senado.leg.br/diarios/ver/19196?sequencia=40 (last visited Mar. 2, 2023)

DIÁRIO DO SENADO FEDERAL, Ano LXIX, No. 187, 15.11.2014 [D.S.F. 187/2014] [GAZETTE OF THE FEDERAL SENATE, Year LXIX, No. 187, Nov. 15, 2014] (Braz.), https://legis.senado.leg.br/diarios/ver/19202?sequencia=608 (last visited Mar. 2, 2023)

DIÁRIO DO SENADO FEDERAL, Ano LXXI, No. 203, 9.12.2016 [D.S.F. 203/2016] [GAZETTE OF THE FEDERAL SENATE, Year LXXI, No. 203, Dec. 9, 2016] (Braz.), https://legis.senado.leg.br/diarios/ver/20777?sequencia=384 (last visited Sep. 2, 2022)

DIÁRIO DO SENADO FEDERAL, Ano LXXIV, No. 135, 12.9.2019 [D.S.F. 135/2019] [GAZETTE OF THE FEDERAL SENATE, Year LXXIV, No. 135, Sep. 12, 2016] (Braz.), https://legis.senado.leg.br/diarios/ver/101922?sequencia=1 (last visited Feb. 22, 2023)

DIÁRIO OFICIAL, REPÚBLICA FEDERATIVA DO BRASIL, Seção I, Ano CXXVI, No. 191-A, 5.10.1988 [D.O.U. I 191-A/1995] [OFFICIAL GAZETTE, FEDERATIVE REPUBLIC OF BRAZIL, Section I, Year CXXVI, No. 191-A, Oct. 5, 1988], http://www.planalto.gov.br/ccivil_03/Constituicao/DOUconstituicao88.pdf (last visited Jan. 20, 2024)

Inflation Targeting, BANCO CENTRAL DO BRASIL [CENTRAL BANK OF BRAZIL], https://www.bcb.gov.br/en/monetarypolicy/Inflationtargeting (last visited Jan. 17, 2024)

Leis Complementares, *Portal da Legislação*, PORTAL DO GOVERNO BRASILEIRO [*Supplementary Laws*, *Legislation Portal*, BRAZILIAN GOVERNMENT PORTAL], https://www4.planalto.gov.br/legislacao/portal-legis/legislacao-1/leis-complementares-1/todas-as-leis-complementares-1 (last visited Jan. 20, 2024)

Leis Delegadas, *Portal da Legislação*, PORTAL DO GOVERNO BRASILEIRO [*Delegated Laws*, *Legislation Portal*, BRAZILIAN GOVERNMENT PORTAL], https://www4.planalto.gov.br/legislacao/portal-legis/legislacao-1/leis-delegadas-1 (last visited Jan. 20, 2024)

Medidas Provisórias Anteriores à Emenda Constitucional No. 32 [1992 a 1995], *Portal da Legislação*, PORTAL DO GOVERNO BRASILEIRO [*Provisional Measures Prior to Constitutional Amendment No. 32*, 1992 to 1995, *Legislation Portal*, BRAZILIAN GOVERNMENT PORTAL], https://www4.planalto.gov.br/legislacao/portal-legis/legislacao-1/medidas-provisorias/1992-a-1995 (last visited Jan. 21, 2024)

O Senado Federal no Combate à COVID-19, SENADO FEDERAL [*The Federal Senate in the fight against COVID-19*, FEDERAL SENATE], https://www25.senado.leg.br/web/atividade/materia/covid-19 (last visited Jan. 10, 2024)

PL 23/2020, CÂMARA DOS DEPUTADOS [*Bill No. 23, 2020*, CHAMBER OF DEPUTIES], https://www.camara.leg.br/proposicoesWeb/fichadetramitacao?idProposicao=2236343 (last visited Jan. 10, 2024)

Presidentes da República que nomearam ministros para o Supremo Tribunal Federal, SUPREMO TRIBUNAL FEDERAL [*Presidents of the Republic who appointed justices to the Federal Supreme Court*, FEDERAL SUPREME COURT], http://portal.stf.jus.br/ostf/ministros/ministro.asp?periodo=STF&consulta=QUADRO_INDICACOES (last visited Feb. 25, 2022)

Projeto de Lei da Câmara No. 79, de 2016, SENADO FEDERAL [*Chamber Bill No. 79, 2016*, FEDERAL SENATE], https://www25.senado.leg.br/web/atividade/materias/-/materia/127688 (last visited Feb. 21, 2023).

Projeto de Lei de Conversão (CN) No. 31, de 1990, SENADO FEDERAL [*Congress Conversion Bill No. 31, 1990*, FEDERAL SENATE], https://www25.senado.leg.br/web/atividade/materias/-/materia/31643 (last visited Jan. 19, 2024)

Projeto de Lei do Congresso Nacional No. 36, de 2014, CONGRESSO NACIONAL [*P.L.N. 36/2014*] [*National Congress Bill No. 36, 2014*, NATIONAL CONGRESS], https://www.congressonacional.leg.br/materias/pesquisa/-/materia/118860 (last visited Mar. 2, 2023)

Projeto de Lei No. 23, de 2020, SENADO FEDERAL [*Bill No. 23, 2020*, FEDERAL SENATE], https://www25.senado.leg.br/web/atividade/materias/-/materia/140490 (last visited Jan. 10, 2024)

Proposta de Emenda à Constituição No. 10, de 2020, CÂMARA DOS DEPUTADOS [*P.E.C. 10/2020-C.D.*] [*Proposal of Amendment to the Constitution No. 10, 2020*, CHAMBER OF DEPUTIES], https://www.camara.leg.br/proposicoesWeb/fichadetramitacao?idProposicao=2242583 (last visited Apr. 30, 2023)

Proposta de Emenda à Constituição No. 10, de 2020, Fase 2, CÂMARA DOS DEPUTADOS [*P.E.C. 10/2020-Fase 2-C.D.*] [*Proposal of Amendment to the Constitution No. 10, 2020, Phase 2*, CHAMBER OF DEPUTIES], https://www.camara.leg.br/proposicoesWeb/fichadetramitacao?idProposicao=2249946 (last visited Apr. 30, 2023)

Proposta de Emenda à Constituição No. 10, de 2020, SENADO FEDERAL [*P.E.C. 10/2020-S.F.*] [*Proposal of Amendment to the Constitution No. 10, 2020*, FEDERAL SENATE], https://www25.senado.leg.br/web/atividade/materias/-/materia/141443 (last visited Apr. 30, 2023)

Proposta de Emenda à Constituição No. 115, de 2015, SENADO FEDERAL [*Proposal of Amendment to the Constitution No. 115, 2015*, FEDERAL SENATE], http://www25.senado.leg.br/web/atividade/materias/-/materia/122817 (last visited Feb. 16, 2023)

Proposta de Emenda à Constituição No. 159, de 2019, CÂMARA DOS DEPUTADOS [*P.E.C. 159/2019-C.D.*] [*Proposal of Constitutional Amendment No. 159, 2019*, CHAMBER OF DEPUTIES], https://www.camara.leg.br/proposicoesWeb/fichadetramitacao?idProposicao=2223878 (last visited May 17, 2023)

Proposta de Emenda à Constituição No. 23, de 2021, CÂMARA DOS DEPUTADOS [*P.E.C. 23/2021-C.D.*] [*Proposal of Constitutional Amendment No. 23, 2021*, CHAMBER OF DEPUTIES], https://www.camara.leg.br/proposicoesWeb/fichadetramitacao?idProposicao=2293449 (last visited Nov. 17, 2021)

SIGA Brasil, *Painel Emendas*, SENADO FEDERAL [*SIGA Brazil*, *Amendments Panel*, FEDERAL SENATE], https://www9qs.senado.leg.br/extensions/Siga_Brasil_Emendas/Siga_Brasil_Emendas.html?_gl=1*4wtr88*_ga*MTU5Mzc4MTA3LjE2NTAzOTgxNDg.*_ga_CW3ZH25XMK*MTcwMjczMDI4MS40Mi4xLjE3MDI3MzM4MzEuMC4wLjA. (last visited Apr. 13, 2024)

Sistema Gerenciador de Séries Temporais [*Time Series Management System*], BANCO CENTRAL DO BRASIL [CENTRAL BANK OF BRAZIL], https://www3.bcb.gov.br/sgspub/localizarseries/localizarSeries.do?method=prepararTelaLocalizarSeries (last visited Jan. 17, 2024)

Italy

CAMERA DEI DEPUTATI, SERVIZIO STUTI, XVIII LEGISLATURA, LA PRODUZIONE NORMATIVA: CIFRE E CARATTERISTICHE [CHAMBER OF DEPUTIES, RESEARCH SERVICE, XVIII LEGISLATURE, REGULATORY PRODUCTION: FIGURES AND CHARACTERISTICS], https://www.camera.it/temiap/documentazione/temi/pdf/1105144.pdf?_1699941916387 (last visited Nov. 13, 2023)

CORTE COSTITUZIONALE, SERVIZIO STUDI NO. 304, LA DECRETAZIONE D'URGENZA NELLA GIURISPRUDENZA COSTITUZIONALE [CONSTITUTIONAL COURT, RESEARCH SERVICE, THE

EMERGENCY DECREE IN CONSTITUTIONAL JURISPRUDENCE] (Riccardo Nevola ed., 2017), https://www.cortecostituzionale.it/documenti/convegni_seminari/STU_304_Decretazione_urgenza.pdf (last visited Jan. 27, 2024)

Leggi Pubblicate: Tipo di Iniziativa [*Published Laws: Type of Initiative*], https://leg14.camera.it/_dati/leg14/lavori/datistatistici/attivitalegislativa/datleg8.1.asp?Nas=1 (last visited Nov. 14, 2023)

Produzione Normativa per Tipo di Atto [*Legislative Production by Type of Act*], https://leg15.camera.it/_dati/leg15/lavori/datistatistici/attivitalegislativa/datleg8.1.asp?Nas=1 (last visited Nov. 14, 2023)

Temi dell'Attività Parlamentare, La Produzione Normativa: Cifre e Caratteristiche, XVII Legislatura, CAMERA DEI DEPUTATI [*Topics of Parliamentary Activity, Legislative Production: Figures and Characteristics, XVII Legislature*, CHAMBER OF DEPUTIES], https://www.camera.it/leg17/465?tema=la_produzione_normativa_nella_xvii_legislatra (last visited Nov. 13, 2023)

United Kingdom

Freedom of speech in debate, Paragraph 13.2, ERSKINE MAY, https://erskinemay.parliament.uk/section/4581/freedom-of-speech-in-debate/ (last visited Mar. 13, 2022)

United States

H. Res. 216/2009, 111th Cong. (2009) (as introduced by Rep. Ron Paul (R.-Tex.))

RIDDICK, F.M. & FRUMIN, A.S., RIDDICK'S SENATE PROCEDURE, S. DOC. NO. 101-28 (Alan S. Frumin ed., Revised ed. 1992)

Other textual sources (books, articles, working papers, manuscripts, pamphlets, etc.)

Abranches, S.H.H., *Presidencialismo de Coalizão: O Dilema Institucional Brasileiro* [*Coalition Presidentialism: The Brazilian Institutional Dilemma*], 31 DADOS 5 (1988)

Ackerman, B., *The Emergency Constitution*, 113 THE YALE LAW JOURNAL 1029 (2004)

AGAMBEN, G., STATE OF EXCEPTION (Kevin Attell tran., 2005)

AGAMBEN, G., WHERE ARE WE NOW? THE EPIDEMIC AS POLITICS (Valeria Dani tran., 2021)

Alston, E.C., Alston, L.J. & Mueller, B., *New Institutional Economics and Cliometrics* (National Bureau of Economic Research, Working Paper No. 30924, 2023)

Alston, L.J. & Mueller, B., *Pork for Policy: Executive and Legislative Exchange in Brazil* (National Bureau of Economic Research, Working Paper No. 11273, 2005)

Andrada, A.F.S., *Quem, Afinal, Apoiou o Plano Collor?* [*Who supported the "Plano Collor"?*], 38 BRAZILIAN JOURNAL OF POLITICAL ECONOMY 781 (2018)

Araujo, J.P. & Rodrigues, M., *Evidence on Search Costs Under Hyperinflaton in Brazil: The Effect of Plano Real*, 40 BRAZILIAN REVIEW OF ECONOMETRICS 75 (2020)

ARENBERG, R.A. & DOVE, R.B., DEFENDING THE FILIBUSTER (2014)

ARENDT, H., THE HUMAN CONDITION (2d ed. 1998)

ARISTOTLE, POLITICS (Ernest Barker & R. F. Stalley eds., 1995)

AUSTIN, J., THE PROVINCE OF JURISPRUDENCE DETERMINED (1832)

Ayres, J. et al., *The History of Brazil*, *in* A MONETARY AND FISCAL HISTORY OF LATIN AMERICA, 1960–2017 133 (Juan Pablo Nicolini & Timothy J. Kehoe eds., 2022)

Bailey, J.D., *Constitutionalism, Conflict, and Consent: Jefferson on the Impeachment Power*, 70 REV POL 572 (2008)

Barber, N.W., *Must Legalistic Conceptions of the Rule of Law Have a Social Dimension?*, 17 RATIO JURIS 474 (2004)

Barkow, R.E., *More Supreme than Court? The Fall of the Political Question Doctrine and the Rise of Judicial Supremacy*, 102 COLUMBIA LAW REVIEW 237 (2002)

Bar-Siman-Tov, I., *Lawmakers as Lawbreakers*, 52 WILLIAM AND MARY LAW REVIEW 805 (2010)

Bar-Siman-Tov, I., Separating Law-Making from Sausage-Making: The Case for Judicial Review of the Legislative Process (2011) (Doctor of the Science of Law thesis, Columbia University) (on file with Columbia University Libraries)

Bauerschmidt, J., *The Basic Principles of the European Union's Ordinary Legislative Procedure*, 22 ERA FORUM 211 (2021)

BELLAMY, R., POLITICAL CONSTITUTIONALISM (2007)

BENTHAM, J., AN INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION (1948)

BENTHAM, J., POLITICAL TACTICS (Michael James, Cyprian Blamires, & Catherine Pease-Watkin eds., 1999)

BERNARDES JÚNIOR, J.A., O CONTROLE JUDICIAL DO PROCESSO LEGISLATIVO [JUDICIAL OVERSIGHT OF THE LEGISLATIVE PROCESS] (2009)

BETH, R.S., CONGRESSIONAL RESEARCH SERVICE, R42929, PROCEDURES FOR CONSIDERING CHANGES IN SENATE RULES (2013), https://crsreports.congress.gov/product/pdf/R/R42929 (last visited Apr. 26, 2023)

BITTENCOURT, F.M.R., CONSULTORIA DE ORÇAMENTOS, FISCALIZAÇÃO E CONTROLE, NOTA TÉCNICA 152/2021, PRN 4/2021 E ATO ANEXO - COMPATIBILIDADE COM DECISÃO DO STF NA ADPF 854 (2021), https://static.poder360.com.br/2021/11/nota-tecnica-senado-rp9.pdf (last visited May 9, 2023)

BOWERS, K.R., CONGRESSIONAL RESEARCH SERVICE, IF12077, THE MAJOR QUESTIONS DOCTRINE (2022), https://crsreports.congress.gov/product/pdf/IF/IF12077 (last visited Apr. 21, 2024)

Branum, T.L., *President or King? The Use and Abuse of Executive Orders in Modern-Day America*, 28 JOURNAL OF LEGISLATION 1 (2002)

Bremer, E.S., *The Unwritten Administrative Constitution*, 66 FLORIDA LAW REVIEW 1215 (2014)

Briffault, R., *Campaign Finance Disclosure 2.0*, 9 ELECTION LAW JOURNAL 273 (2010)

Brooke, J., *As Collor Completes First Year, Brazilians Write Off Their Highest Hopes*, THE NEW YORK TIMES, Mar. 14, 1991, at A3, https://www.nytimes.com/1991/03/14/world/as-collor-completes-first-year-brazilians-write-off-their-highest-hopes.html (last visited Jan 19, 2024)

BURKE, E., SELECT WORKS OF EDMUND BURKE: A NEW IMPRINT OF THE PAYNE EDITION (Francis Canavan ed., 1999)

Burns, T., *What is Politics? Robinson Crusoe, Deep Ecology and Immanuel Kant*, 20 POLITICS 93 (2000)

Calabresi, S.G. & Prakash, S.B., *The President's Power To Execute the Laws*, 104 THE YALE LAW JOURNAL 541 (1994)

Canestrini, N., *Covid-19 Italian Emergency Legislation and Infection of the Rule of Law*, 11 NEW JOURNAL OF EUROPEAN CRIMINAL LAW 116 (2020)

Canes-Wrone, B., Howell, W.G. & Lewis, D.E., *Toward a Broader Understanding of Presidential Power: A Reevaluation of the Two Presidencies Thesis*, 70 THE JOURNAL OF POLITICS 1 (2008)

CAPPELLETTI, M., JUÍZES LEGISLADORES? [LEGISLATOR JUDGES?] (Carlos Alberto Alvaro de Oliveira tran., 1993)

CARNEIRO, A.C.S., SANTOS, L.C.A. & NETTO, M.G.N., CURSO DE REGIMENTO INTERNO DA CÂMARA DOS DEPUTADOS [INTERNAL REGULATIONS OF THE CHAMBER OF DEPUTIES COURSE] (6th ed.), https://livraria.camara.leg.br/curso-regimento-interno-6ed (last visited Apr. 12, 2023)

Carvalho, C.E., *O Fracasso Do Plano Collor: Erros de Execução Ou de Concepção?* [*The Failure of the Collor Plan: Errors of Execution or Design?*], 4 ECONOMIA [ECONOMY] 283 (2003)

Carvalho, H.P., A Subtração do Tempo de Interstício entre Turnos de Votação de Proposta de Emenda à Constituição de 1988: Uma Contextualização de Interesses Segmentados em Detrimento do Direito da Cidadania [The Subtraction of Interstitial Time Between Voting Rounds of a Proposal of Amendment to the 1988 Constitution: A Contextualization of Segmented Interests to the Detriment of the Right of Citizenship] (2010) (dissertação de Mestrado em Direito, Universidade de Brasília, Brasil [Master of Laws dissertation, University of Brasilia, Brazil]), https://repositorio.unb.br/bitstream/10482/8379/1/2010_HeraldoPereiradeCarvalho.pdf (last visited Apr. 30, 2023)

Casson, D., *Emergency Judgment: Carl Schmitt, John Locke, and the Paradox of Prerogative*, 36 POLITICS & POLICY 944 (2008)

CELOTTO, A., L'ABUSO DEL DECRETO-LEGGE [THE ABUSE OF THE DECREE-LAW] (1997)

Celotto, A., *Mattarella e l'Abuso del Decreto-Legge* [*Mattarella and the Abuse of the Decree-Law*], FORMICHE (2023), https://formiche.net/2023/02/mattarella-abuso-decreto-celotto/ (last visited Nov. 16, 2023)

Celotto, A., *Parlamento e Poteri Legislativi del Governo in Italia: L'Abuso del Decreto d'Urgenza (Decreto-Legge)* [*Parliament and Legislative Powers of the Government in Italy: The Abuse of the Emergency Decree (Decree-Law)*], 55 DERECHO PUCP 55 (2002)

CESARIS, A.M., DECRETO LEGGE E CORTE COSTITUZIONALE [DECREE LAW AND CONSTITUTIONAL COURT] (1996)

Chafetz, J., *The Unconstitutionality of the Filibuster*, 43 CONNECTICUT LAW REVIEW 1003 (2011)

CHAFETZ, J.A., CONGRESS'S CONSTITUTION (2017)

CHEMERINSKY, E., CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES (6th ed. 2019)

Choper, J.H., *The Political Question Doctrine: Suggested Criteria*, 54 DUKE LAW JOURNAL 1457 (2005)

Coelho, I.M., *Prefácio* [*Preface*] of ARAÚJO CASTRO, A CONSTITUIÇÃO DE 1937 [THE 1937 CONSTITUTION] (2003) (fac-similar ed. 2003)

Cohen, D., *The Origin of Roman Dictatorship*, 10 MNEMOSYNE 300 (1957)

Cole, D., *Judging the Next Emergency: Judicial Review and Individual Rights in Times of Crisis*, 101 MICHIGAN LAW REVIEW 2565 (2003)

Constant, B., *The Liberty of the Ancients Compared with That of the Moderns*, *in* DEMOCRACY 108 (Ricardo Blaug & John Schwarzmantel eds., 2016)

CORWIN, E.S., THE PRESIDENT, OFFICE AND POWERS, 1787-1957 (4th revised ed. 1957)

COSTA, N.N. & ALVES, G.M., CONSTITUIÇÃO FEDERAL ANOTADA E EXPLICADA [FEDERAL CONSTITUTION ANNOTATED AND EXPLAINED] (3d ed. 2005)

Cox, G.W., *On the Effects of Legislative Rules*, 25 LEGISLATIVE STUDIES QUARTERLY 169 (2000)

Cozzolino, A., *Reconfiguring the State: Executive Powers, Emergency Legislation, and Neoliberalization in Italy*, 16 GLOBALIZATIONS 336 (2019)

Croce, M., *Santi Romano Before Legal Institutionalism: The Order Above and Beyond Positive Law*, *in* LAW, NECESSITY, AND THE CRISIS OF THE STATE: THE EARLY WRITINGS OF SANTI ROMANO 1 (Mariano Croce ed., 1st ed. 2023)

DAVIDSON, R.H. ET AL., CONGRESS AND ITS MEMBERS (18th ed. 2022)

DAVIS, C.M., CONGRESSIONAL RESEARCH SERVICE, IN10875, EIGHT MECHANISMS TO ENACT PROCEDURAL CHANGE IN THE U.S. SENATE (2020), https://crsreports.congress.gov/product/pdf/IN/IN10875 (last visited Apr. 26, 2023)

DAVIS, C.M., CONGRESSIONAL RESEARCH SERVICE, RL30960, THE PRESIDENT PRO TEMPORE OF THE SENATE: HISTORY AND AUTHORITY OF THE OFFICE (2015), https://crsreports.congress.gov/product/pdf/RL/RL30960 (last visited Mar. 25, 2023)

DAVIS, C.M., CONGRESSIONAL RESEARCH SERVICE, RS20234, EXPEDITED OR "FAST-TRACK" LEGISLATIVE PROCEDURES (2015), https://crsreports.congress.gov/product/pdf/RS/RS20234 (last visited Dec. 26, 2021)

Dawn Oliver, *Parliament and the Courts: A Pragmatic (or Principled) Defence of the Sovereignty of Parliament*, *in* PARLIAMENT AND THE LAW 309 (Alexander Horne, Gavin Drewry, & Dawn Oliver eds., 2013)

DeBonis, M. & Roubein, R., *Senate Blocks Bill to Codify Right to Abortion*, THE WASHINGTON POST (May 11, 2022), https://www.washingtonpost.com/politics/2022/05/11/abortion-senate-vote/ (last visited Jun. 23, 2022)

Dornbusch, R. & Cline, W.R., *Brazil's Incomplete Stabilization and Reform*, 1997 BROOKINGS PAPERS ON ECONOMIC ACTIVITY 367 (1997)

Dovi, S., *Political Representation*, THE STANFORD ENCYCLOPEDIA OF PHILOSOPHY (Edward N. Zalta ed., Fall 2018 ed.), https://plato.stanford.edu/archives/fall2018/entries/political-representation/ (last visited Nov. 2, 2021)

DWORKIN, R., A MATTER OF PRINCIPLE (1985)

DWORKIN, R., LAW'S EMPIRE (1986)

DWORKIN, R., TAKING RIGHTS SERIOUSLY (1978)

DYZENHAUS, D., LEGALITY AND LEGITIMACY: CARL SCHMITT, HANS KELSEN AND HERMANN HELLER IN WEIMAR (Reprinted 2003 ed. 1997)

ELY, J.H., DEMOCRACY AND DISTRUST (1980)

ENGLISH CONSTITUTIONAL DOCUMENTS, 1307-1485 (Eleanor C. Lodge & Gladys A. Thornton eds., 1st paperback ed. 2015)

ERICKSON, B., A LEGISLATOR'S GUIDE TO PARLIAMENTARY PROCEDURE 6 (2020), https://www.ncsl.org/Portals/1/Documents/About_State_Legislatures/2020-NCSL-Leg-Guide-Parliamentary-Procedure-Final.pdf (last visited Nov. 11, 2022)

Eskridge Jr., W.N. & Ferejohn, J., *Making the Deal Stick: Enforcing the Original Constitutional Structure of Lawmaking in the Modern Regulatory State*, 8 THE JOURNAL OF LAW, ECONOMICS, AND ORGANIZATION 165 (1992)

ESKRIDGE JR., W.N., BRUDNEY, J.J. & CHAFETZ, J., LEGISLATION AND STATUTORY INTERPRETATION (3d ed. 2022)

ESKRIDGE JR., W.N., GLICK, A.R. & NOURSE, V.F., STATUTES, REGULATION, AND INTERPRETATION (2014)

ESKRIDGE, JR., W.N., FRICKEY, P.P. & GARRETT, E., LEGISLATION AND STATUTORY INTERPRETATION (2d ed. 2006)

Ferejohn, J. & Pasquino, P., *Emergency Powers*, *in* THE OXFORD HANDBOOK OF POLITICAL THEORY 333 (John S. Dryzek, Bonnie Honig, & Anne Phillips eds., 2009)

Ferejohn, J. & Pasquino, P., *The Law of the Exception: A Typology of Emergency Powers*, 2 INTERNATIONAL JOURNAL OF CONSTITUTIONAL LAW 210 (2004)

FERREIRA FILHO, M.G., DO PROCESSO LEGISLATIVO [OF THE LEGISLATIVE PROCESS] (6th rev. ed. 2007)

FERREIRA, P., CURSO DE DIREITO CONSTITUCIONAL [CONSTITUTIONAL LAW COURSE] (7th ed. 1995)

FOLLETT, M.P., THE SPEAKER OF THE HOUSE OF REPRESENTATIVES 1 (1896)

Gardbaum, S., *Due Process of Lawmaking Revisited*, 21 UNIVERSITY OF PENNSYLVANIA JOURNAL OF CONSTITUTIONAL LAW 1 (2018)

Garrett, E., *Conditions for Framework Legislation*, *in* THE LEAST EXAMINED BRANCH 294 (Richard W. Bauman & Tsvi Kahana eds., 1 ed. 2006)

Gay, O. & Tomlinson, H., *Privilege and Freedom of Speech*, *in* PARLIAMENT AND THE LAW 35 (Alexander Horne, Gavin Drewry, & Dawn Oliver eds., 2013)

Gersen, J.E. & Posner, E.A., *Soft Law: Lessons from Congressional Practice*, 61 STANFORD LAW REVIEW 573 (2018)

Gersen, J.E. & Vermeule, A., *Chevron as a Voting Rule*, 116 THE YALE LAW JOURNAL 676 (2007)

GILMORE, G., THE AGES OF AMERICAN LAW (2d ed. 2014)

Ginsburg, T., *Written Constitutions and the Administrative State: On the Constitutional Character of Administrative Law*, *in* COMPARATIVE ADMINISTRATIVE LAW 60 (Susan Rose-Ackerman, Peter L. Lindseth, & Blake Emerson eds., 2017)

Gold, M.B. & Gupta, D., *The Constitutional Option to Change Senate Rules and Procedures: A Majoritarian Means to Over Come the Filibuster*, 28 HARVARD JOURNAL OF LAW & PUBLIC POLICY 205 (2004)

Goldie, M., *Locke and Executive Power*, *in* THE LOCKEAN MIND 446 (Jessica Gordon-Roth & Shelley Weinberg eds., 2021)

Gould, J.S., *Law Within Congress*, 129 THE YALE LAW JOURNAL 1946 (2020)

Gould, J.S., Shepsle, K.A. & Stephenson, M.C., *Democratizing the Senate from Within*, 13 JOURNAL OF LEGAL ANALYSIS 502 (2021)

Gould, J.S., *The Law of Legislative Representation*, 107 VIRGINIA LAW REVIEW 765 (2021)

GRABER, A.A., CONGRESSIONAL RESEARCH SERVICE, R46738, EXECUTIVE ORDERS: AN INTRODUCTION 2 (2021)

Graça, L.O.B., *Estado Social de Direito, Novo Regime Fiscal e os Desafios da 4a Revolução Industrial* [*Social Rule of Law, New Fiscal Regime, and the Challenges of the 4th Industrial Revolution*], *in* 3 30 ANOS DA CONSTITUIÇÃO [30 YEARS OF THE CONSTITUTION] 272 (Rafael Silveira e Silva ed., 2018)

Graça, L.O.B., *Judicial Review of the Legislative Process in Brazil*, 7 U.C.L. JOURNAL OF LAW AND JURISPRUDENCE 55 (2018)

Graton, L.H.T., Bonacim, C.A.G. & Sakurai, S.N., *Political Bargaining Practices Through Federal Budget Execution*, 54 REV. ADM. PÚBLICA 1361 (2020)

Green, L. & Adams, T., *Legal Positivism*, THE STANFORD ENCYCLOPEDIA OF PHILOSOPHY (Edward N. Zalta ed., Winter 2019 ed.), https://plato.stanford.edu/archives/win2019/entries/legal-positivism/ (last visited Nov. 8, 2021)

GREGGIANIN, E., SOUZA, M.L.G. & CAMBRAIA, T., NOTA INFORMATIVA: ATENDIMENTO À SOLICITAÇÃO DE TRABALHO CONOF/CD NO. 1155/2020, TRAMITAÇÃO DO PLDO 2021 E DO PLOA 2021. REGIME NORMAL VERSUS REGIME EXCEPCIONAL (PANDEMIA). SUBSÍDIOS. PRECEDENTES. FUNDAMENTAÇÃO LEGAL. (2020), https://www.camara.leg.br/midias/file/2020/11/1155-20.pdf (last visited May 3, 2023)

GROGAN, J., EUROPEAN PARLIAMENT, POLICY DEPARTMENT FOR ECONOMIC, SCIENTIFIC AND QUALITY OF LIFE POLICIES, STUDY REQUESTED BY THE COVI COMMITTEE, IMPACT OF COVID-19 MEASURES ON DEMOCRACY AND FUNDAMENTAL RIGHTS (2022), https://www.europarl.europa.eu/thinktank/en/document/IPOL_STU(2022)734010 (last visited Jan. 10, 2024)

Grove, T.L., *Presidential Laws and the Missing Interpretive Theory*, 168 UNIVERSITY OF PENNSYLVANIA LAW REVIEW 877 (2020)

Guillaume, M., *Les Ordonnances: Tuer ou Sauver la Loi?* [*The Ordinances: Kill or Save the Law?*], 114 POUVOIRS 117 (2005)

HÄBERLE, P., PETER HÄBERLE ON CONSTITUTIONAL THEORY: CONSTITUTION AS CULTURE AND THE OPEN SOCIETY OF CONSTITUTIONAL INTERPRETERS (Markus Kotzur ed., 1st ed. 2018)

HABERMAS, J., BETWEEN FACTS AND NORMS: CONTRIBUTIONS TO A DISCOURSE THEORY OF LAW AND DEMOCRACY (William Rehg tran., 1996)

Habermas, J., *Constitutional Democracy: A Paradoxical Union of Contradictory Principles?*, 29 POLITICAL THEORY 766 (2001)

HALCHIN, L.E., CONGRESSIONAL RESEARCH SERVICE, 98-505, NATIONAL EMERGENCY POWERS 8–11 (2021), https://crsreports.congress.gov/product/pdf/RL/98-505/32 (last visited Dec. 23, 2021)

HART, H.L.A., THE CONCEPT OF LAW (Penelope A. Bulloch & Joseph Raz eds., 2d ed. 1994)

HART, R.P. ET AL., POLITICAL KEYWORDS: USING LANGUAGE THAT USES US (2005)

HARTOG, C.D. & MONROE, N.W., AGENDA SETTING IN THE U.S. SENATE (2011)

HAYEK, F.A., LAW, LEGISLATION AND LIBERTY: A NEW STATEMENT OF THE LIBERAL PRINCIPLES OF JUSTICE AND POLITICAL ECONOMY (1982)

HEITSHUSEN, V., CONGRESSIONAL RESEARCH SERVICE, 97-780, THE SPEAKER OF THE HOUSE: HOUSE OFFICER, PARTY LEADER, AND REPRESENTATIVE, https://crsreports.congress.gov/product/pdf/RL/97-780 (last visited Mar. 25, 2023)

HEITSHUSEN, V., CONGRESSIONAL RESEARCH SERVICE, 98-306, POINTS OF ORDER, RULINGS, AND APPEALS IN THE SENATE, https://crsreports.congress.gov/product/pdf/RS/98-306 (last visited Apr. 9, 2023)

HEITSHUSEN, V., CONGRESSIONAL RESEARCH SERVICE, 98-307, POINTS OF ORDER, RULINGS, AND APPEALS IN THE HOUSE OF REPRESENTATIVES, https://crsreports.congress.gov/product/pdf/RS/98-307 (last visited Apr. 9, 2023)

HEITSHUSEN, V., CONGRESSIONAL RESEARCH SERVICE, R40948, CONSTITUTIONAL POINTS OF ORDER IN THE SENATE, https://crsreports.congress.gov/product/pdf/R/R40948 (last visited Apr. 9, 2023)

HEITSHUSEN, V., CONGRESSIONAL RESEARCH SERVICE, R44819, SENATE PROCEEDINGS ESTABLISHING MAJORITY CLOTURE FOR SUPREME COURT NOMINATIONS: IN BRIEF (2017), https://crsreports.congress.gov/product/pdf/R/R44819 (last visited Apr. 26, 2023)

HEITSHUSEN, V., CONGRESSIONAL RESEARCH SERVICE, RS20544, THE OFFICE OF THE PARLIAMENTARIAN IN THE HOUSE AND SENATE, https://crsreports.congress.gov/product/pdf/RS/RS20544 (last visited Apr. 25, 2023)

HOBBES, T., ON THE CITIZEN (Richard Tuck & Michael Silverthorne eds., 1998)

Holmes, O.W., *The Path of the Law*, 10 HARVARD LAW REVIEW 457 (1897)

HORWITZ, M.J., THE TRANSFORMATION OF AMERICAN LAW, 1870-1960 (1992)

HOWELL, W.G., POWER WITHOUT PERSUASION: THE POLITICS OF DIRECT PRESIDENTIAL ACTION (2015)

Huang, G. & van Eden, H., *The Timing of the Government's Fiscal Year*, I.M.F.: PUBLIC FINANCIAL MANAGEMENT BLOG (Oct. 20, 2016), https://blog-pfm.imf.org/en/pfmblog/2016/10/the-timing-of-the-governments-fiscal-year (last visited Aug. 11, 2023)

JOHNSON, C.W., SULLIVAN, J.V. & WICKHAM, JR., T., HOUSE PRACTICE (2017)

Joseph Story's Farewell Speech in the Massachusetts House of Representatives (Jan. 17, 1812), https://archives.lib.state.ma.us/bitstream/handle/2452/819790/ocm39986872-1812-HB-UN0002.pdf?sequence=1&isAllowed=y (last visited Apr. 5, 2023)

JUSTEN FILHO, M., CURSO DE DIREITO ADMINISTRATIVO [ADMINISTRATIVE LAW COURSE] (5th ed. 2010)

Kagan, E., *Presidential Administration*, 114 HARVARD LAW REVIEW 2245

Kamata, T., *Adjudication and the Governing Process: Political Questions and Legislative Discretion*, 53 LAW AND CONTEMPORARY PROBLEMS 181 (1990)

Karni, A. & Cochrane, E., *The Senate Moved a Step Closer to Passing a Bipartisan Gun Safety Bill*, N.Y. TIMES (Jun. 23, 2022), https://www.nytimes.com/2022/06/23/us/politics/senate-gun-control-bill.html? (last visited Jun. 23, 2022)

KATZMANN, R.A., JUDGING STATUTES (2014)

KELSEN, H., TEORIA PURA DO DIREITO [PURE THEORY OF LAW] (João Baptista Machado tran., 7th ed. 2006)

Kelsen, H., *Who Ought to Be the Guardian of the Constitution? Kelsen's Reply to Schmitt*, *in* THE GUARDIAN OF THE CONSTITUTION: HANS KELSEN AND CARL SCHMITT ON THE LIMITS OF CONSTITUTIONAL LAW 174 (Lars Vinx ed., 2015)

KELSEN, K., INTRODUCTION TO THE PROBLEMS OF LEGAL THEORY (Bonnie Litschewski Paulson & Stanley L. Paulson trans., 1992)

KHAN, A., FUNDAMENTALS OF PUBLIC BUDGETING AND FINANCE (2019)

Kilgore, E., *Do Republicans Know What Communism Is?*, INTELLIGENCER (2022), https://nymag.com/intelligencer/article/do-republicans-know-what-communism-is.html (last visited Aug. 18, 2022)

KOGAN, R., GREENSTEIN, R. & HORNEY, J., CENTER ON BUDGET AND POLICY PRIORITIES, BIENNIAL BUDGETING: DO THE DRAWBACKS OUTWEIGH THE ADVANTAGES? (2012), https://www.cbpp.org/research/biennial-budgeting-do-the-drawbacks-outweigh-the-advantages#:~:text=Proponents%20of%20biennial%20budgeting%20present,an%20unwise%20course%20to%20pursue. (last visited Jul. 30, 2023).

Ladeira, F.F., *Bolsonarismo e o "vírus comunista"* [*Bolsonarism and the "communist virus"*], OBSERVATÓRIO DA IMPRENSA [PRESS OBSERVATORY] (2020), https://www.observatoriodaimprensa.com.br/conjuntura-politica/bolsonarismo-e-o-virus-comunista/ (last visited Aug. 18, 2022)

LANDIS, J.M., THE ADMINISTRATIVE PROCESS (1938)

Laraia, R.R., A Dupla Face do Princípio da Legalidade [The Double Face of the Principle of Legality] (2008) (tese de Doutorado em Direito, Pontifícia Universidade Católica de São Paulo, Brasil [Doctor of the Science of Law thesis, Pontifical Catholic University of São Paulo, Brazil]), https://tede2.pucsp.br/bitstream/handle/8232/1/Ricardo%20Regis%20Laraia.pdf (last visited Oct. 16, 2022)

Lawson, G., *The Rise and Rise of the Administrative State*, 107 HARVARD LAW REVIEW 1231 (1994)

Lessig, L. & Sunstein, C.R., *The President and the Administration*, 94 COLUMBIA LAW REVIEW 1 (1994)

Levinson, S. & Balkin, J.M., *Constitutional Dictatorship: Its Dangers and Its Design*, 94 MINNESOTA LAW REVIEW 1789 (2010)

Levinson, S. & Balkin, J.M., *Democracy and Dysfunction: An Exchange*, 50 INDIANA LAW REVIEW 281 (2016)

Linde, H.A., *Due Process of Lawmaking*, 55 NEBRASKA LAW REVIEW 197 (1976)

Lindner, J. & Góes, B., *Orçamento Secreto: Consultoria Do Senado Diz Que é Possível Divulgar Responsáveis Pelas Emendas de Relator* [*Secret Budget: Senate Advisory Office Says It Is Possible to Disclose Those Responsible for the Rapporteur's Amendments*], O GLOBO, https://oglobo.globo.com/politica/orcamento-secreto-consultoria-do-senado-diz-que-possivel-divulgar-responsaveis-pelas-emendas-de-relator-25297890 (last visited May 10, 2023)

Liptak, A., *The Supreme Court Strikes Down a New York Law Limiting Guns in Public*, N.Y. TIMES (Jun. 23, 2022), https://www.nytimes.com/2022/06/23/us/supreme-court-ny-open-carry-gun-law.html (last visited Feb. 25, 2023)

LIU, E.C., CONGRESSIONAL RESEARCH SERVICE, LSB 10415, COVID-19: FEDERAL TRAVEL RESTRICTIONS AND QUARANTINE MEASURES (2020), https://crsreports.congress.gov/product/pdf/LSB/LSB10415 (last visited Jan. 10, 2024)

LOCKE, J., TWO TREATISES OF GOVERNMENT (Thomas I. Cook ed., 1947)

Londras, F. & Davis, F.F., *Controlling the Executive in Times of Terrorism: Competing Perspectives on Effective Oversight Mechanisms*, 30 OXFORD JOURNAL OF LEGAL STUDIES 19 (2010)

Macedo, C.M., A Legitimidade e a Extensão do Controle Judicial sobre o Processo Legislativo no Estado Democrático de Direito [Legitimacy and the Extent of Judicial Control over the Legislative Process under the Democratic Rule of Law] (2007) (dissertação de Mestrado em Direito, Universidade de Brasília, Brasil [Master of Laws dissertation, University of Brasilia, Brazil]), http://icts.unb.br/jspui/bitstream/10482/2316/1/2009_Cristiane%20Branco%20Macedo.pdf (last visited Apr. 14, 2024)

MACHIAVELLI, N., DISCOURSES ON LIVY (Julia Conaway Bondanella & Peter Bondanella trans., 1997)

MACKENZIE, I., POLITICS: KEY CONCEPTS IN PHILOSOPHY (2009)

Madonna, A.J., Lynch, M.S. & Williamson, R.D., *Questions of Order in the U.S. Senate: Procedural Uncertainty and the Role of the Parliamentarian*, 100 SOCIAL SCIENCE QUARTERLY 1343 (2019)

MANN, T.E. & ORNSTEIN, N.J., THE BROKEN BRANCH: HOW CONGRESS IS FAILING AMERICA AND HOW TO GET IT BACK ON TRACK (2008)

Marantzidis, N., *'For my friends, everything; for my enemies, the law,'* EKATHIMERINI.COM (Mar. 12, 2021), https://www.ekathimerini.com/opinion/1156932/for-my-friends-everything-for-my-enemies-the-law/ (last visited Mar. 5, 2022)

Marmor, A. & Sarch, A., *The Nature of Law*, THE STANFORD ENCYCLOPEDIA OF PHILOSOPHY (Edward N. Zalta ed., Fall 2019 ed.), https://plato.stanford.edu/archives/fall2019/entries/lawphil-nature/ (last visited Nov. 11, 2021)

MARSHALL, B.W., RULES FOR WAR: PROCEDURAL CHOICE IN THE US HOUSE OF REPRESENTATIVES (2005)

MARX, K., CRITIQUE OF THE GOTHA PROGRAMME (2001), https://ebookcentral.proquest.com/lib/berkeley-ebooks/detail.action?docID=3008482 (last visited Feb. 15, 2023)

Mattie, S., *Prerogative and the Rule of Law in John Locke and the Lincoln Presidency*, 67 THE REVIEW OF POLITICS 77 (2005)

MAYER, K.R., WITH THE STROKE OF A PEN: EXECUTIVE ORDERS AND PRESIDENTIAL POWER (2002)

MCKAY, W. & JOHNSON, C.W., PARLIAMENT AND CONGRESS: REPRESENTATION AND SCRUTINY IN THE TWENTY-FIRST CENTURY (2010)

Medina, V., *Locke's Militant Liberalism: A Reply to Carl Schmitt's State of Exception*, 19 HISTORY OF PHILOSOPHY QUARTERLY 345 (2002)

MEIRELLES, H.M., DIREITO ADMINISTRATIVO BRASILEIRO [BRAZILIAN ADMINISTRATIVE LAW] (22nd ed. 1990)

MENDES, G.F. & BRANCO, P.G.G., CURSO DE DIREITO CONSTITUCIONAL [CONSTITUTIONAL LAW COURSE] (18th ed. 2023) (ebook)

Mérette, M., *Post-Mortem of a Stabilization Plan: The Collor Plan in Brazil*, 22 JOURNAL OF POLICY MODELING 417 (2000)

Metzger, G.E., *Agencies, Polarization, and the States*, 115 COLUMBIA LAW REVIEW 1739 (2015)

Metzger, G.E., *Embracing Administrative Common Law*, 80 GEORGE WASHINGTON LAW REVIEW 1293 (2012)

Michel, R.H., *The Minority Leader Replies*, THE WASHINGTON POST (Dec. 29, 1987), https://www.washingtonpost.com/archive/opinions/1987/12/29/the-minority-leader-replies/95d94d68-11e1-4522-9619-5266e7c4e6f0/ (last visited May 20, 2023)

Miller, M.B., *The Justiciability of Legislative Rules and the "Political" Political Question Doctrine*, 78 CALIFORNIA LAW REVIEW 1341 (1990)

Modugno, F., *Le Fonti del Diritto* [*The Sources of Law*], *in* DIRITTO PUBBLICO [PUBLIC LAW] 101 (Franco Modugno ed., 3d ed. 2017)

Montalivet, P., *L'Inflation Des Ordonnances* [*The Inflation of Ordinances*], 133 REVUE DU DROIT PUBLIC 37 (2017)

Montgomery, J., *Recognising a Right to Health*, *in* ECONOMIC, SOCIAL AND CULTURAL RIGHTS 184 (R. Beddard & D.M. Hill eds., 1992)

Note, *Political Questions, Public Rights, and Sovereign Immunity*, 130 HARVARD LAW REVIEW 723 (2016)

Nourse, V.F., *A Decision Theory of Statutory Interpretation: Legislative History by the Rules*, 122 THE YALE LAW JOURNAL 70 (2012)

OLESZEK, W.J. ET AL., CONGRESSIONAL PROCEDURES AND THE POLICY PROCESS (11th ed. 2020)

OLESZEK, W.J., CONGRESSIONAL RESEARCH SERVICE, R46597, THE "REGULAR ORDER": A PERSPECTIVE, https://crsreports.congress.gov/product/pdf/R/R46597 (last visited Apr. 22, 2023)

OLESZEK, W.J., CONGRESSIONAL RESEARCH SERVICE, RL33939, THE RISE OF SENATE UNANIMOUS CONSENT AGREEMENTS, https://crsreports.congress.gov/product/pdf/RL/RL33939 (last visited Apr. 18, 2023)

OLIVEIRA, L.H.S., COMENTÁRIOS AO REGIMENTO INTERNO DO SENADO FEDERAL [COMMENTS ON THE INTERNAL REGULATIONS OF THE FEDERAL SENATE] 580 (2021), https://www2.senado.leg.br/bdsf/bitstream/handle/id/590473/Comentarios_regimento_interno_Senado_Federal_v2.pdf (last visited Apr. 14, 2024)

OLSON, W.J. & WOLL, A., THE CATO INSTITUTE, POLICY ANALYSIS NO. 358, EXECUTIVE ORDERS AND NATIONAL EMERGENCIES: HOW PRESIDENTS HAVE COME TO "RUN THE COUNTRY" BY USURPING LEGISLATIVE POWER (1999), https://www.cato.org/sites/cato.org/files/pubs/pdf/pa358.pdf (last visited Sep. 18, 2023)

Parra, A., L'Utilizzo del Decreto Legge nell'Esperienza delle Ultime Legislature [The Use of the Decree Laws in the Experience of the Recent Legislatures] (2018–2019) (tesi di Laurea Magistrale in Scienze delle Pubbliche Amministrazioni, Università di Pisa, Italia [Master's thesis in Public Administration Sciences, University of Pisa, Italy]), https://etd.adm.unipi.it/theses/available/etd-06032019-201301/unrestricted/TESI_A.Parra_120619.pdf (last visited Jan. 25, 2024)

Pasquino, P., *Locke on King's Prerogative*, 26 POLITICAL THEORY 198 (1998)

Passarinho, N., *Em sessão com ministros do STF, Congresso promulga PEC da Bengala* [*In session with STF justices, Congress promulgates Walking Stick Proposal of Amendment to the Constitution*], G1 (2015), https://g1.globo.com/politica/noticia/2015/05/com-presenca-de-ministros-do-stf-congresso-promulga-pec-da-bengala.html (last visited Feb. 25, 2022)

Passarinho, N., *Por Que Congresso e STF Caminham para Lados Opostos na Discussão sobre Aborto no Brasil* [*Why Congress and STF Go in Opposite Directions Concerning Abortion in Brazil*], B.B.C. NEWS BRASIL (Jun. 13, 2018), https://www.bbc.com/portuguese/brasil-44458907 (last visited Jun. 23, 2022)

Pereira, C. & Mueller, B., *Comportamento Estratégico em Presidencialismo de Coalizão: As Relações entre Executivo e Legislativo na Elaboração do Orçamento Brasileiro* [*Strategic Behavior in a Coalition-Based Presidential System: Executive-Legislative Relations in the Budgetary Process in Brazil*], 45 DADOS 265 (2002)

Pereira, C., Power, T.J. & Rennó, L.R., *Agenda Power, Executive Decree Authority, and the Mixed Results of Reform in the Brazilian Congress*, 33 LEGISLATIVE STUDIES QUARTERLY 5 (2008)

Pereira, L.C.B. & Nakano, Y., *Hiperinflação e Estabilização No Brasil: O Primeiro Plano Collor*, 11 BRAZILIAN JOURNAL OF POLITICAL ECONOMY 565 (1991)

Pereira, L.C.B. & Nakano, Y., *Hyperinflation and Stabilization in Brazil: The First Collor Plan*, *in* ECONOMIC PROBLEMS OF THE 1990'S: EUROPE, THE DEVELOPING COUNTRIES AND THE UNITED STATES 41 (Paul Davidson & J.A. Kregel eds., 1991)

PETTIT, P., REPUBLICANISM: A THEORY OF FREEDOM AND GOVERNMENT (1999)

Philpott, D., *Sovereignty*, THE STANFORD ENCYCLOPEDIA OF PHILOSOPHY (Edward N. Zalta ed., Fall 2020 ed.), https://plato.stanford.edu/archives/fall2020/entries/sovereignty/ (last visited Jan. 13, 2024)

Polsby, N.W., *The Institutionalization of the U.S. House of Representatives*, 62 THE AMERICAN POLITICAL SCIENCE REVIEW 144 (1968)

RANDALL, J.G., CONSTITUTIONAL PROBLEMS UNDER LINCOLN (1926)

RAWLS, J., A THEORY OF JUSTICE (rev. ed. 1999)

RAWLS, J., POLITICAL LIBERALISM (Expanded ed. 2005)

RAZ, J., THE AUTHORITY OF LAW: ESSAYS ON LAW AND MORALITY (1979)

REALE, M., LIÇÕES PRELIMINARES DE DIREITO [LAW PRELIMINARY LESSONS] (1973)

Reed, T.B., *Reforms Needed in the House*, 150 THE NORTH AMERICAN REVIEW 537 (1890)

Romano, S., *On the Decree Laws and the State of Siege During the Earthquakes in Messina and Reggio Calabria*, *in* LAW, NECESSITY, AND THE CRISIS OF THE STATE: THE EARLY WRITINGS OF SANTI ROMANO 24 (Mariano Croce ed. & tran., 1st ed. 2023)

ROSE-ACKERMAN, S., EGIDY, S. & FOWKES, J., DUE PROCESS OF LAWMAKING: THE UNITED STATES, SOUTH AFRICA, GERMANY, AND THE EUROPEAN UNION (2015)

Rosenbaum, D.E., *The Tax Reform Act of 1986: How the Measure Came Together*, THE NEW YORK TIMES, Oct. 23, 1986, at D16, https://www.nytimes.com/1986/10/23/business/tax-reform-act-1986-measure-came-together-tax-bill-for-textbooks.html (last visited Nov. 26, 2022)

ROSSITER, C.L., CONSTITUTIONAL DICTATORSHIP (1948)

ROTULI PARLIAMENTORUM (John Strachey ed., 1767), https://babel.hathitrust.org/cgi/pt?id=pst.000020573621&seq=1 (last visited Jan. 6, 2024)

RYBICKI, E., CONGRESSIONAL RESEARCH SERVICE, 98-314, SUSPENSION OF THE RULES IN THE HOUSE: PRINCIPAL FEATURES, https://crsreports.congress.gov/product/pdf/RS/98-314 (last visited Apr. 5, 2023)

Saint-Martin, D., *Gradual Institutional Change in Congressional Ethics: Endogenous Pressures Toward Third-Party Enforcement*, 28 STUDIES IN AMERICAN POLITICAL DEVELOPMENT 161 (2014)

Sampaio F., *Entenda a PEC que antecipa a aposentadoria dos ministros do STF* [*Understand the Proposal of Amendment to the Constitution that anticipates the retirement of STF justices*], CNN BRASIL (Nov. 25, 2021), https://www.cnnbrasil.com.br/politica/entenda-a-pec-que-antecipa-a-aposentadoria-dos-ministros-do-stf/ (last visited Feb. 25, 2022)

SANDEL, M.J., JUSTICE (1st ed. 2009)

Sandler, D., *Forget What You Learned in Civics Class: The Enrolled Bill Rule and Why It's Time to Overrule Field v. Clark*, 41 COLUMBIA JOURNAL OF LAW AND SOCIAL PROBLEMS 213 (2007)

Santos, L.R., As Questões de Ordem na Câmara dos Deputados: Estabilidade ou Instabilidade Hermenêutica? [Questions of Order in the Chamber of Deputies: Hermeneutic Stability or Instability?] (2005) (monografia de Especialização em Gestão Legislativa, Universidade de Brasília, Brasil [Legislative Management Specialization monograph, University of Brasilia, Brazil]), https://bd.camara.leg.br/bd/bitstream/handle/bdcamara/3563/questoes_ordem_lourimar.pdf?sequence=1&isAllowed=y (last visited Apr. 12, 2023)

Santos, M.G., *Medida Provisória 979/2020: Inconstitucionalidade Da Nomeação de Reitores Pelo Ministro Da Educação Sem Consulta à Comunidade Universitária* [*Provisional Measure 979/2020: Unconstitutionality of Universities' Presidents' Nomination by the Minister of Education Without Consultation with the University Community*], ESTADÃO (2020), https://www.estadao.com.br/politica/gestao-politica-e-sociedade/medida-provisoria-979-2020-inconstitucionalidade-da-nomeacao-de-reitores-pelo-ministro-da-educacao-sem-consulta-a-comunidade-universitaria/ (last visited Jan. 22, 2024)

SCHATTSCHNEIDER, E.E., THE SEMISOVEREIGN PEOPLE (1st ed. 1960)

Schauer, F., *Legislatures as Rule-Followers*, *in* THE LEAST EXAMINED BRANCH 468 (Richard W. Bauman & Tsvi Kahana eds., 2006)

Scheuerman, W.E., *Survey Article: Emergency Powers and the Rule of Law After 9/11*, 14 JOURNAL OF POLITICAL PHILOSOPHY 61 (2006)

SCHMITT, C., POLITICAL THEOLOGY (George Schwab tran., 1985)

Schmitt, C., *The Guardian of the Constitution: Schmitt on Pluralism and the President as the Guardian of the Constitution*, *in* THE GUARDIAN OF THE CONSTITUTION: HANS KELSEN AND CARL SCHMITT ON THE LIMITS OF CONSTITUTIONAL LAW 125 (Lars Vinx ed., 2015)

Schneider, B.S., *Brazil Under Collor: Anatomy of a Crisis*, 8 WORLD POLICY JOURNAL 321 (1991)

Schönegger, P. & Sætra, H.S., *Locke on Prerogative: Democracy, Libertarianism, and Proto-Utilitarianism*, 23 LOCKE STUDIES 1 (2023)

SCHUMPETER, J.A., HISTORY OF ECONOMIC ANALYSIS (Elizabeth Boody Schumpeter ed., Reprinted 1994 ed. 1954)

Schwartsman H., *Aos inimigos, a lei* [*For Enemies, the Law*], FOLHAONLINE (2008), https://www1.folha.uol.com.br/folha/pensata/helioschwartsman/ult510u388268.shtml (last visited Mar. 5, 2022)

SECONDAT, C., BARON DE MONTESQUIEU, THE SPIRIT OF THE LAWS (Anne M. Cohler, Basia Carolyn Miller, & Harold Samuel Stone trans., 1989)

SHEPSLE, K.A., RULE BREAKING AND POLITICAL IMAGINATION (2017)

SILVA, J.A., APLICABILIDADE DAS NORMAS CONSTITUCIONAIS [CONSTITUTIONAL NORMS APPLICABILITY] (7th ed. 2007)

SINCLAIR, B., UNORTHODOX LAWMAKING: NEW LEGISLATIVE PROCESSES IN THE U.S. CONGRESS (5th ed. 2017)

SLOAN, C., THE COURT AT WAR: FDR, HIS JUSTICES, AND THE WORLD THEY MADE (1st ed. 2023)

Smyth, L.L., *Privilege, Exclusive Cognisance and the Law*, *in* PARLIAMENT AND THE LAW 3 (Alexander Horne, Gavin Drewry, & Dawn Oliver eds., 2013)

STRAUS, J.R., CONGRESSIONAL RESEARCH SERVICE, R40760, HOUSE OFFICE OF CONGRESSIONAL ETHICS: HISTORY, AUTHORITY, AND PROCEDURES (2022), https://crsreports.congress.gov/product/pdf/R/R40760 (last visited Mar. 15, 2023)

Strauss, P.L., *The Place of Agencies in Government: Separation of Powers and the Fourth Branch*, 84 COLUMBIA LAW REVIEW 573 (1984)

Studlar, D., *E. E. Schattschneider, The Semi-Sovereign People: A Realist's View of Democracy in America*, *in* THE OXFORD HANDBOOK OF CLASSICS IN PUBLIC POLICY AND ADMINISTRATION 123 (Martin Lodge, Edward C. Page, & Steven J. Balla eds., 2015)

TAVARES FILHO, N., CONSULTORIA LEGISLATIVA, EDIÇÃO DE MEDIDAS PROVISÓRIAS [LEGISLATIVE ADVISORY OFFICE, ENACTMENT OF PROVISIONAL MEASURES] (2021), https://bd.camara.leg.br/bd/handle/bdcamara/40521 (last visited Oct. 12, 2023)

Távora, F.L., *Medida Provisória: Reflexões e Debate para Arquitetura de um Novo Rito Constitucional de Análise* [*Provisional Measure: Reflections and Debate for the Design of a New Constitutional Rite of Analysis*] (Núcleo de Estudos e Pesquisas da Consultoria Legislativa, Senado Federal [Legislative Advisory Office Studies and Research Center, Federal Senate], Texto para Discussão [Working Paper] No. 325, 2023), https://www12.senado.leg.br/publicacoes/estudos-legislativos/tipos-de-estudos/textos-para-discussao/td325 (last visited Jan. 26, 2024)

THE FEDERALIST NO. 10 (James Madison) (Isaac Kramnick ed., 1987)

THE FEDERALIST NO. 45 (Alexander Hamilton)

THE FEDERALIST NO. 48 (James Madison) (Isaac Kramnick ed., 1987)

Thompson, D.F., *Both Judge and Party*, 13 BROOKINGS REVIEW 44 (1995)

Tobia, K., Walters, D.E. & Slocum B., *Major Questions, Common Sense?*, 97 SOUTHERN CALIFORNIA LAW REVIEW (forthcoming 2024) (Aug. 18, 2023 manuscript) (on file with authors)

TREVELYAN, G.M., THE ENGLISH REVOLUTION, 1688-1689 (1938)

Tuckness, A., *Locke's Political Philosophy*, THE STANFORD ENCYCLOPEDIA OF PHILOSOPHY (Winter 2020 ed.), https://plato.stanford.edu/archives/win2020/entries/locke-political/ (last visited Jun. 14, 2022)

Tushnet, M., *Non-Judicial Review*, HARVARD JOURNAL ON LEGISLATION 453 (2003)

Tyler, A.L., *Judicial Review in Times of Emergency: From the Founding Through the Covid-19 Pandemic*, 109 VIRGINIA LAW REVIEW 489 (2023)

Tyler, T.R., *Governing amid Diversity: The Effect of Fair Decisionmaking Procedures on the Legitimacy of Government*, 28 LAW & SOCIETY REVIEW 809 (1994)

VAN DER EIJK, C., THE ESSENCE OF POLITICS (2018)

Vauchez, S.H., *Taming the Exception? Lessons from the Routinization of States of Emergency in France*, 20 INTERNATIONAL JOURNAL OF CONSTITUTIONAL LAW 1793 (2022)

Vermeule, A., *Absolute Majority Rules*, 37 BRITISH JOURNAL OF POLITICAL SCIENCE 643 (2007)

Vermeule, A., *The Constitutional Law of Congressional Procedure*, 71 THE UNIVERSITY OF CHICAGO LAW REVIEW 361 (2004)

Villela, E.F.M.V. et al., *COVID-19 Outbreak in Brazil: Adherence to National Preventive Measures and Impact on People's Lives, an Online Survey*, 21 BMC PUBLIC HEALTH 152 (2021)

Vinx, L., *Carl Schmitt*, THE STANFORD ENCYCLOPEDIA OF PHILOSOPHY (Edward N. Zalta ed., Fall 2019 ed.), https://plato.stanford.edu/archives/fall2019/entries/schmitt/ (last visited Oct. 26, 2023)

Waldron, J., *Can There Be a Democratic Jurisprudence?*, 58 EMORY LAW JOURNAL 675 (2009)

WALDRON, J., LAW AND DISAGREEMENT (Reprinted ed. 2004)

Waldron, J., *Principles of Legislation*, *in* THE LEAST EXAMINED BRANCH 15 (Richard W. Bauman & Tsvi Kahana eds., 2006)

Waldron, J., *The Core of the Case Against Judicial Review*, 115 THE YALE LAW JOURNAL 1346 (2006)

WALDRON, J., THE DIGNITY OF LEGISLATION (1999)

Wallner, J.I., *Parliamentary Rule: The US Senate Parliamentarian and Institutional Constraints on Legislator Behaviour*, 20 THE JOURNAL OF LEGISLATIVE STUDIES 380 (2014)

Weterman, D. & Pires, B., *Consultoria Do Senado Contradiz Lira e Pacheco e Alega Ser Viável Revelar Nomes Do Orçamento Secreto* [*Senate Advisory Office Contradicts Lira and Pacheco and Claims It Is Feasible to Reveal Secret Budget Names*], ESTADÃO, https://www.estadao.com.br/politica/consultoria-do-senado-contradiz-lira-e-pacheco-e-alega-ser-viavel-revelar-nomes-do-orcamento-secreto/ (last visited May 10, 2023)

Weyland, K., *The Rise and Fall of President Collor and Its Impact on Brazilian Democracy*, 35 JOURNAL OF INTERAMERICAN STUDIES AND WORLD AFFAIRS 1 (1993)

Whittington, K.E., When Does Abuse of Power Justify Impeachment? (Feb. 11, 2022) (unpublished manuscript) (on file with the Kadish Center for Morality, Law & Public Affairs, Berkeley Law)

Wilde, M., *The Dictator's Trust: Regulating and Constraining Emergency Powers in the Roman Republic*, 33 HISTORY OF POLITICAL THOUGHT 555 (2023)

Wintgens, L.J., *Legisprudence as a New Theory of Legislation*, 19 RATIO JURIS 1 (2006)

Wolff, J. & Leopold, D., *Karl Marx*, THE STANFORD ENCYCLOPEDIA OF PHILOSOPHY (Spring 2021 ed.), https://plato.stanford.edu/archives/spr2021/entries/marx/ (last visited Aug. 18, 2022)

WOLFF, J., THE HUMAN RIGHT TO HEALTH (2012)

Audiovisual materials

CONFISCO [CONFISCATION] (HBO Brazil 2021)

Instituto do Legislativo Paulista, *Direito do Parlamentar ao Devido Processo Legislativo* [*Representative's Right to Due Legislative Process*], YOUTUBE (Sep. 2, 2021), https://www.youtube.com/watch?v=CktLj3HBi5I (last visited Sep. 2, 2021)

The Nomination of Ketanji Brown Jackson to be an Associate Justice of the Supreme Court of the United States (Day 3), COMMITTEE ON THE JUDICIARY (U.S. SENATE) (2022), https://www.judiciary.senate.gov/meetings/the-nomination-of-ketanji-brown-jackson-to-be-an-associate-justice-of-the-supreme-court-of-the-united-states-day-3 (last visited Apr. 26, 2022)