

PART V

LATIN AMERICA



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Conflict Resolution and Constitutionalism

The Making of the Brazilian Constitution of 1988

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Brazil's historical experience with conflict resolution contrasts sharply with that of its Latin American neighbors. While the former Spanish colonies fought prolonged and bloody wars to achieve independence, Brazil achieved independence peacefully. This was largely the result of the unusual response of the Portuguese monarch—Prince Regent João, the future King João VI—to Napoleon's invasion of Iberia in 1807: He decided to move the Portuguese court to Rio de Janeiro, where it remained even after Napoleon's fall. In 1815, he declared the United Kingdom of Portugal and Brazil. Only when liberal revolutionaries in Lisbon convened a parliament in 1820 and threatened revolt did João return to Portugal, leaving behind his son Pedro as Prince Regent. In 1822, Pedro declared Brazilian independence. In no position to contest the issue, Portugal peacefully accepted the loss of its former colony in return for a small indemnity.

From 1822 to 1889, Brazil was the only country in Latin America governed by a constitutional hereditary monarchy. In 1889, a military coup d'état overthrew the monarchy, leading to a short experience with pseudo-democratic government. The era of Brazilian history known as the Old Republic (1891–1930) operated with a constitution that created the trappings of democracy, but single-party machines, controlled by the landed oligarchy, rigged the elections. The electorate averaged less than 3 percent of the population. Winning candidates received more than 90 percent of the vote in six of eleven presidential elections and more than 70 percent of the vote in the others. As Kenneth P. Erickson has observed, “For most Brazilians, therefore, the democracy of the Old Republic was only a sham.”¹

In 1930, the Old Republic was overthrown by another military coup d'état. From 1930 to 1945, Brazil was ruled by the dictatorial regime of Getúlio Vargas, who in turn was

overthrown by a military coup d'état in 1945. An ensuing democratic interlude was interrupted in 1964, when President João Goulart was ousted by yet another military coup. Brazil was ruled by a series of military regimes from 1964 until 1985. The Brazilian electorate did not have a chance to vote directly for a president until 1989. Disregarding the sham democracy of the Old Republic, Brazil's actual experience with democratic government before adopting the 1988 Constitution was limited to only sixteen years of its 166 years of existence as an independent nation.

A Brief Overview of Prior Brazilian Constitutions

The 1824 Constitution

Dom Pedro, son of João VI, convoked a constituent assembly to draft Brazil's first constitution. One of the assembly's first acts was to crown Dom Pedro I as Emperor and Perpetual Defender of Brazil. Dissatisfied with the limitations on his power in the constitutional draft, Dom Pedro forcibly dissolved the assembly and replaced it with a ten-member commission over which he presided personally. In December 1823, his commission completed a draft constitution satisfactory to Dom Pedro. After municipal councils approved the draft, the Emperor promulgated it on March 25, 1824.

Brazil's first constitution was, to date, also its most enduring, lasting sixty-five years with only one amendment.² It was modeled on the French constitution of 1814, establishing a hereditary Catholic monarchy headed by the Emperor. The monarchy spared Brazil the constant coups and political turmoil that characterized the early experiments of its Spanish-speaking neighbors, but the abolition of slavery in 1888 led disgruntled former slave holders to support a military coup that ousted the monarchy in 1889.

The 1891 Constitution and the First Republic

The 1891 Constitution, which was heavily influenced by the U.S. constitution, thoroughly changed Brazil's form of government. The monarchy became a democracy, the unitary state became a federation of twenty states called the United States of Brazil, and the quasi-parliamentary system became a presidential system. The states promulgated their own constitutions, elected their own governors and legislative assemblies, and organized their own systems of courts and public administration. The municipalities had virtual autonomy on subjects of particular interest to them.

The 1891 Constitution was a well-written and liberal document that worked badly. Considerable political instability marked its initial period. Shortly after promulgation of the constitution, Brazil's first elected president, Deodoro da Fonseca, staged an *autogolpe*, dissolving the Congress and declaring a state of siege. Twenty days later, the *autogolpe* fizzled. The president resigned and his vice president, Floriano Peixoto, assumed the presidency. Although he promised to convoke new elections, Peixoto did not do so. The political crisis was aggravated by a financial crisis that led to many bankruptcies and a series of rebellions.

The First Republic was characterized by widespread electoral fraud and monopolization of political power by the states of São Paulo and Minas Gerais. Resentment over the election returns of 1930—which replaced the incumbent Paulista president, Washington Luís, with another Paulista, Júlio Prestes—coupled with the economic crisis of the Great Depression ultimately led to a successful military revolt.

The Vargas Dictatorship and Constitutions of 1934 and 1937

The Constitution of 1891 was a casualty of the 1930 military revolt that brought Getú-

lio Vargas to power. Although theoretically in force, the 1891 Constitution was modified by a series of acts of the provisional government, which replaced it with a new constitution in 1934.

Modeled after the Weimar constitution of 1919 and the Spanish constitution of 1931, Brazil's 1934 Constitution substituted social democracy for liberal democracy. It enfranchised women and introduced secret voting. For the first time, all Brazilians over the age of eighteen, regardless of sex, became eligible to vote, provided that they were not illiterate, beggars, or enlisted military. Optional during the Old Republic, voting became compulsory for all eligible males and female civil servants.

The 1934 Constitution lasted only three years. In 1937, under the pretext of putting down a communist takeover plot, Getúlio Vargas staged an *autogolpe* and proclaimed a dictatorship called the New State (*Estado Novo*). Vargas replaced the 1934 Constitution with a shadow constitution, nicknamed the *Polaca* because of its resemblance to Poland's 1935 constitution.³ Under it, the president was the supreme authority of the state. The provisions for democratic institutions and representative elections were merely window dressing. Vargas dissolved all political parties and dispensed with elections. Even though Article 187 of the 1937 Constitution required ratification by a plebiscite before entering into force, no plebiscite was ever held. Consequently, the Vargas government was actually a *de facto* regime. Because Congress never met, Vargas simply legislated by decree, issuing more than eight thousand decree-laws between 1937 and 1945; some of these are still in force. During the entire period that the 1937 Constitution was nominally in force, a state of emergency suspended individual rights and guarantees. This state of emergency lasted until November 30, 1945, a month after Vargas was overthrown by the military.

Restoration of Democracy and the 1946 Constitution

The 1946 Constitution reestablished a democratic system of government. Like the 1891 Constitution, it reflected the influence of the U.S. constitution regarding federalism and individual rights. It also reflected the influence of the Weimar constitution regarding socioeconomic rights and structures.

The demise of the 1946 Constitution began in 1961 with the enigmatic resignation of the popularly elected president, Jânio Quadros, who indicated that he had renounced the presidency because the country was "ungovernable" under the existing constitutional regime. Widespread political opposition to leftist vice president João Goulart led to the enactment of Constitutional Amendment 4 of September 2, 1961, which permitted Goulart to assume the presidency, but only under a parliamentary regime that deprived him of most presidential powers. This parliamentary system functioned poorly. After a plebiscite, a constitutional amendment of January 23, 1963, restored presidentialism. But Goulart was neither a popular nor a competent president. Inflation reached a record high after a failed stabilization program that alienated his supporters. Badly miscalculating his tenuous political support, Goulart attempted to move the country sharply to the left. The result was a military coup that ousted Goulart in April 1964.

The Constitutions of 1967 and 1969

The military maintained the Congress and the 1946 Constitution but quickly modified it by a series of institutional acts. These were unconstitutional decrees signed by members of the military high command, who claimed to be exercising the constituent power in the name of the revolution. Thus, the military high command became a self-designated and self-legitimizing ambulatory constituent assembly. Military leaders used institutional

acts to select presidents, remove opposition members of Congress, and deprive many Brazilians of their political and civil rights for a ten-year period. The Second Institutional Act permitted the president to pack the Supreme Court and issue decree-laws in matters involving national security, a power soon expanded by the Fourth Institutional Act to include all financial and administrative matters.

The 1967 Constitution was designed to lend a greater semblance of legitimacy and permanence to the military regimes running Brazil. Formally ratified by a Congress from which most political opposition had been purged, this constitution incorporated key provisions of the four institutional acts passed between April 1964 and December 1966. Its tenor resembled the 1937 Constitution that institutionalized the Vargas dictatorship. An electoral college consisting of members of Congress and delegates nominated by the state legislative assemblies formally elected the president for a four-year term. In practice, however, only a general could be a candidate.

The 1967 Constitution was followed by a period of constant crisis due to widespread popular opposition to the military government. The military command responded by issuing another series of twelve institutional acts that continuously modified the constitution in accordance with the military's assessment of the needs of the moment. Institutional Act 5 of December 13, 1968, thoroughly eviscerated the constitution, as it authorized President Arturo da Costa e Silva to suspend all legislators and exercise total legislative powers himself. It also gave the president the power to deprive citizens of their political rights for ten years, quash legislative mandates summarily, declare and prolong states of siege, suspend freedom of association, impose censorship, and dismiss or retire any government employee or officeholder. Article 10 suspended habeas corpus

for crimes against national security, the popular economy, and the social and economic order. The president used the act to launch a witch hunt against his opponents and force early retirement of three prominent members of the Supreme Court.

The Constitution of 1969

In August 1969, President da Costa e Silva suffered a stroke. Rather than permit the civilian vice president, Pedro Aleixo, to succeed to the presidency in accordance with the constitution, the armed forces issued Institutional Act 12, authorizing the military leaders to assume executive power in the form of a junta. A few months later Institutional Act 17 of October 17, 1969, authorized the military junta to issue constitutional amendments. The junta promptly issued Constitutional Amendment 1, which rewrote and renumbered the entire text of the 1967 Constitution. Despite its label, most Brazilian constitutional scholars treat Amendment 1 as the 1969 Constitution.

The 1969 Constitution strengthened the powers of the executive. It increased the presidential term of office from four to five years and expanded the ambit of the president's decree-law power to include taxation, creation of public employment, and determination of salaries for civil servants. The greatest expansion of executive power came from a provision allowing the president to send bills to Congress on any subject, but giving each house only forty-five days to consider such bills. If labeled urgent, both houses had only forty days to consider such bills jointly. Any bill not considered or rejected during that period was deemed automatically approved.

The 1969 Constitution sharply reduced the nominal protection previously accorded to individual rights. Publications contrary to good morals were prohibited. The government could impose the sanctions of death, perpetual imprisonment, banishment, and

confiscation. Even those individual rights that were theoretically guaranteed remained suspended until October 13, 1978, when the institutional acts were revoked.

The 1969 Constitution, like the 1967 and 1937 Constitutions, institutionalized de facto military regimes. All three constitutions shared the basic feature of heavy centralization of power. All transferred power to the federal government from the states and municipalities, leaving Brazilian federalism a shadow of its former self. All transferred powers from the legislature to the executive. In practice, none actually provided minimally adequate protection for individual rights. All lacked legitimacy, for none was adopted by the people or their democratically elected representatives. None of the regimes they institutionalized had any serious commitment to constitutionalism.

The Process of Adopting the 1988 Constitution

The Long Transition to Democracy

Unlike transitions from military rule in many countries, the Brazilian transition was not initiated by pressure from civil society. Instead, it was initiated by the military. In 1974, President Ernesto Geisel and his chief of cabinet, General Golbery de Couto e Silva, started an eleven-year gradual relaxation of dictatorial measures that eventually resulted in redemocratizing the nation. Their motives for beginning the long transitional process are complex and to some extent remain enigmatic. Alfred Stepan, who conducted interviews on the subject with both Geisel and Golbery, reports that the decision to reach out to civil society for allies was motivated in large part by concern about the growing autonomy of the security apparatus, both in the state and within the military itself. Because Brazil's leftist guerrilla movements had long been destroyed, the security apparatus

was no longer needed and constituted a serious danger to the military as an institution.⁴ In 1978, at the end of Geisel's term, Congress enacted Constitutional Amendment 11, which revoked the institutional acts and their complementary measures to the extent they conflicted with the 1969 Constitution.⁵ Also in 1978, a massive strike in the auto industry on the outskirts of São Paulo marked the beginning of a period of substantial labor unrest and dissatisfaction with government-dominated labor relations.

General João Baptista de Oliveira Figueiredo, who assumed the presidency in 1979, permitted the enactment of an amnesty law that applied not only to members of the security forces who had committed human rights violations but also to political prisoners and exiles.⁶ This double-sided amnesty law—which, unlike similar laws in Argentina and Uruguay, has never been overturned—facilitated widespread acceptance of redemocratization by the military and its most vociferous opponents. A new law on political parties permitted the resumption of a much more vigorous and diverse political life. In 1980, the National Conference of Lawyers approved the Declaration of Manaus, calling for a return of the constituent power to the people. Distinguished jurists, such as Raymundo Faoro and Miguel Seabra Fagundes, began to call publicly for convocation of an assembly to draft a new constitution.⁷

In 1982, concerned about losing its control over constitutional amendments, the military government increased the number of votes required in Congress to adopt a constitutional amendment from an absolute majority to two-thirds.⁸ This change proved critical two years later, when the Partido do Movimento Democrático Brasileiro (Party of the Brazilian Democratic Movement, or PMDB), the principal opposition party with 200 seats in the Chamber of Deputies, proposed a constitutional amendment to restore popular election of the president. All oppo-

sition parties joined in mobilizing popular support for the measure. Millions of Brazilians attended rallies and took to the streets in the principal cities to demand *diretas-já*, direct presidential elections, immediately. On April 25, 1984, a majority of Congress voted for a constitutional amendment to restore direct elections but fell twenty-two votes short of the two-thirds majority needed for enactment.

As the military government changed the rules for amending the constitution, it decided also to change the rules for the next presidential election, which was moved forward from October 1984 to January 1985. Constitutional Amendment 22, which the military pushed through Congress in 1982, modified the Electoral College that indirectly selected the president. The Electoral College had been composed of the entire National Congress, plus an additional group of electors selected by the state legislatures in proportion to each state's population.⁹ Amendment 22 eliminated proportional representation for the additional group of electors; instead, each state selected six additional electors, chosen by the majority party in a winner-take-all vote.¹⁰ Nevertheless, this strategy failed to prevent the Electoral College, which met in January 1985, from ending twenty-one years of military rule by electing as president Tancredo Neves, the head of the PMDB and a principal leader of civilian opposition to military rule.

Shortly thereafter, fate seriously undermined the Brazilian redemocratization process. Neves died shortly before assuming office. The vice president, José Sarney, was a lackluster traditional politician from Maranhão, a backward northeastern state. Until shortly before the 1985 election, he had been president of the Partido Democrático Social (Social Democratic Party, or PDS), the promilitary regime party. The PDS had split, and its dissidents, including Sarney, joined

the Partido a Frente Liberal (Liberal Front Party, or PFL). The PFL then formed a coalition with the PMDB called the Democratic Alliance, which produced the Neves–Sarney ticket. Although many PMDB politicians had wanted Ulysses Guimarães, popular leader of the PMDB, to succeed Neves, the military insisted that Sarney be sworn in as Brazil's transitional president on March 15, 1985.¹¹ Two months later, Congress adopted Constitutional Amendment No. 25, which not only restored direct elections for all levels of government but also totally liberalized the rules governing political parties by legalizing Marxist parties, abolishing the requirement of party discipline, eliminating obstacles to party formation, and permitting multiparty alliances.

With Constitutional Amendment No. 25, the path of Brazilian constitutionalism reached a critical juncture. Because most of its authoritarian features had been relaxed by subsequent constitutional amendments, the 1969 Constitution could have been maintained. Alternatively, the democratic 1946 Constitution could have been restored. But Neves had promised a new constitution, and after his untimely death, his successor was determined to fulfill that promise.

The Utilization of Congress as a Constituent Assembly

In 1985, Brazil made a critical decision that seriously undermined the democratic character of the constitution-making process. Instead of popularly electing delegates to a constituent assembly, an idea that had substantial popular support,¹² President Sarney proposed and Congress adopted a constitutional amendment empowering the next Congress—elected on November 15, 1986—to double as the constituent assembly.¹³ The condition that Congress serve as the constituent assembly appears to have

been imposed secretly by the military high command, on the theory that Congress would be more responsive to military demands than would a specially elected constituent assembly.¹⁴ While many countries have used their legislatures as constituent assemblies successfully, in the Brazilian context, the procedure was fundamentally flawed. First, the degree to which Brazilians were democratically represented in Congress was severely attenuated. Brazil's electoral legislation badly underrepresented the most populous states. States from the north, northeast, and center-west, with about 40 percent of the population, had 52 percent of the delegates to the assembly. Using two different models, Barry Ames has calculated that about one-fifth of the crucial votes in the constituent assembly would have been different if its membership had been elected proportionally to population.¹⁵ Second, the 1986 Congress included senators elected indirectly by an electoral college in 1982, under the prior authoritarian electoral legislation. These twenty-three senators had no specific mandate from the electorate to serve as part of a constituent assembly.¹⁶ Third, voters knew virtually nothing about the candidates' views on elaborating a new constitution.¹⁷ Fourth, Congress had—and still has—a ravenous appetite for pork-barrel benefits, that is, government jobs for supporters and geographically specific public works projects. Votes of members of Congress in the constituent assembly were purchased, or at least rented, in exchange for pork-barrel programs.¹⁸ While specially elected members of a constituent assembly also might have been susceptible to the blandishments of pork, their lack of concern for reelection should have made their appetites much smaller than those of members of Congress.

Another element of unfairness resulted from the Sarney administration's success in concealing the ineffectiveness of its eco-

nomic stabilization plan from the electorate. Sarney deliberately delayed until just after the November 1986 congressional elections a desperately needed adjustment to his Cruzado Plan, a wage increase coupled with a freeze on prices and the exchange rate that created the illusion of monetary stability and relative prosperity while exacerbating the underlying causes of the galloping inflation it had temporarily suppressed.¹⁹ Had voters realized that the Cruzado Plan was a huge fiasco, and that the country was actually in the grip of the worst inflationary crisis in Brazilian history, the number of members of Congress elected from the PMDB would have been far fewer.²⁰

Apart from political fairness, combining legislative and constitution-making functions in Congress had other drawbacks. Drafting a new constitution dragged on for nineteen months, partly because Congress was forced to divide its time, meeting unicamerally in the mornings as the constituent assembly and bicamerally in the afternoons as the legislature. Ideally, constitutions should endure without revision rather than be constantly rewritten.²¹ This means that they should be elaborated by statesmen with long-term national perspectives. Brazil's Congress is a highly political body with a short-term perspective and agenda, elected primarily to represent state and local interests rather than the interests of the nation. President Sarney successfully exploited congressional local interests to influence the constitution-making process.²² Moreover, as a basic political player, Congress had a clear conflict of interest. It is not surprising that the constitutional document that Congress drafted aggrandizes congressional power and confers numerous favors and entitlements upon states, counties, and special-interest groups. Congress also has been the primary beneficiary of frequent constitutional amendments, each of which provides two occasions to open

the pork barrel to secure the needed extraordinary majorities in two voting rounds.

The Composition of the Assembly

At the start of the constitutional assembly's deliberations in early 1987, the majority (298 out of 559) of its delegates were members of the PMDB. But Brazilian party affiliations are frequently transient, and many of those elected under the eclectic PMDB label came from other parties. David Fleischer's analysis shows that 82 members of the PMDB in 1987 were former members of the PDS or ARENA (National Renovating Alliance), parties that supported the military government, and that only 212 (40 percent) members were authentic PMDB members in the sense that they either came to the PMDB from the MDB (Brazilian Democratic Movement), the party that opposed the military government, or joined the PMDB directly. But even the so-called authentic PMDB was ideologically quite heterogeneous. Fleischer's research also reveals that the largest group in the assembly consisted of the 217 delegates who were former members of ARENA. The *Folha* of São Paulo, one of Brazil's leading newspapers, estimated the ideological breakdown of the assembly as 9 percent leftist, 23 percent center-leftist, 32 percent centrist, 24 percent center-rightist, and 12 percent rightist. Although 257 (46 percent) of the delegates had law degrees, only 51 (9.1 percent) actually practiced law. In socioeconomic terms, the largest group of delegates was made up of 211 (37.7 percent) delegates whose primary income came from invested capital. Another 133 (23.8 percent) of the delegates were rural property owners.²³

Adopting the Assembly's Internal Rules

The constitutional assembly convened on February 1, 1987, with a largely undefined agenda. Its first tasks were election of its

president and executive committee (Mesa) and the drafting of its internal rules. The constitutional amendment that convoked the assembly mandated only three rules: that the Chamber of Deputies and the Senate meet as a single chamber on February 1, 1987; that the president of the Supreme Court install the constituent assembly and supervise the election of its president; and that the text of the constitution be approved in two rounds of voting by an absolute majority. Ulysses Guimarães, the leader of the PMDB, was easily elected president of the assembly, and he appointed Senator Fernando Henrique Cardoso, a member of the liberal wing of the PMDB from São Paulo, to formulate the internal rules in collaboration with the leadership of the political parties. Cardoso's draft of the internal rules, presented on February 16, 1987, generated controversy on two critical issues: the assembly's sovereign powers to enact measures that would take effect immediately and the process by which the new constitution would be drafted.

The Cardoso draft gave the assembly the power to issue decisional measures (*projetos de decisão*) with immediate effect on any matter deemed relevant. Such measures would have allowed the assembly to amend the existing 1969 Constitution at any time by vote of an absolute majority, rather than the two-thirds majority that the 1969 Constitution required. The center-right elements vehemently opposed this proposal, arguing that the sovereign powers of the assembly were limited to drafting a new constitution rather than governing the country. Eventually, Cardoso worked out a compromise, in which decisional measures could be issued only against acts that threatened the assembly's sovereignty. Although several such measures were proposed, none was ever adopted.²⁴

The second issue was whether to start the drafting process with or without a draft prepared by constitutional scholars. The assembly opted to draw up a new constitution without

starting from a draft on the theory that this would make the process as open and democratic as possible. The assembly emphatically rejected the idea of commissioning a draft as a “dangerous instrument of control over the assembly.”²⁵

The No Architect/No Blueprint Approach to Constitution Building

The constitutional assembly’s decision to proceed without a draft seriously complicated the assembly’s principal task. Had it started with a coherent draft, the assembly could have shortened the drafting process enormously and probably would not have produced a document with such serious conceptual and organizational flaws. In July 1985, President Sarney appointed a blue-ribbon committee, headed by Afonso Arinos, a distinguished jurist and politician, to prepare a draft constitution for submission to the constituent assembly. The extensive Arinos Draft, issued in September 1986, contained 451 articles with many commendable features.²⁶ It proposed a type of parliamentarism similar to the French Fifth Republic, with a congressionally chosen prime minister and a popularly elected president. It also proposed a badly needed German-style reorganization of the party system with proportional representation and a threshold of 3 percent of the national vote for party representation in Congress. But President Sarney refused to submit the Arinos Draft to the constituent assembly because he disagreed with many of its provisions, particularly the creation of a mixed parliamentary-presidential system of government. Nevertheless, a strikingly similar proposal surfaced in the assembly’s draft constitution.

Though the entire 559-member assembly drafted the constitution from scratch, the draft itself was patched together; delegates borrowed many provisions from previous Brazilian constitutions and the Arinos

Draft. PRODASEN (Center for Informatics and Data-Processing of the Federal Senate) not only assembled and compared all prior Brazilian constitutions but also collected Portuguese translations of the constitutions of more than thirty-six countries, including Germany, Italy, Japan, Spain, and the United States. These translations, along with the Portuguese constitution, were made available to members of the assembly.²⁷ The assembly also held seminars on constitution writing for its members with experts from various countries. The strongest outside influence on the assembly members was the Portuguese constitution of 1976 and the doctrinal writings of the distinguished Portuguese constitutional scholar, Professor José Joaquim Gomes Canotilho of the Law School of the University of Coimbra.²⁸

Thematic Committees and Subcommittees

The assembly’s internal rules, approved on March 24, 1987, adopted a decentralized system of drafting, to be done initially by the members themselves rather than hired experts or a special committee. The rules called for all assembly members to divide themselves into eight thematic committees, each made up of sixty-three regular members and a similar number of substitutes, who were also assembly members. Each committee, in turn, was divided into three thematic subcommittees, each with twenty-one members. At every phase, decisions were made by absolute majority vote. The thematic committees and subcommittees consisted of the following:

I. Committee on Sovereignty and the Rights and Guarantees of Men and Women

- (a) Nationality, Sovereignty, and International Relations
- (b) Political Rights, Collective Rights, and Guarantees
- (c) Individual Rights and Guarantees

II. **Committee on Organization of the State**

- (a) Federal Government, Federal District, and Territories
- (b) States
- (c) Counties and Regions

III. **Committee on Organization of the Branches and System of Government**

- (a) Legislative Branch
- (b) Executive Branch
- (c) Judicial Branch

IV. **Committee on Electoral and Party Organization and Institutional Guarantees**

- (a) Election System and Political Parties
- (b) Defense of the State and Society and their Security
- (c) Guarantee of the Constitution, its Reform, and Amendment

V. **Committee on the Tax System, Budget, and Finance**

- (a) Taxation and Revenue Participation and Sharing
- (b) Budget and Financial Oversight
- (c) Financial System

VI. **Committee on the Economic Order**

- (a) General Principles, State Intervention, and Regimes of Property to the Subsoil and Economic Activity
- (b) Urban Questions and Transportation
- (c) Agricultural Policy, Land Tenure, and Land Reform

VII. **Committee on Social Order**

- (a) Rights of Workers and Civil Servants
- (b) Health, Security, and the Environment
- (c) Blacks, Indians, Disabled, and Minorities

VIII. **Committee on Family, Education, Culture, Sports, Communication, Science, and Technology**

- (a) Education, Culture, and Sports
- (b) Science, Technology, and Communication
- (c) Family, Minors, and Elderly

In June 1987, the assembly created a special systematization committee, the function of which was to integrate the final reports of the eight thematic committees into an organic draft for presentation to the entire assembly. The critical role of this committee and its rapporteur is discussed below.

The PMDB had by far the largest representation on each committee and subcommittee because membership on all committees was proportional to each party's representation in the assembly. The PMDB allowed its members to designate the committees on which they wished to serve. Each committee and subcommittee was headed by a president, two vice presidents, and a general rapporteur. These leadership positions were allocated on the basis of negotiations among the leaders of the various parties. The liberal wing of the PMDB took advantage of the internal divisions within the conservative wing of its party to elect Mário Covas, a liberal senator from São Paulo, as floor leader of the PMDB in an internal election on March 18, 1987. Covas made sure that all nine of the committee rapporteurs, who played critical roles in the initial drafting process,²⁹ were PMDB members, and that eight were drawn from the liberal wing of that party. Eight committee presidents were members of the second largest party, the PFL, and one presidency went to the much smaller PDS. The great bulk of the vice-presidential positions also went to the PMDB. While leadership of the subcommittees was more evenly divided among the parties, Covas secured the bulk of the leadership positions for the more liberal members of the PMDB.³⁰

The internal rules permitted civic associations, private citizens, and members of the assembly to submit suggestions to each sub-

committee. The first sessions were devoted to collecting and reviewing 11,989 suggestions from civic associations and individuals that had been organized by PRODASEN. The subcommittees then held 182 public hearings and heard testimony from individuals and organizations regarding the public suggestions. Each subcommittee then drafted its respective part of the principal committee's theme, which was then forwarded to the principal committee for integration into that committee's draft. In May 1987, after forwarding their twenty-four drafts to their respective parent-committee rapporteurs, the subcommittees were dissolved.

Between May 25 and June 15, 1987, the eight thematic committee rapporteurs integrated their subcommittee drafts into a single document, which they submitted to the entire committee for amendment and discussion. In this first round, a total of 7,727 amendments were proposed to the eight committee drafts. The rapporteurs then re-drafted the documents for further discussion and amendment. Another 7,184 amendments were proposed in the second round. Finally, the proposed text was submitted to a vote of the entire committee. Despite the barrage of proposed amendments, surprisingly few modifications were made at the thematic committee level.³¹

Popular Participation

Unlike the assembly that drafted the U.S. constitution, which operated in complete secrecy, Brazil's constitutional assembly made a concerted effort to make its proceedings as public as possible. The assembly strongly encouraged popular participation from all sectors of civil society. The internal rules created the so-called popular amendment, which enabled citizens' groups to present constitutional proposals that the entire assembly had to consider. Popular amendments required the signatures of at least 30,000 voters and

had to be organized by at least three legally constituted associative entities responsible for the authenticity of the signatures. For each popular amendment, one signatory had the right to make a twenty-minute presentation to the full assembly. One hundred twenty-two popular amendments, some with more than one million signatures, were actually submitted to the assembly in the month following the systematization committee's presentation of its initial draft.

The assembly's internal rules also required that each subcommittee devote five to eight sessions to hearing from entities representing various sectors of Brazilian civil society. Virtually all interest groups—including government ministers, environmentalists, human rights activists, feminists, business associations, unions, landlords, Indians, street urchins, prostitutes, homosexuals, and maids—sought to protect their interests and to include their demands in the new constitution. Proposals from any civic organization were automatically submitted to subcommittees, who were required to hold public hearings on them. PRODASEN sent out more than five million questionnaires to voters and civic groups soliciting suggestions on what they believed should be in the new constitution. PRODASEN also set up a computerized data bank containing the results of the 72,719 popular suggestions received in return.³²

Television and newspapers kept the work of the assembly in constant public view. O Globo, Brazil's largest television network, carried the entire initial session of the assembly in a live broadcast. The congressional staff set up a media center to ensure that news outlets disseminated and explained the assembly's acts to the general public. This center produced 716 television programs, 700 radio programs, 3,000 hours of video, and 4,871 interviews with members of the assembly. Five-minute radio and television segments on the assembly's work were aired twice a

day. The center's weekly journal on the assembly's proceedings was distributed to more than seventy thousand government officials, universities, and research institutions.³³ The press, the Roman Catholic Church, unions, human rights groups, and civic groups repeatedly urged the public to become involved in the process of drafting the new constitution. During the seemingly interminable deliberations, virtually all aspects of Brazilian society were debated. Both in principle and in final result, nothing was deemed too trivial for possible inclusion in the new constitutional text. Some 61,142 amendments were proposed; some 21,000 speeches were delivered. The annals of the constituent assembly fill one hundred volumes.³⁴ As president of the assembly, Ulysses Guimarães dubbed Brazil's new charter "The Citizens' Constitution" for good reason.

Because the political parties were weakly organized and political forces badly divided, the assembly was unusually susceptible to pressures from societal interest groups.³⁵ Seven of the most influential societal interest groups were organized labor, business groups, rural landowners, the military, the Church, peasants, and the so-called popular movement.

Organized Labor

Since labor unions had difficulty agreeing upon specific proposals, a lobbying organization called the Inter-Union Department for Parliamentary Action (DIAP) had the task of articulating organized labor's interests before the constituent assembly. Organized in 1983 by a group of labor unions, DIAP was a voluntary organization run by a group of labor lawyers.³⁶ The interests of the labor movement were also promoted by the Workers' Party (PT), founded in 1980 by Luis Inácio Lula da Silva. Sixteen PT representatives were elected to the 1986 Congress.

The labor movement lobbied hard and effectively for autonomy from the Ministry of Labor and a series of specific labor benefits, such as reducing the number of hours in the workweek from forty-eight to forty-four, extending the right to strike to all workers, extending maternity leave and creating paternity leave, and increasing the compensation rate for overtime. They also lobbied hard for restoration of job tenure, which the military had replaced with the Fund for the Guarantee of the Time of Service (FGTS).³⁷ Business groups' strong opposition to restoring job tenure in the private sector ultimately resulted in its defeat after bitter debate. However, civil servants successfully lobbied for job security and extending tenure to all government employees with five years of service irrespective of whether they had passed the entrance exams, as well as generous retirement benefits. Maids' organizations, formed specifically to lobby the assembly, successfully inserted a provision that extended to domestic workers the benefits of the minimum wage, a month's paid vacation, one day off a week, a month's notice before dismissal, four months of paid maternity leave, and retirement. The labor movement also supported land reform, albeit much less effectively. The labor movement sought to influence the assembly directly through its PT representatives by sending delegations to lobby, mobilizing the rank and file, and holding rallies to support prolabor candidates.

Business Groups

The business sector was much more diverse than the labor sector and consequently had even greater difficulty in articulating a set of policies for which to lobby. The Federation of Industries of São Paulo (FIESP) set up a special committee to prepare constitutional proposals, which in 1986 produced a neoliberal document called *Contribution to the Fu-*

ture Brazilian Constitution. In March 1986, industrial leaders organized the Union of Brazilian Businessmen (UBE) in Brasília as an umbrella organization for diverse business groups to formulate constitutional proposals for the business community. In November 1987, a similar umbrella organization, the National Front for Free Enterprise (FNLI), was organized to mobilize business interests to defend free enterprise against the constitutional draft emerging from the assembly; it ran a fifteen-day television campaign in favor of free enterprise. Industrial business groups lobbied hard in favor of free enterprise, restriction of governmental enterprises, and neoliberalism. They also lobbied against labor demands for absolute job security and an extension of the right to strike. But some business groups diverged from neoliberalism to support market protection, special privileges for firms of national capital, and extensive restrictions on foreign investment. Perhaps the most effective technique that business groups used to influence the outcome of the constitutional drafting process was to elect 211 of their members to the assembly. Business groups also generated numerous documents articulating and explaining their positions.

Rural Landowners

Rural landowners vigorously and effectively opposed peasant demands for land reform. Membership in its lobbying organization, the Rural Democratic Union (UDR), organized in 1985 in reaction to a land-reform program, grew from 50,000 to 230,000 between 1986 and 1987. In October 1986, several rural agro-business organizations, such as the Confederation of Agriculture (CNA) and the Brazilian Rural Society (SRB), joined the UDR to form an umbrella organization called the Ample Front for Agriculture (FAA) to lobby the constituent assembly.

Landowners raised substantial funds by auctioning off cattle, using the funds to mobilize mass demonstrations and buy media time urging rejection of constitutional provisions on land reform.³⁸ They also had eighty of their members elected to the constituent assembly.

The Military

The military lobbied the assembly very effectively through thirteen superior officers assigned as liaisons to Congress and through its longtime ally, President Sarney. It also strongly pressured—even intimidated—members of the assembly through public threats of another coup d'état by military ministers. The military successfully sought to protect its corporative privileges, retain its historic position as the guardian of domestic order and protector of the constitutional order, increase military appropriations, and maintain its contingent of six cabinet positions. It also successfully opposed civilian control over the military, an attempt to create a ministry of defense, a parliamentary form of government, attempts to dismantle the National Security Council (CSN) and the National Information Service (SNI), land reform, and extension of the right to strike to essential public services. The military's influence on the assembly's deliberations was so great that Alfred Stepan and Juan Linz have placed the 1988 Brazilian constitution in the category of constitutions "created under highly constraining circumstances reflecting de facto power of non-democratic institutions and forces."³⁹

The Church

The Roman Catholic Church had been a significant moral force in opposing the military regime, particularly in criticizing its human rights violations and in promoting social jus-

tice for the poor through grassroots church committees (CEBs). It eschewed covert lobbying of assembly members; instead, the National Conference of the Bishops of Brazil (CNBB) tried to set the agenda for the assembly by publishing a document in 1986 entitled *For a New Constitutional Order*, which called for protection of human rights, income redistribution for the poor, agrarian reform, reduction in media monopolization, and more active citizen participation in government. Rather than endorse specific candidates for the assembly, the Church urged its members to vote for candidates dedicated to social justice and human rights. The Church did play an active role, however, in promoting popular amendments and organizing public meetings with assembly members. It also organized a special commission to record and disseminate the assembly's work.⁴⁰ The bishops successfully included a provision in the constitution that made religious education optional during normal school hours in public elementary schools; they also successfully blocked feminist attempts to legalize abortion. The Church was less successful, however, in preventing expansion of the right to divorce and artificial birth control.

Peasant Groups

With millions of members, the National Confederation of Agricultural Workers (CONTAG) was one of the leading organizations pressing for agrarian reform. In 1985, CONTAG prepared a document for the Arinos Commission setting forth its constitutional agenda for land reform. In 1985, the CNBB formed the Pastoral Commission for Land to support peasant lobbying for land reform. The Movement of the Landless Rural Workers (MST), formed in 1980, also pushed hard for land reform. The agenda of these groups was specific constitutional provisions permitting expropriation of produc-

tive land and payment of compensation for land taken for agrarian reform at less than fair market value and in bonds. They urged that 5 percent of governmental revenues be set aside solely for agrarian-reform purposes. They also demanded limits on the size of land holdings by both Brazilians and foreigners, as well as severe constraints on the ability of property owners to resist the expropriation of their lands in the courts. The peasant groups' principal lobbying technique was mass mobilization. Lacking the financial resources of the rural landowners, the peasant groups managed to have only one of their members elected to the assembly. Intense political maneuvering by rural landowners ultimately led to rejection of most of the peasants' demands in the assembly.⁴¹

The Popular Movement

The popular movement consisted of a diverse group of civic and professional organizations, as well as a broad array of grassroots organizations and technical institutions, that began as a lobby for a popular constituent assembly. It was led by the Brazilian Bar Association (OAB), the CNBB, and the PT. Achieving their initial goal, the groups began lobbying the constituent assembly to make the drafting process transparent and accessible to the public. They succeeded in having the assembly adopt the popular amendment process, which they then used to propose detailed and programmatic measures to make Brazilian society more just. Their lobbying efforts consisted of rallies, leaflets, demonstrations, books, posters, and popular amendments.

The Role of the Systematization Committee

The thematic committee rapporteurs were responsible for forwarding the draft articles to the systematization committee.⁴² This

committee—the composition of which was decidedly more progressive or liberal than the entire constituent assembly—had the difficult task of trying to mold the twenty-four thematic subcommittees' uncoordinated and often inconsistent articles, plus the thousands of amendments suggested by assembly members and outside groups, into a more or less coherent document. The PMDB leadership designated Bernardo Cabral, a PMDB deputy and former president of the Brazilian Bar Association, as rapporteur for the systematization committee. Cabral and his assistant rapporteurs⁴³ arranged the thematic committee reports into a single text known as Cabral Zero. In June 1987, Cabral presented this text to the assembly without changing the contents of the committee reports.

Cabral Zero was a 501-article monstrosity quickly nicknamed “the Frankenstein draft.”⁴⁴ In July 1987, after assembly members presented 5,615 amendments, Cabral submitted his own 496-article draft (Cabral I), incorporating a number of the proposed amendments. This draft pleased none of the major political forces, particularly President Sarney and the military. Because the rapporteur was free to include or reject any proposed amendments, intensive lobbying efforts by assembly members, the executive, and organized societal groups focused upon Cabral to try to persuade him to change the draft to their liking. Assembly members presented Cabral with another 20,790 amendments, and popular groups submitted an additional eighty-three amendments.

In September 1987, Cabral presented his second draft (Cabral II) to the systematization committee. Cabral II reduced the number of articles from 496 to 264, plus 72 transitional provisions. In this second draft, Cabral sought to resolve many constitutional controversies by postponing them to future enactment of complementary or ordinary legislation, deleting them, or attempt-

ing compromise solutions. For example, he excluded the direct democracy features of plebiscites, referendums, and popular initiatives. He maintained the concept of Brazilian firms of national capital, which were to be favored by law, but prohibited discrimination against foreign firms. He left the question of expropriability of land for agrarian reform to ordinary legislation. To try to placate President Sarney, Cabral extended the president's mandate from five to six years. The president would be elected by direct elections, but if no candidate received a majority, Congress would select the winner from among the candidates who received the most votes.⁴⁵

The systematization committee made substantial changes to Cabral II, undoing many of Cabral's compromises. The committee took two months to vote out its modified version of Cabral II, known as *Projeto A* (Draft A), released for consideration by the entire assembly on November 18, 1987. At that point, the systematization committee was dissolved, leaving only its rapporteur to continue his crucial role in the redrafting process. The committee's Draft A was a critical document, for the internal rules mandated that an absolute majority (280 votes) was necessary to amend or remove any item. Draft A reflected the center-left agenda: a parliamentary system, significant restrictions on foreign investment, substantial government interference in the economy, mechanisms for direct democracy, reduction of the term of the president to five years, limiting Sarney's mandate to four years, highly protective labor provisions, decentralization, substantial transference of tax authority and revenue to the states and municipalities, agrarian reform, expropriation of productive land, liberal human rights protection, and broad amnesty provisions. Draft A produced a strong backlash from business groups and rural landowners. The military and President Sarney reacted even more neg-

atively, warning that its approval might lead to a military coup.

The Centrão Coalition and the Change in Internal Rules

Initially, conservatives were badly divided, which allowed the forces of the center-left to dominate the early rounds of constitutional bargaining. Reactions to Draft A galvanized the formation of a broad, diverse coalition of constituent assembly members from the center and right known as the Centrão (the big center). This loose-knit group, which cut across party lines, initially coalesced around the strategy of changing the assembly's internal rules.⁴⁶ The Centrão accomplished this goal through a petition signed by 290 assembly members; their signatures were collected through intensive lobbying by large landowners and business elites, increasing threats from the military, and President Sarney's generous distribution of blandishments from the government's pork barrel. The petition ultimately changed the rule requiring 280 votes to remove or amend an item in the systematization committee draft to one that required 280 votes either to keep an item in the draft or to remove or amend it. This rule change significantly reduced the power of the progressive-leftist group that dominated the systematization committee, but it made the voting process even more convoluted.

Voting Procedure on the Final Drafts

Amendments were considered in two rounds by roll-call votes. The voting order was to consider first any amendment with at least 280 signatures to the basic text of each chapter and title in the systematization committee's Draft A. Because the Centrão had prepared its own competing draft constitution, its draft was voted upon first. The Centrão's amendments had two chances for success. Approval of an amendment, either when initially pre-

sented or twenty-four hours later, definitively eliminated the corresponding original text from Draft A. Only if the Centrão's substitute provision failed to win the necessary 280 votes in two tries did the assembly vote upon the corresponding provision in Draft A. If the original Chapter A provision also failed to receive the necessary 280 votes, Cabral had forty-eight hours to revise the text. If his proposed revision also failed to win 280 votes, the provision was excluded from the constitution. Each chapter and title of the draft was considered in order, starting with the preamble and ending with the Transitory Constitutional Provisions Act. Each amendment was read aloud by Ulysses Guimarães, opined on by Bernardo Cabral, and debated by assembly members.

Once an absolute majority approved the basic text of a chapter, the assembly moved to the next voting phase. This was consideration of redactive amendments called *destaques*, designed to add, modify, or delete words, phrases, or articles in the approved text. The process also included a mechanism called the *destaque para votação em separado*, used to vote on provisions that were previously excluded from the basic text. The *destaques* had to be presented previously to the rapporteur for screening and organization.

Lack of Political Domination in the Assembly

No single political group or figure dominated the constituent assembly. Even though the PMDB initially had an overwhelming majority of assembly members, the political party contained deep ideological divisions and no party loyalty or discipline.⁴⁷ During the constituent assembly, many of the PMDB's left-wing members deserted it to form the Partido da Social-Democracia Brasileira (Brazilian Social Democratic Party, or PSDB), but "even before the split the PMDB had ceased to enjoy any sort of programmatic coherence or legislative discipline."⁴⁸ The PMDB was

not alone in this regard. None of the major parties had a coherent party line for drafting the new constitution, and only the PT had some semblance of party discipline.

Lack of political direction and the Byzantine voting procedure meant that majority votes on virtually every issue depended on protracted negotiations and bargaining. Faced with a realistic prospect of stalemate, party leaders created an institution called the Leaders' Council (*Colégio de Líderes*), which has since become a permanent feature of Congress, to accelerate the voting process. Prior to voting sessions, party leaders began meeting to organize the voting, determining in advance official party positions and the areas of agreement and disagreement.⁴⁹ The Leaders' Council usually removed the most contentious provisions from the basic texts, leaving them for the *destaques*. These *destaques* frequently became the focus of heated debate that was often resolved by compromise after informal negotiations among party leaders.⁵⁰ Some of these compromises had to be renegotiated if party leaders could not deliver the necessary votes. Even if the votes were there, often the voters were not: In a constitution-making process that dragged out for nineteen months, absenteeism became a significant problem, particularly for assembly members with business or professional interests in other cities.

The Substantial Revision of Draft A

The constituent assembly made critical changes to Draft A that resulted from the Centrão's internal rule change (described above). In March 1988, by a vote of 344 to 212, presidentialism replaced parliamentarism. By a vote of 304 to 223, Sarney was granted another year in the presidency. On the other hand, because of absenteeism and ideological divisions, the Centrão failed to prevent many leftist provisions in Draft A from remaining in Draft B.

The rules under which Brazilian constitution making was conducted forced assembly members to negotiate hotly contested issues. No side could claim a clear victory and no side was clearly defeated. The process resulted in a series of compromises that allowed conservative forces to prevail on certain issues, such as permitting the military to intervene on the invitation of any branch of government to protect law and order, or prohibiting agrarian reform expropriations of productive land and small- to medium-sized properties. Job security for workers was eliminated in the private sector but retained for the public sector. On other issues, the center-left prevailed, restricting foreign investment, prohibiting usury, granting labor unions greater autonomy, and implementing a broad array of human rights.⁵¹ Political moderation, protracted negotiations, and substantial compromises—all hallmarks of Brazil's lengthy transition to democracy—ultimately also became the hallmarks of the process of drafting the new constitution.

The first round required delegates to vote on 732 occasions and finally concluded, five months later, at the end of June 1988. After a July recess, the same process was repeated, albeit more quickly, with each chapter and title of Draft B. The second round required delegates to vote only 289 times and took a little more than one month.

On July 26, 1988, President Sarney made a last-ditch effort to sabotage the assembly's work, claiming in a televised address that adopting Draft B would leave the country bankrupt and ungovernable. The next day, Draft B was submitted to the entire assembly for a second round of suppressive and corrective amendments. The assembly eventually approved the final draft by a majority of 403 to 13.

The approved text was then sent to an editing committee of thirty people appointed by Ulysses Guimarães. After a final edit for style, the assembly approved the constitution

on September 22 and promulgated it on October 5, 1988, twenty months after the assembly began its work. Neither a plebiscite nor any other ratification procedure was held, thereby reducing the constitution's legitimacy and eliminating any chance for further changes dictated by citizen input.

Despite the complex legalistic rules governing the proceedings, at least three articles were adopted by resort to the ubiquitous Brazilian *jeito*.⁵² In October 2003, fifteen years after the constitution's adoption, Nelson Jobim, then vice president of the Supreme Court, publicly revealed that with Guimarães's complicity, he had slipped two articles into the final draft of the constitution, bypassing the assembly's rules for submission and voting on amendments.⁵³ Shortly thereafter, Jarbas Passarinho, then president of the committee on electoral and party organization and institutional guarantees and member of the systematization committee, publicly disclosed that he too had slipped in a last-minute amendment at Guimarães's suggestion.⁵⁴ After a group of jurists called for his impeachment,⁵⁵ Jobim rationalized his action by opining that his amendments had been ratified by the final vote of the assembly, which he deemed a kind of third round.⁵⁶ The effort to impeach Jobim went nowhere.

The Results of Brazil's Constitution-Making Process

The 1988 Constitution reflects the intense political mobilization of interest groups and lobbies for inclusion of their demands and protection of their interests. It contains a host of unwieldy entitlements that often embed traditional Brazilian corporatism and clientelism. The convoluted drafting process virtually assured that the new constitution would lack organic unity and a coherent vision for a democratic Brazil. The end product is a *mélange* of progressive, conservative, liberal, radical, and moderate provisions, all

rather uncomfortably ensconced side by side in a complex, detailed document containing 245 articles and 70 transitional provisions, many of which contain numerous elliptical sections and subparagraphs.

The constitution is *dirigiste* and programmatic, setting out ambitious goals for reforming Brazilian society and attempting to determine the political course of action for future governments. Rather than emphasizing fundamental principles and basic procedural rules for future resolution of societal problems, Brazil's charter sets out detailed substantive rules that belong either in ordinary legislation or administrative regulations rather than in a constitution. The result is a constitutional straightjacket that has been a serious obstacle to effective democratic governance and socioeconomic modernization.

Despite the great detail in which many subjects have been regulated, the constitution requires a great many complementary and ordinary laws to fill in missing elements or permit implementation of its provisions. A principal reason for this constitutional style is the polemical nature of many provisions. Many measures were so divisive that the constituent assembly could finish its task only by leaving aside the details for future legislation.⁵⁷

Moreover, the assembly made a calculated decision to defer rather than resolve constitutional conflicts permanently. It postponed for five years the ultimate resolution of the shape of the constitution that it had just adopted. Given the serious constraints that the military and its ally, President Sarney, placed upon the constitution-making process, as well as the political unfairness associated with the way in which its members were selected, the assembly's decision to make Brazil's 1988 Constitution provisional arguably was a sensible strategy.⁵⁸ Two transitional provisions provided for revisiting basic constitutional questions after five years, by plebiscite and a facilitated revision procedure.

Plebiscite after Five Years

The framers deferred ultimate resolution of their bitter fight about whether to adopt a presidential or parliamentary form of government for five years, at which time the issue would be resolved by plebiscite.⁵⁹ Initially, supporters of presidentialism proposed to resolve the issue by plebiscite when they were losing in the deliberations of the systematization committee. Thereafter, supporters of parliamentarism embraced the idea after losing to presidentialism in the plenary vote. As the time to introduce new amendments had already passed, the vanquished supporters of parliamentarism hitched a ride on a bizarre amendment by Deputy Cunha Bueno that was awaiting floor consideration. Bueno's amendment proposed holding a plebiscite in five years to decide whether to restore the monarchy or retain a republican form of government.⁶⁰ The amendment was passed with the support of the unsuccessful advocates of a parliamentary system, who successfully added a subamendment calling for an additional vote on whether to adopt a presidential or parliamentary system of government.

Both questions were ultimately resolved by a plebiscite held in 1993. In an election marred by significant absenteeism and spoiled ballots, 66 percent of the votes were cast in favor of retaining a republican form of government, against 10.2 percent for restoring the monarchy; 55.4 percent were cast for presidentialism, against 24.6 percent for parliamentarism.⁶¹

Streamlined Total Revision after Five Years

Article 3 of the Transitional Constitutional Provisions Act provided that the constitution could be revised in 1993 by an absolute majority of Congress in a unicameral session. Some of the constitution's critics cynically observed, only partly tongue-in-cheek, that this was the only sensible provision in the entire constitution, for it allowed Congress

to amend the document by a process simpler than enacting an ordinary statute. The president had no veto power, and the unicameral vote facilitated overriding obstructionism from the smaller, more conservative Senate. This was obviously a risky proposition with the potential for scuttling a basic purpose of a written constitution—the preservation of a particular vision of structuring and limiting power and protecting that vision from being easily overthrown by future generations.⁶² It also created five years of institutional uncertainty. However, it had the potential to revisit a badly flawed constitutional document during a period in which the president would be popularly elected and the military would be much less likely to intervene.

Unfortunately, the wholesale constitutional revision envisaged for October 1993 never materialized. Important non-governmental organizations challenged the legitimacy of revising the constitution by a single vote of a bare majority of Congress. Leftist politicians and social groups, fearful that they would lose gains made in 1988, formed an antirevisionist bloc that temporarily succeeded in preventing the revision, initially by litigation and later by parliamentary obstructionism. By this time, congressional attention was diverted toward a major corruption scandal, nicknamed Budgetgate, in which twenty-nine of its members were charged with diverting huge sums from the treasury into their own bank accounts through a budget-rigging scheme. Budgetgate forced postponement of constitutional revision until March 1994. By then, most congressmen were focused on the upcoming elections.

Although more than 17,000 amendments were presented for congressional consideration, only six were enacted, and of these, only two had any real significance. Revision Amendment 1 of March 1, 1994, temporarily changed the revenue-sharing rules, placing 15 percent of the revenues that were to be transferred from the federal government

to state and local governments for fiscal years 1994 and 1995 into an emergency social fund. This transfer of an estimated nine billion dollars was critical to the success of the Plano Real, the stabilization plan that successfully lowered the inflation rate from about 50 percent per month to less than 10 percent per year. The other significant revision amendment was Amendment 5 of June 7, 1994, which increased the presidential term from four to five years.

Conflict Resolution via Inflation

Forty years ago, Albert Hirschman, in discussing Chilean society, theorized that inflation could be regarded as “a substitute for civil war.”⁶³ Conflicts over the percentage of national income to which different groups are entitled are resolved by inflating the size of the economic pie so that each group receives an apparently larger slice. Inflation permits governments to temporize and gain additional room for social maneuvering during disruptive periods.

Brazil has been a chronically inflationary society. One of the reasons for the 1964 military takeover was the Goulart regime’s inability to control inflation, which reached a record high of 91.7 percent in 1964. Unfortunately, the return of civilian government in 1985 produced unprecedented levels of hyperinflation that made the Goulart era look monetarily stable.⁶⁴

The 1988 Constitution exacerbated Brazil’s inflationary problems. Assembly members simply acquiesced to the demands of various socioeconomic groups with little or no concern about whether Brazil could afford to fund the constitutional mandates and entitlements. Even worse, they drafted a straitjacket upon the powers to tax and spend that made it virtually impossible to control the federal government’s huge budgetary deficits. The constitution has hindered the reduction of major sources of expenditures,

such as cutting bloated government payrolls and overly generous retirement benefits or privatizing public-sector monopolies. It also forced major increases in fiscal transfers to the state and local governments and mandated significant increases in governmental expenditures. It forgave monetary correction payments of small private firms and farmers on loans from banks and financial institutions contracted between 1986 and 1987. President Sarney warned the assembly for good reason that adopting the proposed constitution would aggravate Brazil’s desperate fiscal crisis, but his warning was ignored.

By the end of Sarney’s presidential term in early 1990, Brazil was in the middle of the worst inflationary crisis in its history. The domestic debt doubled between 1988 and 1989. By the time Fernando Collor de Mello assumed the presidency, the inflation rate had reached an astonishing monthly rate of 84 percent. Collor reduced inflation drastically by a draconian and hare-brained plan of freezing all bank accounts for eighteen months, which threw the country into a severe recession, but the accumulated inflation for 1990 still reached 1,447 percent. The Collor Plan rapidly collapsed because it failed to address the underlying causes of inflation, and by 1992, the annual inflation rate had climbed back to 1,158 percent. Collor had hoped to persuade Congress to enact a huge constitutional reform package dealing with administrative, fiscal, and civil service reform. But he was ultimately frustrated by a Congress with strong ties “to well-organized groups with vested interests in preserving aspects of the constitution that institutionalized fiscal chaos.”⁶⁵

Itamar Franco, Collor’s successor, also attempted several times—unsuccessfully—to control inflation. The inflation rate reached 2,489 percent in 1993. Brazil was unable to control inflation successfully until July 1994, when then-finance minister Fernando Henrique Cardoso introduced the Plano Real. At

that time, inflation was running at 50 percent a month and the country was in serious economic crisis. Chile's impressive success with a free-market economy, as well as Argentina's successful stabilization and privatization programs, contrasted sharply with Brazil's track record of spiraling inflation, economic stagnation, and growing urban violence. Congress finally relented and enacted a critical constitutional amendment that created an emergency fund to reallocate tax funds to the federal government. The success of the Plano Real propelled Cardoso to the presidency in the 1994 elections.

A Steady Stream of Constitutional Amendments

Amending the constitution is only moderately difficult in Brazil. Approval requires two successive votes by at least three-fifths of each house of Congress. No further ratification is required by the states or the people.⁶⁶

Unlike his predecessors, President Cardoso had considerable success in negotiating with Congress to enact a series of amendments that dismantled important features of the 1988 Constitution. As of April 2009, Congress has enacted sixty-three amendments, and many proposed amendments are presently in the pipeline. Congress has become an ambulatory constituent assembly. From time to time, it appears to recognize that certain fiscal features of the constitution make Brazil ungovernable. Rather than permanently amend those provisions, however, Congress prefers to make temporary changes. Thus, the Emergency Fund, which enabled the federal government to reduce the tax revenues it had to transfer to state and local governments, has been extended for brief periods by a series of constitutional amendments.⁶⁷ Four constitutional amendments extended the tax on financial transactions, formerly called the Provisional Assessment on the Movement or Transfer of Securities, Credits, or Rights of a Financial Nature.⁶⁸ A

constitutional amendment adopted in 2000 resolved a budgetary crisis by unlinking mandated spending with respect to one-fifth of budgetary resources, but only until 2003. Another amendment extended the period to 2007, and still another amendment extended the period to 2011.⁶⁹

From 1992 to 2005, Congress also enacted amendments removing significant constitutional obstacles to reducing budgetary deficits by reforming social security, eliminating expensive retirement benefits, capping the compensation of all governmental employees, permitting the firing of tenured civil servants, and eliminating certain government monopolies and most restrictions on foreign investment.⁷⁰ As a consequence, many of the inflationary, statist, and nationalist features of the constitution have been dismantled. Moreover, much fiscal chaos has been avoided, at least temporarily. Timothy Power has noted the supreme irony: "Most of the political capital in 1987–1988 was spent in the making of a new constitution: In the 1990s, most of the political capital was spent trying to unmake the same document."⁷¹

The Provisional Measure: The Antidemocratic Drafting Blunder that Facilitated Governability

The constitution's framers sought to concentrate law-making powers in Congress. Because the most abused authoritarian institution was the decree-law, the 1988 Constitution deprives the president of the power to issue any. On the other hand, in recognition of the historic tendency of the executive to initiate legislation in Brazil, Article 62 authorizes the president to issue provisional measures with the force of law whenever he deems it urgent and relevant. The drafters copied the provisional measure from the Italian constitution under the assumption that Brazil was adopting a parliamentary system of government. When the form of government reverted from a parliamentary

to a presidential system, the assembly committed a colossal blunder by failing to delete the provisional measure from Draft B.

The provisional measure quickly became a critical device for transferring substantial amounts of legislative power to the executive. Until 2001, Brazilian presidents could issue provisional measures with the force of law on any subject, thus expanding the breadth of their power to enact law by decree well beyond the military constitutions.⁷² The only constraint on the president was that he had to submit provisional measures immediately to Congress; if not converted into law within thirty days, the measures were void *ab initio*. But Brazil is the land of the *jeito*, and Brazilian presidents quickly invented a technique for bypassing this constraint. The executive regularly reissued provisional measures, sometimes as many as eighty or ninety times, until Congress ultimately enacted them into law or rejected them. The executive also added a clause validating all acts performed in reliance on prior provisional measures.⁷³ Abuse of the provisional measure was substantially reduced by promulgation of Amendment 32 on September 11, 2001, which prohibits use of provisional measures in certain areas and permits provisional measures to be republished only once.⁷⁴ Nevertheless, Brazilian presidents continue to misuse the provisional measure to initiate ordinary rather than emergency legislation.

Conflict Resolution via Litigation

The 1988 Constitution augments judicial independence and makes the judiciary, particularly the Supreme Court, the primary guardian of constitutional rights. As a reaction against the twenty-one years of authoritarian military rule, the new constitution makes a very impressive effort to assure protection of an extensive list of individual, collective, and social rights. It also contains a number of procedural innovations designed to foster

judicial protection of these rights. The 1934 Constitution had created a new summary remedy called a writ of security (*mandado de segurança*) to protect certain rights that habeas corpus did not protect from violation by public authorities. The 1988 Constitution creates a collective writ of security, a sensible expansion of Brazil's limited concept of a class action, to protect groups or classes against illegal or abusive governmental actions. It borrows from the Portuguese constitution a procedural device called *habeas data*, which allows anyone to discover any information the government has about him in its data banks and rectify that data if it is incorrect. The personal nature of this right, however, prevents its effective use to discover the fate of persons who disappeared or were killed during the period of military repression. The representation, an action to challenge the unconstitutionality of any law or decree directly before the Supreme Court, could be brought only by the procurator general during the time of military rule. The 1988 Constitution relabels the representation as a direct action of unconstitutionality and confers standing on a fairly large number of groups to secure an abstract determination of the constitutionality of any federal or state law or normative act.⁷⁵ To try to protect constitutional rights from congressional inertia, the constitution creates the mandate of injunction (*mandado de injunção*), which is to be granted whenever the absence of a regulatory or implementing rule makes impracticable the exercise of constitutional rights and liberties or the prerogatives inherent in nationality, citizenship, or sovereignty. It also imports from Portugal the action of unconstitutionality for omission, which is to be granted whenever the Supreme Court determines "the lack of measures to make a constitutional rule effective."⁷⁶

Two additional constitutional remedies have been created since the adoption of the 1988 Constitution. The declaratory action of constitutionality, created by Amendment 3

in 1993, confers original jurisdiction on the Supreme Court to hear “actions declaring the constitutionality of federal laws or normative acts.” This action, which can be brought only by the president, the executive committee of either house of Congress, or the procurator general, is essentially a mechanism for the federal government to bypass the lower courts and secure a speedy determination of the constitutionality of important and sensitive legislation. Disobedience of a fundamental precept, an action created by Law 9.882 in 1999, can be brought directly before the Supreme Court by anyone with standing to bring a direct action of unconstitutionality whenever there is no other effective remedy. This procedural device enables an absolute majority of the Supreme Court to suspend proceedings before any lower court; a two-thirds Supreme Court majority can declare unconstitutional any law or normative act.

The constitution also transforms the Public Ministry (*Ministério Público*) into an autonomous institution, assigning it a primary role in insuring that the laws are being faithfully executed and that collective and diffuse constitutional rights are being judicially protected. By instituting public actions against governmental authorities for misuse of public funds, class actions to protect the environment and consumers, and criminal prosecutions against corrupt politicians, the Public Ministry has become, in the opinion of several Brazilian scholars, a “fourth power.”⁷⁷

The result of this significant expansion of constitutional rights and remedies has been a flood of litigation, as the caseloads of the Brazilian courts have increased dramatically since the constitution was adopted.⁷⁸ Much of the litigation involves suits against the government, which stubbornly insists upon appealing every judgment against it, even if the issues have already been decided against it in Brazil’s highest courts. As William Prillaman has observed, the 1988 Constitution was “so prescriptive and detailed that

it constitutionalized a staggering range of minor issues and flooded the courts—even the Supreme Court—with the most trivial cases.” As a result, “a decade later, opinion was unanimous that unfettered access for everyone had produced, not surprisingly, access for no one.”⁷⁹ On the other hand, the procedural innovations of the current constitution have forced the judiciary, particularly the Supreme Court, into the political arena on a regular basis. Consequently, the courts have become an active countermajoritarian political force.⁸⁰

The Electoral System

Although Brazil has all the formal indicia of democracy,⁸¹ the constitution enshrines one of the least democratic federal systems in the world. The Brazilian political system has long had a highly malapportioned system of representation in Congress. The military regime aggravated the malapportionment by fusing two heavily populated opposition states (Rio and Guanabara) and creating two new thinly populated states (Mato Grosso do Sul and Rondônia). The constituent assembly did nothing to rectify the situation. Instead, like the military regime, the assembly exacerbated the malapportionment by creating three new sparsely populated states and maintaining unique constitutional provisions that entitle every state to three senators and at least eight but no more than seventy deputies. Consequently, a vote for senator in the newly created state of Roraima has 144 times the weight of a vote for senator in São Paulo. If the Brazilian constitution had adopted the criterion of one person, one vote for the Chamber of Deputies, each of the three newly created states would have only one representative rather than eight, and São Paulo would have 114 rather than 70. In 1990, because of the new constitution, states from the north, northeast, and center-west, with only 43 percent of the population, con-

trolled 74 percent of the seats in the Brazilian Senate.⁸² This egregious overrepresentation gives enormous power to a minority to block any changes in the status quo.

The constituent assembly also did nothing to reform the malfunctioning of the political party system, which is one of the world's worst.⁸³ On the contrary, it imposed virtually no constraints on forming new political parties or allowing tiny splinter parties to be represented in Congress. The number of political parties in Brazil jumped from six in 1985 to thirty in 1990, seriously complicating the task of governance. Nor did it modify the open-list system of proportional representation, in which each state is a single, at-large multi-member district, a system that badly hinders party discipline.⁸⁴

The Military

One of the pacts in the long transition from military to civilian rule was that no effort be made to try members of the military for human rights offenses committed during the period of authoritarian rule. The assembly constitutionalized this pact in Transitional Article 8, which confers broad amnesty for all acts motivated solely by political reasons between 1946 and 1988. The 1988 Constitution continues this ample protection of some of the military's interests, including its right to intervene in matters of national security, law, and order.⁸⁵ President Cardoso, however, pushed through Amendment 23 of September 2, 1999, which replaced the three military ministries and the joint chiefs of staff with the unified civilian-led Ministry of Defense. This amendment explicitly gives the president the power to appoint the commanders of the army, navy, and air force and makes them subject to the congressional impeachment process. Top military leaders are now subject to criminal trials before the Supreme Court, and civilian courts may now hear habeas corpus petitions against military orders.

The number of ministries that the military controls has dropped from six to zero. However, even though civilian control over the military has increased dramatically in recent years, the military still enjoys numerous privileges and special treatment in Brazil.⁸⁶

Conclusion

The process by which Brazil's 1988 Constitution was adopted practically assured that the end product would be a hodgepodge of inconsistent and convoluted provisions. The decisions to designate the incoming Congress as the constituent assembly, to proceed without a draft, to entrust the initial drafting to all members of the assembly divided into twenty-four thematic subcommittees, and to invite as much participation by civil society as possible made it virtually impossible to produce a coherent document, particularly with a weak party system and president. The assembly's quixotic position that no topic was too trivial to be included on its agenda made the constitution-making process nearly unmanageable and wasted a large amount of time. The widespread belief that the new constitution would be a panacea for all Brazil's ills and the intense lobbying by popular groups made it difficult for the drafters to distinguish clearly between what belongs in a constitution and what belongs in ordinary legislation, or in no legislation. The intense lobbying and manner in which delegates were selected also made it difficult to resist efforts to embed in the constitutional text a plethora of political and economic entitlements without considering whether the country could afford them. Nor did the assembly adequately assess the risk of ungovernability that might result from its foolish decisions to lock in future generations by creating constitutional straitjackets.

Given the circumstances under which the assembly proceeded, the decision to make the constitution transitional and revisit it in

five years was defensible. However, the badly needed top-to-bottom revision scheduled for 1993 never materialized. Instead, Congress has promulgated a constant stream of amendments. Some have made insignificant changes or contributed additional entitlements and complications, but others have eliminated or modified some of the ill-considered constitutional obstacles to governability and economic development. Many significant obstacles remain, and many proposed amendments are in the pipeline.

The 1988 Constitution does little to confront the major political, economic, and social problems confronting Brazil. Brazil's political institutions are still relatively weak, and the proliferation of undisciplined political parties in Congress makes governance a major problem. Brazil has long had one of the most unequal patterns of income distribution in the world. The new constitution has not improved this pattern; if anything, it has exacerbated it.

The return of democracy and the adoption of the 1988 Constitution has not appreciably reduced conflict in Brazil either; in many ways, conflict has been exacerbated. Brazil has been unable to deal effectively with the social problems resulting from the lack of effective agrarian reform. Landless peasants continue to invade privately owned farms, frequently provoking violent responses from rural landowners and the police. The formal legal system has done little to protect rural workers, lawyers, and Indians from violence stemming from land conflicts. Brazil also has significant problems with uncontrolled urban violence, some of which is attributable to arbitrary actions by the civil and military police, some to a malfunctioning criminal justice system, and some to police and prison officials' inability or unwillingness to control common criminals and drug traffickers. The wave of crime and violence afflicting Brazil has created a general climate of personal insecurity and mistrust of the legal system.⁸⁷

Until 1994, many conflicts were shifted into the redistributive arena produced by galloping inflation. Since 1995, the Plano Real has virtually eliminated this cruel tax, which fell most heavily on the poor. Yet Brazil needs to find permanent solutions to its perennial fiscal crisis. In the past few years, important constitutional amendments have been adopted to facilitate the dismantling of Brazil's bloated governmental bureaucracy, rationalize the compensation and social security benefits of public employees, control state and municipal expenditures and indebtedness, and reform the judiciary. The Brazilian constitution impressively protects virtually all fundamental and human rights. Traditional first-generation rights, such as life, liberty, property, due process, free speech, equal protection, religious freedom, and freedom of association, are fully protected. Second-generation rights, such as the right to work, right to strike, maternity and paternity leave, housing, clothing, food, health, leisure, social security, and education, are also guaranteed, along with third-generation rights such as an ecologically balanced environment, self-determination, and cultural preservation. Amendment 45, of December 8, 2004, added what might be termed a fourth-generation right: "Everyone is assured that judicial and administrative proceedings will end within a reasonable time and the means to guarantee that they will be handled speedily." Unfortunately, many of these guarantees exist only on paper. Some very important guarantees are regularly violated with impunity, as a recent article by Augusto Zimmermann so vividly demonstrates.⁸⁸ Many important individual rights that the constitution created need strong enforcement to make them a reality. But the police and other law-enforcement officers function precariously, and the judiciary, which under normal conditions moves slowly, is swamped with cases. In 2005, the Supreme Court received 95,212 cases and decided 103,700 cases. Constitu-

tional Amendment 45, adopted at the end of 2004, enables the Supreme Court to create binding precedents, provided they deal with constitutional issues and are adopted by a two-thirds vote. Thus far, this has done little to reduce the huge volume of cases. As of April 2009, the Supreme Court has adopted only fourteen binding precedents pursuant to this amendment. The court urgently needs a device like *certiorari* to allow it to hear only cases that address novel and important national issues.⁸⁹

On the positive side, Brazil's constitution has provided a peaceful way of resolving many important conflicts. Rather than resort to a coup, Brazilians removed Collor de Mello, their first popularly elected president in three decades, by following the constitutionally prescribed procedure of impeachment. Elections are held regularly, peacefully, competently, and without claims of fraud. The electorate is one of the broadest in the world. All of the mechanisms of representative democracy, as well as those of direct democracy—such as the initiative, plebiscite, and referendum—are in place, though not much used. Political and fiscal power is substantially less concentrated in the federal executive and federal government by the strengthening of the powers of the states and local government, as well as the powers of the federal judiciary and legislature.

No longer do Brazilians talk of a coup d'état to resolve political problems.⁹⁰ The military did not threaten one in 1999, when a constitutional amendment created the Ministry of Defense and formally subordinated the military to civilian control. Nor did the military or other organized groups make such threats when Luís Inácio Lula da Silva, the first popularly elected leftist labor leader, assumed the presidency in January 2003.

Despite its many technical defects, the 1988 Constitution has enormous symbolic value. As Luís Roberto Barroso has pointed out, the constitution symbolizes the culmina-

tion of the process of the restoration of a democracy under a rule of law and the superseding of an authoritarian system characterized by intolerance, monopolization of power, and violence.⁹¹

Unfortunately, the 1988 Constitution has been more hindrance than help in working out democratic solutions to Brazil's most pressing economic and social problems. Ultimately, the legitimacy of the constitutional system has to survive a pragmatic test: Does it provide a substantial economic payoff for a substantial portion of its citizens?⁹² Thus far, the answer has been negative. If persistent tinkering does not significantly change the answer, one can expect another round of constitution making from Brazil.

Notes

1. Kenneth P. Erickson, "Brazil: Corporative Authoritarianism, Democratization, and Dependency," in *Latin American Politics and Development*, 2nd ed., eds. Howard J. Wiarda and Harvey F. Kline (Boulder, CO: Westview Press, 1985), pp. 160, 169.

2. The amendment was Law 16 of August 12, 1834, called the Additional Act, which reduced the number of regents from three to one, abolished the Council of State, outlawed entailing of estates, and replaced the general councils with legislative assemblies that had powers to regulate local affairs. Four other laws arguably had the effect of constitutional amendments: Law 1 of October 1828 (creating municipal assemblies), Law 12 of October 1832 (ordering the provincial electors to confer upon the Chamber of Deputies powers to reform certain constitutional articles), Law 105 of May 12, 1840 (interpreting certain articles in the prior constitutional reform), and Law 234 of November 23, 1841 (reestablishing the Council of State).

3. The 1937 Constitution was called the *Polaca* because the Polish Constitution of 1935 declared that "the sole and individual authority of the State is concentrated in the person of the President of the Republic" (art. 2). Another reason was that in the argot of Rio de Janeiro, *polaca* meant any foreign prostitute. Walter Costa Porto, "A Constituição de 1937," in *As Constituições Brasileiras: Análise Histórica e Propostas de Mudança*, ed. Luiz Felipe D'Ávila (São Paulo: Editora Brasiliense, 1993), pp. 43, 50.

4. Alfred Stepan, *Rethinking Military Politics: Brazil and the Southern Cone* (Princeton, NJ: Princeton University Press, 1988), pp. 30–44. Scott Mainwaring offers a four-factor explanation: need for greater legitimacy, tensions between the military as government and as an institution, the success of the military in subjugating its opponents, and economic success. See Scott Mainwaring, “The Transition to Democracy in Brazil,” *Journal of Interamerican Studies and World Affairs*, vol. 28, no. 1 (Spring 1986), pp. 149, 151–54.

5. The legal effects of acts based upon the Institutional Acts were maintained and excluded from judicial review. See Constitutional Amendment 11 of October 13, 1978, art. 3.

6. Law No. 6.683 of August 28, 1979.

7. Luís Roberto Barroso, “Dez Anos da Constituição de 1988 (Foi Bom Pra Você Também),” in *1988–1998: Uma Década de Constituição*, ed. Margarida Maria Lacombe Camargo (Rio de Janeiro: Renovar, 1999), pp. 37, 40.

8. Constitutional Amendment 22 of June 29, 1982. The military government had reduced the voting requirement to an absolute majority of both houses of Congress by Constitutional Amendment 11 of October 13, 1978. The military’s numerous manipulations of Brazil’s electoral system are recounted in David Fleischer, “Manipulações Casuísticas do Sistema Eleitoral durante o Período Militar, ou Como Usualmente o Feitico Se Voltava contra o Feiticeiro,” in *21 Anos de Regime Militar: Balanços e Perspectivas*, eds. Gláucio Soares and Maria Celina D’Araújo (Rio de Janeiro: Fundação Getúlio Vargas, 1994), pp. 154–97.

9. Each state legislature selected three electors plus an additional elector for each one million inhabitants. Each state could choose at least four electors. Constitutional Amendment 8 of April 14, 1977.

10. State legislatures elected 138 out of the total of 686 electors in the Electoral College. The military government expected that even if it lost its majority in the Chamber of Deputies, it would keep its majority in the Senate and maintain a majority in the Electoral College by winning a majority of the state legislatures. David Fleischer, “Constitutional and Electoral Engineering in Brazil: A Double-Edged Sword,” *Inter-American Economic Affairs*, vol. 37, no. 3 (Spring 1984), p. 29.

This system was blatantly unfair to the most populous states. São Paulo, with more than twenty-five million inhabitants, elected only sixty members of the Chamber of Deputies, while eight states,

with a combined population of about ten million, each elected eight members. Each deputy from São Paulo represented 417,345 voters, while each deputy from Acre represented only 37,701 voters. See Superior Electoral Tribunal Resolution no. 11.355 of July 1, 1982. This egregious malapportionment was compounded by giving each state the right to elect the same number of additional members to the Electoral College.

11. Guimarães later explained that the only reason he did not dispute Sarney for the right to succeed Neves was because he was forced to follow the instructions of his jurist, General Leônidas Pires Gonçalves (the army minister in Sarney’s cabinet), who insisted that Sarney assume the presidency. Jorge Zaverucha, *Frágil democracia: Collor, Itamar, FHC e os militares: (1990–1998)* (Rio de Janeiro: Civilização Brasileira, 2000), pp. 38–39.

12. A number of groups, including the Brazilian Bar Association, the National Conference of Brazilian Bishops, the Brazilian Press Association, the Worker’s Party, and the United Worker’s Congress organized a movement to pressure Congress into calling a popular election for delegates to the constituent assembly under a new system of rules that would eliminate the disproportionate representation embodied in the existing electoral legislation. Their efforts were unsuccessful. Javier Martínez-Lara, *Building Democracy in Brazil: The Politics of Constitutional Change, 1985–95* (New York: St. Martin’s Press, 1996), pp. 58–59.

13. Constitutional Amendment 26 of November 27, 1985.

14. Martínez-Lara, *Building Democracy in Brazil*, p. 57; David Fleischer, “The Constituent Assembly and the Transformation Strategy: Attempts to Shift Political Power from the Presidency to Congress,” in *The Political Economy of Brazil: Public Policies in an Era of Transition*, eds. Lawrence Graham and Robert H. Wilson (Austin: University of Texas Press, 1990), pp. 210, 221. This was publicly confirmed (although later denied) by Fernando Henrique Cardoso. After his denial, the reporter published the tape of Cardoso’s confirmation in the May 21, 1990, issue of the *Folha de São Paulo*. See Jorge Zaverucha, “The 1988 Constitution and its Authoritarian Legacy: Formalizing Democracy while Gutting its Essence,” paper presented at the meeting of the Latin American Studies Association, Guadalajara, Mexico, April 17–19, 1997, pp. 6–7.

15. Barry Ames, *The Deadlock of Democracy in Brazil* (Ann Arbor: University of Michigan Press, 2001), pp. 54–55.

16. Decree-Law 1.543 of April 14, 1977, provided that one-third of each state's federal senators be elected by an electoral college composed of the members of the state and municipal legislatures. With a mandate of eight years, the term of these so-called bionic senators did not expire until 1990. At the assembly's second session, the PT challenged the right of these senators to participate in the constituent assembly. By a vote of 394 to 126, the assembly decided to permit the twenty-three senators to participate and to vote.

17. A decision of the Superior Electoral Tribunal of September 10, 1985, prohibited media interviews with the candidates during the three months prior to the election, making it very difficult to organize debates on the subject of the new constitution. The decision also prohibited party leaders who were not candidates from appearing on television and limited candidates' television appearances to states where they were running for office. Maria do Carmo Campello de Souza, "The Brazilian 'New Republic': Under the 'Sword of Damocles,'" in *Democratizing Brazil: Problems of Transition and Consolidation*, ed. Alfred Stepan (New York: Oxford University Press, 1989), pp. 351, 374.

18. Ames, *The Deadlock of Democracy in Brazil*, p. 273.

19. The history of the ill-fated Cruzado Plan is recounted in Hugo Presgrave de A. Faria, "Macroeconomic Policymaking in a Crisis Environment: Brazil's Cruzado Plan and Beyond," in *Brazil's Economic and Political Future*, eds. Julian Chacel, Pamela Falk, and David Fleischer (Boulder, CO: Westview Press, 1988), pp. 42–59; and Werner Baer and Paul Beckerman, "The Decline and Fall of Brazil's Cruzado," *Latin American Research Review*, vol. 24, no. 1 (1989), pp. 35–64.

20. See Campello de Souza, "The Brazilian 'New Republic,'" pp. 362, 373. In large part due to the strategic concealment of the disastrous results of the Cruzado Plan until after the 1986 election, the PMDB managed to elect 260 deputies and 36 senators. Adding the 7 senators it elected in 1982, the PMDB had a majority of 303 out of the 559 members to the constituent assembly. By August 30, 1988, party shifts caused the PMDB's representation in the assembly to fall to 235 members.

21. Thomas Jefferson took a contrary view, maintaining that the people should rewrite the constitution every generation because otherwise there would be too little citizen participation in governmental affairs. Geoffrey Stone, Louis Seidman, Cass Sunstein, and Mark Tushnet, *Constitutional*

Law, 4th ed. (New York: Aspen Law & Business, 2001), p. 73.

22. Ames, *The Deadlock of Democracy in Brazil*, p. 28; Leonardo Avritzer, "The Conflict between Civil and Political Society in Postauthoritarian Brazil: An Analysis of the Impeachment of Fernando Collor de Mello," in *Corruption and Political Reform in Brazil: The Impact of Collor's Impeachment*, eds. Keith S. Rosenn and Richard Downes (Coral Gables, FL: University of Miami North-South Ctr. Press, 1999), pp. 119, 133.

23. David V. Fleischer, "Perfil Sócio-Econômico e Político da Constituinte," in *O Processo Constituinte 1987–1988*, ed. Milton Guran (Brasília: AGIL, 1988), pp. 29, 31.

24. Martínez-Lara, *Building Democracy in Brazil*, pp. 93–94.

25. Lucas Coelho, "O Processo Constituinte," in *O Processo Constituinte 1987–1988*, pp. 41, 43.

26. *Constituição Federal Anteprojeto da Comissão Afonso Arinos* (Rio de Janeiro: Forense, 1987). The committee included prominent businessmen, social scientists, and labor leaders, but jurists constituted the majority. Bolívar Lamounier, "Brazil: Toward Parliamentarism?" in *The Failure of Presidential Democracy*, eds. Juan J. Linz and Arturo Valenzuela (Baltimore, MD: Johns Hopkins University Press, 1994), pp. 253, 274. For an acerbic critique of the Arinos Committee's draft constitution, see Ney Prado, *Os notáveis erros dos notáveis da Comissão Provisória de Estudos Constitucionais* (Rio de Janeiro: Forense, 1987).

27. Abdo I. Baaklini, *The Brazilian Legislature and Political System* (Westport, CT: Greenwood Press, 1992), p. 164.

28. See Augusto Zimmermann, *Curso de Direito Constitucional* (Rio de Janeiro: Editora Lumen Juris, 2002), p. 182.

29. The rapporteurs drafted the initial proposals, screened amendments, integrated approved amendments into the text, and later integrated the final reports of the subcommittees into a single text.

30. Shortly before the vote on the leadership positions, PFL leaders threatened a boycott as a protest against Covas' stacking the leadership with liberal PMDB members, which they deemed a breach of an informal agreement that they had reached with Covas' predecessor, Luis Henrique. They ultimately backed down after receiving no support from the other parties. Martínez-Lara, *Building Democracy in Brazil*, p. 98.

31. Martínez-Lara, *Building Democracy in Brazil*, pp. 107–08.

32. For details about the project and insights into the popular suggestions, see *A Constituição Desejada; SAIC: As 72.719 Sugestões Enviadas Pelos Cidadãos Brasileiros a Assembléia Nacional Constituinte*, 2 vols., ed. Stéphane Monclaire (Brasília: Centro Gráfico, 1991).

33. Baaklini, *The Brazilian Legislature and Political System*, p. 172.

34. Lombardo, “A Constituição: Resultado de 613 dias de trabalho,” *Gazeta Mercantil*, October 6, 1988, at p. 1; *Jornal do Brasil*, September 3, 1988, 1st Caderno, p. 4.

35. Maria D’Alva G. Kinzo, “Transitions: Brazil,” in *Democracy in Latin America: (Re)Constructing Political Society*, eds. Manuel Antonio Garretón M. and Edward Newman (New York: United Nations University Press, 2001), pp. 19, 31.

36. Margaret E. Keck, “The New Unionism in the Brazilian Transition,” in Stepan, *Democratizing Brazil*, pp. 252, 284.

37. Article 492 of the Consolidated Labor Legislation created a system of job tenure by prohibiting employers from firing an employee with more than ten years of service except for “serious fault” or *force majeure*, criteria that were exceedingly difficult for employers to prove before the Labor Courts. Consequently, many employers routinely fired employees before they attained tenure. The military government pushed through Congress Law 5.107 of September 13, 1966, which “permitted” workers to opt for the FGTS regime, a compensation scheme for discharged workers, instead of the ten-year tenure system. As a practical matter, employers required virtually all workers without tenure to opt for the FGTS regime, thereby effectively preventing workers without tenure from acquiring it. See W. Gary Vause and Dulcina de Holanda Palhano, “Labor Law in Brazil and the United States—Statism and Classical Liberalism Compared,” *Columbia Journal of Transnational Law*, vol. 33 (1995), pp. 583, 612–15.

38. Gary M. Reich, “The 1988 Constitution a Decade Later: Ugly Compromises Reconsidered,” *Journal of Interamerican Studies and World Affairs*, vol. 40, no. 5 (Winter 1998), p. 15.

39. Juan J. Linz and Alfred Stepan, *Problems of Democratic Transition and Consolidation: Southern Europe, South America, And Post-Communist Europe* (Baltimore, MD: Johns Hopkins University Press, 1996), p. 169. For additional assessments of military

domination of the constituent assembly, see Wolgran Junqueira Ferreira, *Comentários à Constituição de 1988*, vol. 1 (Campinas/São Paulo: Julex Livros Ltda., 1989), pp. 63–65; Stepan, *Rethinking Military Politics*, pp. 112–14; and Zaverucha, “The 1988 Constitution and its Authoritarian Legacy.”

40. Kenneth P. Serbin, “The Catholic Church, Religious Pluralism, and Democracy in Brazil,” in *Democratic Brazil: Actors, Institutions, and Processes*, eds. Peter R. Kingstone and Timothy J. Power (Pittsburgh, PA: University of Pittsburgh Press, 2000), pp. 144, 150–51.

41. See David Driesen, “Brazil’s Transition to Democracy: Agrarian Reform and the New Constitution,” *Wisconsin International Law Journal*, vol. 8, no. 1 (1989), pp. 66–81.

42. The systematization committee was supposed to have eighty-nine members, made up of all the presidents and rapporteurs of the committees and all the rapporteurs of the subcommittees, plus forty-nine members of the assembly chosen in proportion to party representation. Actually, the committee ended up having ninety-three members to ensure the presence of at least one member of each party. Coelho, “O Processo Constituinte,” p. 44.

43. Cabral was assisted by three subrapporteurs, José Fragaça (PMDB), Adolfo de Oliveira (PL), and Antonio Carlos Konder Reis (PDS), all of whom were members of the systematization committee. Konder Reis had been the 1967 Constitution’s rapporteur.

44. In his report accompanying Cabral Zero, the rapporteur explained that some of the incongruities and excesses in the draft resulted from ideological conflicts within the committees and subcommittees, as well as the tendencies of assembly members to introduce into the text “constitutional rules that turn its nature into a stew by dealing with subjects that fit better into ordinary legislation.” Cited in Josaphat Marino, “Uma Perspectiva da Nova Constituição Brasileira,” *Cadernos de Direito Constitucional e Ciência Política*, vol. 131, no. 2 (January–March 1993).

45. This account is largely drawn from Martínez-Lara, *Building Democracy in Brazil*, pp. 109–10.

46. The Centrão was made up of 152 delegates, 80 drawn from the PFL, 43 from the PMDB, 19 from the PDS, 6 from the PTB, 3 from the PDC and from the PL. DIAP, *Quem Foi Quem Na Constituinte Nas Questões de Interesse dos Trabalhadores* (São Paulo: Cortez/Obaré, 1988), cited in Maria D’Alva Gil Kinzo, “O Quadro Constituinte

Partidário e a Constituinte,” in *De Geisel a Collor: O Balanço da Transição*, ed. Bolívar Lamounier (São Paulo: IDESP/Sumaré, 1990), pp. 105–34.

47. For an explanation of the eclectic nature of the PMDB and why it had great difficulty in taking coherent policy positions, see Frances Hagopian, “The Compromised Consolidation: The Political Class in the Brazilian Transition,” in *Issues in Democratic Consolidation: The New South American Democracies in Comparative Perspective*, ed. Scott Mainwaring, Guillermo O’Donnell, and J. Samuel Valenzuela (South Bend, IN: University of Notre Dame Press, 1992), pp. 243, 265–71.

48. Ames, *The Deadlock of Democracy in Brazil*, p. 28.

49. Carlos Alberto Marques Novaes, “Dinâmica Institucional de Representação,” *Novos Estudos Cebap*, vol. 38 (March 1994), pp. 115, 117.

50. Martínez-Lara, *Building Democracy in Brazil*, pp. 116–17.

51. For an analysis of party voting patterns and coalitions on key votes on Drafts A and B, see Kinzo, “O Quadro Constituinte Partidário e a Constituinte,” pp. 117–32.

52. The *jeito* is a commonly used device for bending legal norms to expediency. See Keith S. Rosenn, “Brazil’s Legal Culture: The *Jeito* Revisited,” *Florida International Law Journal*, vol. 1, no. 1 (1984), pp. 1–43.

53. Lydia Medeiros, “Constituição 15 Anos,” *O Globo*, Oct. 5, 2003. At the time, Nelson Jobim was a PMDB leader in the constituent assembly.

54. Gilse Guedes, “Passarinho admite que inclui artigo não votado na Constituição,” *O Estado de São Paulo*, Oct. 9, 2003. Passarinho, former minister of education and social security under the military governments, added a measure that eliminated a disparity in treatment for the military with respect to salary benefits.

55. Thélío Magalhães, “OAB recebe pedido de impeachment de Jobim,” *O Estado de São Paulo*, Nov. 8, 2003.

56. Eduardo Kattah, “Jobim nega inclusão de artigos não-votadas na Constituição,” *O Estado de São Paulo*, Nov. 10, 2003.

57. A study by an agency of the Justice Ministry found that the 1988 Constitution expressly required 256 complementary laws and implicitly required another 87. Paulo Gomes Pimentel Júnior, *Constituição e Ineficácia Social* (Curitiba: Juruá Editora, 2003), p. 42. Not surprisingly, Congress has failed to comply with many of these constitutional

directives and deadlines. Even today, a substantial amount of implementing or regulatory legislation has yet to be enacted.

Thousands of existing laws were implicitly revoked or require modification to conform to the new constitution. Many still remain unmodified, leaving some areas of the law legally confused.

58. The argument that a provisional constitution is a useful technique for brokering the transition from military to civilian rule is made elegantly by Ruti Teitel, “Transitional Jurisprudence: The Role of Law in Political Transformation,” *Yale Law Journal*, vol. 106 (1997), pp. 2009, 2057–63.

59. Transitional Constitutional Provisions Act, art. 2.

60. The reason for Bueno’s amendment was that the first governmental decree after proclamation of the Old Republic in 1889 had promised, but never delivered, a plebiscite on whether Brazil should have a monarchy or a republican form of government. Martínez-Lara, *Building Democracy in Brazil*, pp. 144–45.

61. Luís Roberto Barroso, “Dez Anos da Constituição de 1988,” pp. 37, 51; Cármen Lúcia Antunes Rocha, *República e Federação no Brasil: Traços Constitucionais da Organização Política Brasileira* (Belo Horizonte: Del Rey, 1997), p. 84.

62. Sanford Levinson, “Law as Literature,” *Texas Law Review*, vol. 60 (1982), pp. 373, 376.

63. Albert O. Hirschman, *Journeys towards Progress: Studies of Economic Policy-Making in Latin America* (New York: Twentieth Century Fund, 1963), p. 222.

64. In 1985, the annual inflation rate was 235 percent. Although falling to 65 percent in 1986 as a result of the ill-fated Cruzado Plan, it rose to 416 percent the following year. By 1989, inflation had climbed to 1,783 percent. By March of 1990, when Collor de Mello assumed the presidency, the inflation rate was running at 84 percent per month. Between 1990 and 1994, the annual inflation rate averaged nearly 1,400 percent.

65. Peter Kingstone, “Muddling through Gridlock: Economic Policy Performance, Business Responses, and Democratic Sustainability,” in *Democratic Brazil*, pp. 185, 191.

66. The only provisions that may not be amended are the federal system of government; direct, secret, universal, and periodic suffrage; separation of powers; and the individual rights and guarantees. See art. 60.

67. The emergency fund created by the First Revision Amendment lasted only until 1996. A second constitutional amendment, no. 10 of March 4, 1996, extended the fund until June 30, 1997, and a third amendment, no. 17 of November 22, 1997, extended it until December 31, 1999.

68. The most recent was Amendment 42 of December 19, 2003, which extended the tax until December 31, 2007, when it was finally allowed to expire.

69. Amendment 42 of December 19, 2003, art. 2, and Amendment 56 of December 20, 2007, reamending art. 76 of the Transitional Constitutional Provisions Act.

70. Amendments 20 of 1998 and 41 of 2003 made sweeping reforms in social security for both the public and private sectors. Amendments 1 of 1992 and 25 of 2000 imposed limits on compensation for state and local legislators. Amendment 19 of 1998 imposed salary ceilings and eliminated lavish benefits for civil servants, eliminated tenure for those who have not passed competitive exams, and permitted firing of tenured civil servants. Amendments 5 through 9 of 1995, Amendment 13 of 1996, and Amendment 36 of 2002 eliminated a number of obstacles to foreign investment and opened up several government monopolies.

71. Timothy J. Power, "Political Institutions in Democratic Brazil: Politics as a Permanent Constitutional Convention," in *Democratic Brazil*, pp. 17, 34.

72. The Supreme Court has held that the issue of whether a provisional measure is actually urgent and relevant is a nonjusticiable political question. ADIn 1.397-DF, *Diário de Justiça*, June 27, 1997. More recently, the Supreme Court has indicated its willingness, albeit exceptionally, to examine whether there really is the requisite urgency and relevancy to justify resorting to the provisional measure. ADI-MC 2213, *Diário de Justiça*, April 23, 2004.

Constitutional article 246, added by Amendments 6 to 9 of 1995, banned the use of provisional measures to regulate constitutional amendments promulgated after January 1, 1995. Amendment 32 of September 11, 2001, which substantially restricted the president's powers to issue provisional measures, modified article 246 to restore presidential power to regulate future constitutional amendments by decree.

73. The only limitation that the Supreme Court placed upon the power to reissue provisional measures was that the president could not reissue a measure that Congress had specifically rejected.

Ação Direta de Inconstitucionalidade 293, 146 R.T.J. 707 (Tribunal Pleno, June 6, 1990). As of September 11, 2001, when the executive's power to issue and reissue provisional measures was curbed by constitutional amendment, Brazilian presidents had issued 619 original provisional measures and 5,491 reissuances. During this entire period, Congress rejected only 22 provisional measures, enacting 473 into law. The rest were either revoked, became ineffective, or were merged into measures. See www.planalto.gov.br (accessed April 13, 2009).

74. Provisional measures may no longer be issued on certain matters, such as nationality, citizenship, political parties and rights, electoral law, criminal and procedural law, and budgets. To avoid another Plano Collor, no provisional measure may be used to seize or sequester any property or financial assets. Provisional measures are now valid for sixty instead of thirty days and may be extended only once for another sixty days. If rejected or invalid because of the passage of time, provisional measures may not be reissued in the same legislative session. A provisional measure that has lapsed is no longer void ab initio. Any legal relations constituted under it are to be regulated by legislative decree. If no such decree is issued within sixty days after lapse, legal relations constituted under the provisional measure remain in effect and are governed by it. Between September 11, 2001, and March 10, 2009, Brazilian presidents have issued an additional 458 original provisional measures. The overwhelming majority of these measures have been extended for an additional sixty and have been ultimately converted into law. Only thirty have been rejected, and another ten have been declared ineffective.

75. The constitution expanded standing to bring the direct action of unconstitutionality to include the president, executive committees of either house of Congress, state governors, the Federal Council of the Bar Association, any political party represented in Congress, and any national labor or business organization. Amendment 45 of 2004 expanded the category of persons with standing to bring a direct action of unconstitutionality to include the federal district's legislature, its executive committee, and its governor.

76. Constitution of 1988, art. 103 §2.

77. See Maria Tereza Sadek and Rosângela Batista Cavalcanti, "The New Brazilian Public Prosecution: An Agent of Accountability," in *Democratic Accountability in Latin America*, eds. Scott Mainwaring and Christopher Welna (New York: Oxford University Press, 2003), pp. 201, 207.

78. A striking result of the current constitution has been a phenomenal increase in the case-loads of the Brazilian courts. In the first eight years following the constitution's promulgation, the number of cases filed in Brazilian courts increased more than tenfold, from about 350,000 cases in 1988 to more than 3.7 million in 1996. The Supreme Court has been particularly overburdened; the number of cases it decided mushroomed from 17,432 in 1989 to 109,692 in 2001. Not all these cases involve constitutional questions, but Brazilians are increasingly resorting to litigation because of the enormous expansion in both substantive constitutional rights and procedural mechanisms to protect those rights.

79. William C. Prillaman, *The Judiciary and Democratic Decay in Latin America: Declining Confidence in the Rule of Law* (Westport: Praeger Publishers, 2000), pp. 6, 8.

80. See, generally, Matthew M. Taylor, *Judging Policy: Courts and Policy Reform in Democratic Brazil* (2008); Marcos Faro de Castro, "O Supremo Tribunal Federal e a Judicialização da Política," *Revista Brasileira de Ciências Sociais* (No. 34, July 1997), pp. 147–56; Ernani Rodrigues de Carvalho, "Em Busca da Judicialização da Política no Brasil: Apon-tamentos para uma Nova Abordagem," 23 *Revista de Sociologia e Política* (No. 23, November 2004), pp. 115–26; Amandino Teixeira Nunes Junior, "A Constituição de 1988 e a Judicialização da Política no Brasil," *Revista de Informação Legislativa, Ano 45* (No. 178, April/June 2008), pp. 157–79; Rogério Bastos Arantes, "Constitutionalism, the Expansion of Justice and the Judicialization of Politics in Brazil," in *The Judicialization of Politics in Latin America*, eds. Rachel Sieder, Line Schjolden, and Alan Angell (New York, Basingstoke: Palgrave Macmillan, 2005), pp. 231–62.

81. Brazil has universal suffrage, with the exception of foreigners and military conscripts. Illiterates have been enfranchised since 1985, and the 1988 Constitution enfranchised those between the ages of sixteen and eighteen. Voting is compulsory for those between the ages of eighteen and seventy and optional for those over seventy or less than eighteen. Free and relatively honest elections are held regularly.

82. Alfred Stepan, "Brazil's Decentralized Federalism: Bringing Government Closer to the Citizens?" *Daedalus*, vol. 129, no. 2 (2000), pp. 145–69.

83. "Probably no country in the world currently is as anti-party, both in theory and practice, as is Brazil." Giovanni Sartori, *Comparative Con-*

stitutional Engineering: An Inquiry into Structures, Incentives, and Outcomes, 2nd ed. (New York: New York University Press, 1996), p. 95.

84. Ames, *The Deadlock of Democracy in Brazil*, pp. 41–43.

85. The army, navy, and air force are declared to be permanent national institutions and military intervention is permitted to protect law and order at the request of any of the constitutional powers (art. 142). Military service is obligatory in terms of the law (art. 143). The rights and prerogatives of members of the military are amply protected (art. 42).

86. Compare the normalization view presented in Wendy Hunter, "Assessing Civil-Military Relations in Postauthoritarian Brazil," in *Democratic Brazil*, pp. 101, 106–07, with the much more critical view of military power and prerogatives in Zaverucha, *Frágil democracia*, pp. 35–56.

87. See Omar G. Encarnación, *The Myth of Civil Society: Social Capital and Democratic Consolidation in Spain and Brazil* (New York: Palgrave Macmillan, 2003), pp. 146–47.

88. Augusto Zimmermann, "Constitutional Rights in Brazil: A Legal Fiction?" *Murdoch University E-Law Journal*, vol. 14, no. 2 (2007), pp. 31–55.

89. Amendment 45 of December 8, 2004, took an important step in this direction by requiring a showing that constitutional questions presented in an extraordinary appeal have "general repercussions" for the Supreme Court to hear the appeal.

90. Perhaps a caveat should be made for the rant of Leonel Brizola, a leftist former governor of Rio de Janeiro, who was quoted in the *Jornal do Brasil* of May 18, 1995, saying that "if there is no civil reaction [against privatizations], there will be a military one." The next day *O Globo* published an article with the headline "Cardoso Criticizes Brizola for Defending a Military Coup." Cited in Richard Gunther, P. Nikiforos Diamandourous, and Hans-Jürgen Puhle, "O'Donnell's 'Illusions': A Rejoinder," in *The Global Divergence of Democracies*, ed. Larry Diamond and Marc F. Plattner (Baltimore, MD: Johns Hopkins University Press, 2001), pp. 131, 139.

91. Luís Roberto Barroso, *Temas De Direito Constitucional*, vol. 1 (Rio de Janeiro: Renovar, 2001), p. 10.

92. Seymour Martin Lipset, *The First New Nation: The United States in Historical and Comparative Perspective* (Garden City, NY: Doubleday, 1967), p. 52.