

## Should Local Governments Be Included in the Constitution? A Comparative Analysis Between the U.S. and Brazilian Supreme Courts' Reasoning Regarding Annexation Laws

CAROLINA ARLOTA<sup>†</sup>

TABLE OF CONTENTS: 1. Introduction; 2. The U.S. Scenario; 3. The Brazilian Scenario; 4. Discussion of Research Findings; 4.1. General Analysis of the Comparison and Related Consequences for Fundamental Rights; 4.2. Insights Based on Constitutional Design; 5. Conclusion.

ABSTRACT: Annexation of local governments is a contentious topic. Litigation of annexation often addresses important constitutional provisions, such as property rights, federalism, limitations to police powers, equality and, more specifically, the Voting Rights Act. The United States Constitution is famously silent about local governments. In light of this omission and considering individual constitutional rights, would it make a difference to have local governments in the constitutional text? And to whom would it matter the most? This research developed an original dataset to answer those questions. This article focuses on annexation as proxy for local powers, and it compares the U.S. federalism scheme with the Brazilian unprecedented experience of leveling local governments alongside the states and the federal union in the Constitution of 1988. This research is unique in its comparison of the reasoning of the U.S. Supreme Court (U.S.S.C.) and its Brazilian counterpart, the Supremo Tribunal Federal (S.T.F.), with regard to annexation laws. The main contributions of this study to the literature are straightforward. First, it advances the literature on constitutional design by focusing on local governments, instead of states and the federal union. Second, and related to such an advancement, this paper departs from traditional federalism comparisons which were restricted to developed countries. Third, this research provides evidence contradicting previous claims that the U.S. constitutional omission of local governments was a failure of constitutional design relating to future matters. In addition, this study analyzes the consequences of the Brazilian constitutional design. This article concludes that there is no evidence supporting the proposition that the inclusion of municipalities as federal actors is necessarily superior to the current comparative trend that uses the dual spheres system of the U.S. federalism as a paradigm. Therefore, this research leads to unexpected results and provides evidence that contradicts the understanding of the U.S. constitutional omission of local governments as a failure of constitutional design.

KEYWORDS: *Constitutional Design; U.S. Federalism; Annexation Law; United States Supreme Court; Local Governments; Comparative Law; Law and Development; Voting Rights Act; Legal Transplants; Brazilian Federalism.*

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## 1. INTRODUCTION

Annexation is a contentious topic, being the most frequent form of boundary change in the United States.<sup>1</sup> Setting boundaries is of key importance for local governments with regard to a variety of purposes: tax base, jurisdiction, regulations, access to public services and rights to vote.<sup>2</sup> In 2015, there were 89,004 local government entities in the United States, and they levied approximately 6.6% of this country's (G.D.P.).<sup>3</sup> Claims referring to annexation of local governments in light of constitutional rights have significantly increased in the United States.<sup>4</sup> The U.S. Constitution is famously silent about several provisions, including local governments. In light of this omission and individual constitutional rights, would it make a difference to have local governments in the constitutional text? And to whom would it matter the most? This article aims at answering these questions. It focuses on annexation as proxy for local powers, considering the absence of local governments' provisions in the U.S. Constitution. It compares this scheme with the unprecedented Brazilian experience of leveling local governments alongside the states and the federal union in the Constitution of 1988.<sup>5</sup>

This research compares the reasoning of the U.S. Supreme Court (hereinafter U.S.S.C.) with its Brazilian counterpart, the Superior Tribunal

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<sup>†</sup> Carolina Arlota is a Visiting Assistant Professor of Law at the College of Law of the University of Oklahoma. Contact address: [carolarlota@ou.edu](mailto:carolarlota@ou.edu). I am grateful to Professors Nuno Garoupa, Laurie Reynolds and Jose Antonio Cheibub for important comments on earlier versions. I would like to thank anonymous referees of the UBLR for helpful feedback. Emilee N. Crowther provided excellent research assistance. The common disclaimers apply.

<sup>1</sup> See RICHARD BRIFFAULT & LAURIE REYNOLDS, *CASES AND MATERIALS ON STATE AND LOCAL GOVERNMENT LAW* 210-11 (7th ed. 2008).

<sup>2</sup> See Christopher J. Tyson, *Annexation and the Mid-Size Metropolis: New Insights in the Age of Mobile Capital*, 73 U. PITT. L. REV., 505, 506-61 (2012).

*Reports There Are 89,004 Local Governments in the United States*, U.S. CENSUS BUREAU (Aug. 30, 2012), <https://www.census.gov/newsroom/releases/archives/governments/cb12-161.html>.

Local governments levied, in taxes, \$1303 billion in 2015. See *Government Revenue Details*, US GOVERNMENT REVENUE (August 4, 2016), [www.usgovernmentrevenue.com/numbers](http://www.usgovernmentrevenue.com/numbers). Brazil currently has 5564 local governments, with revenue and mandatory transfers from the union reaching 8.6% of the Brazilian G.D.P.. See *Panorama 2011 bulletin*, FRENTE NACIONAL DE PREFEITOS (Feb. 9, 2015).

<sup>4</sup> Along those lines and stressing that, historically, state governments legitimized racially, national origin and class related discrimination: see Michelle Wilde Anderson, *Cities Inside Out: Race, Poverty, and Exclusion at the Urban Fringe*, 55 UCLA L. REV. 1095, 1095-160 (2008). For an illustration, see Chart I of this paper.

<sup>5</sup> For an analysis of Brazilian federalism, see CHARLES D. COLE, *COMPARATIVE CONSTITUTIONAL LAW: BRAZIL AND UNITED STATES* 32-33 (2d ed. 2008).

Federal (hereinafter S.T.F.), in relation to annexation laws.<sup>6</sup> Federalism itself has been associated with the success of the U.S. constitutionalism.<sup>7</sup> As the U.S. federal experience inspired Brazil, implications concerning comparative constitutional design are considered.<sup>8</sup>

A literature review on constitutional design reveals a multiplicity of approaches.<sup>9</sup> Regardless, studies on local governments remain largely overlooked, despite being a relevant factor for fostering democracy.<sup>10</sup> As a product of institutional choices and continuing experiences, the better a constitutional design is, the more it should promote democracy by avoiding permanent political conflict.<sup>11</sup> As litigation increases, less institutional predictability can exist, and economic growth is, therefore, jeopardized.<sup>12</sup> Despite belonging to distinct legal traditions, both courts are independent, with similar jurisdiction when judging issues of local governments.<sup>13</sup> In both countries, such subject matter is generally dealt with at the state level, and the Courts have jurisdiction only if specific violations of the federal Constitution occur.<sup>14</sup>

Insights based on constitutional design also contend that the scope and the size of countries are relevant.<sup>15</sup> In this direction, a comparison between Brazil and the United States is pertinent, because both countries display

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<sup>6</sup> The dataset for this research encompasses the decisions of the U.S. Supreme Court during the long tenure of the U.S. Constitution until February 2014, and the decisions of the S.T.F. – during the Constitution of 1988 until the same year. 2014 is the most recent year for which data could be gathered.

<sup>7</sup> See Keith S. Rosenn, *The Success of Constitutionalism in the United States and Its Failure in Latin America: An Explanation*, 22 U. MIAMI INT'L & COMP. L. REV. 1, 9-20 (1990).

<sup>8</sup> The study of comparative constitutional law has been founded on the U.S. Constitution. MARK TUSHNET, *Comparative Law and National Identity*, in THE OXFORD HANDBOOK OF COMPARATIVE LAW 1226 (Mathias Reimann & Reinhard Zimmermann eds., 2008).

<sup>9</sup> This research uses expression “constitutional design,” despite its intrinsic limitations, including how misleading the notion of design might be when applied to the complexity of social reality. TOM GINSBURG, *COMPARATIVE CONSTITUTIONAL DESIGN* 1-2 (2012).

<sup>10</sup> See SUJIT CHOUDHRY & NATHAN HUME, *Federalism, devolution and secession: from classical to post-conflict federalism*, in *COMPARATIVE CONSTITUTIONAL LAW* 377 (Tom Ginsburg & Rosalind Dixon eds., 2011).

<sup>11</sup> See GINSBURG, *supra* note 9, at 10.

<sup>12</sup> See Ran Hirschl, *The “Design Sciences” and Constitutional “Success”*, 87 TEX. L. REV. 1339, 1339-74 (2009).

<sup>13</sup> Independence in the sense that there is no external and direct interference with each Supreme Court’s final decision in a given case.

<sup>14</sup> Even in consideration of the constitutional amendments that occurred in Brazil in 1996 and 2008, the annexation of municipality occurs in the field of state law – albeit obedient to general guidance that will be determined in a federal complementary law, one which does not exist.

<sup>15</sup> See Hirschl, *supra* note 12, at 1343.

continental dimensions, with complex federal systems. This includes several potential problems related to the implementation of policies at different levels.<sup>16</sup> No single metropolis dominates local governments in Brazil, with Brazilian urban centers being geographically spread out as in the United States.<sup>17</sup> There have been limited attempts in literature to assess design choices made by different federations.<sup>18</sup> <sup>19</sup> This study aims to reduce this gap and to mitigate the so-called parochialism in the current U.S. scholarship.<sup>20</sup> Moreover, classical studies of federalism draw comparisons between countries of the developed world, such as Australia, Canada, Switzerland, and the United States.<sup>21</sup> In this context, the comparison with Brazil brings a new perspective, especially because of Brazil's developing status.

The main contributions of this research to the literature are straightforward. First, this research advances the literature on constitutional design by focusing on local governments, while verifying if the absence of constitutional provisions pertaining to local governments, as it is the case of the U.S. Constitution, was, in fact, a failure of constitutional design relating to future matters.<sup>22</sup> Second, this research analyzes the consequences of the Brazilian constitutional design, which went further by securing a place for local governments as federal actors alongside the states and the federal

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<sup>16</sup> For a discussion of the problems of implementation of federal level policies, see Hirschl, *supra* note 12 at 1344–45.

<sup>17</sup> See DAVID SAMUELS, “Reinventing Local Government? Municipalities and Intergovernmental Relations in Democratic Brazil”, in *DEMOCRATIC BRAZIL* 77 (Peter R. Kingstone & Timothy J. Power eds., 2000).

<sup>18</sup> Note that we refer to academic studies – not to work from practitioners and judges.

<sup>19</sup> See CHOUDHRY & HUME, *supra* note 10, at 359.

<sup>20</sup> For an empirical study finding evidence of U.S. parochialism with regard to federalism scholarship, see Carol S. Weissert, *Beyond Marble Cakes and Picket Fences: What U.S. Federalism Scholars can Learn from Comparative Work*, 73 J. POLIT. 965, 967–68 (2011). Emphasizing, long ago, the necessity of further research about comparative constitutional law. See also Bruce Ackerman, *The Rise of the World Constitutionalism*, 83 V. L. REV. 771, 794 (1997).

<sup>21</sup> See CHOUDHRY & HUME, *supra* note 10, at 356.

<sup>22</sup> See Hirschl, *supra* note 12, at 1348. (The omission of local governments in the constitutional text was a failure of constitutional design regarding future matters.

One among many manifestations of this problem in constitutional design is the silence of most pre-twentieth-century constitutions with respect to urbanization and the emergency of the megacity. Whereas principles of federalism in a two-layer system were usually set out, local government was often overlooked by constitutional framers . . . Because the city is not recognized as an autonomous constitutional entity, it is often not represented at pertinent public-policy bargaining forums . . . At the same time, because the megalopolis is home to so many people, it inevitably carries the brunt of governmental (in) action with respect to crime, poverty, homelessness, etc. Even more acute is the state of megacities in the developing world, where migration to the city and urban sprawl have long exceeded reasonable capacity.)

union.<sup>23</sup> In this sense, this research fosters the debate about the U.S. federalism, while offering a perspective grounded in local government.<sup>24</sup>

In addition, this article is unique in its research, using annexation as a proxy for local governments' powers while looking at Supreme Court cases of constitutional review. From the constitutional review standpoint, the comparison pursued in this research illustrates the predominant conflicts among groups litigating in each country, offering evidence of what are the main issues being disputed in local spheres with regard to annexation. It also shows how each Supreme Court balances freedom of local governments and national interests.<sup>25</sup> Moreover, it is noteworthy that the study of constitutional review itself is relevant on account of its positive correlation with economic and political stability, which enhances business and economic growth.<sup>26</sup> Constitutional review contributes to stability and reassures parties and investors that, for instance, contracts shall be fulfilled. By authorizing independent courts to review potential abusive judicial decisions, executive or legislative enactments, constitutional review advances the rule of law. The more stable is a country, the more foreign investors will be interested in doing business there.

This paper is organized as follows. Sections II and III refer to the U.S. and Brazilian scenarios, respectively, discussing the most controversial topics regarding annexation in the decisions of the U.S. Supreme Court and those of the S.T.F.. Section IV discusses the research findings, focusing on fundamental rights and constitutional design. Section V concludes.

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<sup>23</sup> See CONSTITUIÇÃO FEDERAL [C.F.] art. 18 (Braz.). Note that this article, when referring to Brazilian municipalities, uses the term as a synonym to local government, because "municipality" is the only admissible local government under the Brazilian Constitution of 1988.

<sup>24</sup> See CHOUDHRY & HUME, *supra* note 10, at 377 (highlighting the incidental position of local governments in classical federalism, and the limited comparative studies).

<sup>25</sup> This research considers local government law from the perspective of national (federal laws) and subnational (state laws) determinations, but it does not address cities as international actors, i.e., the concept of cities as international. For such dimension, see Gerald E. Frug & David J. Barron, *International Local Government Law*, 38 URB. LAW. 1 (2006).

<sup>26</sup> See Rafael La Porta, Florencio Lopez-de-Silanes, Cristian Pop-Eleches & Andrei Shleifer, *Judicial Checks and Balances*, 112 J. POLIT. ECON. 445 (2004).

## 2. THE UNITED STATES SCENARIO

This section focuses on the federalism issues that the U.S.S.C. has addressed when deciding matters related to the annexation of local governments.<sup>27</sup> It investigates the limits of annexation in state law enunciated by the Court, pertinent arguments relating to state powers, and how the highest court developed its interpretation over time.

This article turns to an analysis of the U.S. cases, which were classified according to the main issues involved in the litigation.<sup>28</sup> The cases of each set are grouped in chronological order, and the issues that address annexation were considered by preponderance in relation to other issues raised by the decisions<sup>29</sup> This division intends to facilitate further discussion. The annexation cases were assembled in the following five groups: police power of states over municipalities, succession of liability of counties, judicial review of state statute, general decisions about due process of law, and racial discrimination in connection with the right to vote.

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<sup>27</sup> This research is interested in the progression of the U.S. Supreme Court's dockets, encompassing all of the cases that met the search criteria further detailed, being systematic and coherent with the parameters used for the Brazilian S.T.F.. This study is a departure from the methodology based on the "most difficult cases," because a relevant part of it is to compare the dockets of both Supreme Courts. For a survey about studies using the approach of the "most difficult cases," see Ran Hirschl, *The Question of Case Selection in Comparative Constitutional Law*, 53 AM. J. COMP. L. 125 (2005).

<sup>28</sup> West Law and Lexis Advance were consulted in a detailed online research. Only the cases that appeared for both searches became part of the research cluster. Three searches were conducted, all of them combining annexation with municipality, county, and local government, respectively. Municipality, county, and local governments are the three most common denominations referring to local governments as translated to the Brazilian "municípios." After the pertinent exclusions, this research found thirty-one decisions based solely on the cases that appeared on both search tools of West Law and Lexis Research. Notwithstanding this number, this research further addresses two cases that are relevant (and that were cited by scholars in the field that are related to this federalism discussion, albeit not dealing with annexation directly). The final list of cases of the electronic search is consolidated in Table 1. This research is limited until February 2014 in order to permit all of the search mechanisms concerning Brazilian and U.S. cases to be updated.

<sup>29</sup> On the one hand, there were cases that did not appear in the search, because they did not address annexation; nevertheless this article comments on them for purposes of completeness. The two cases that are also discussed, because they refer to the application of the equal protection clause to states (despite not dealing with annexation, directly) are: *Avery v. Midlan County*, 390 U.S. 474 (1968); *Allegheny Pittsburgh Coal Co. v. County Comm'n.*, 488 U.S. 336 (1989). On the other hand, there were cases that appeared in the search, but they were excluded because they did not directly address annexation (or state and local government powers) in light of this specific form of boundary change. There were several instances where annexation was not used in accordance with the technical meaning object of this research, but as mere vernacular synonym of inclusion or addition. This research focuses on general-purpose local governments. All of the cases dealing with board of educations, special districts, and similar entities were excluded because municipalities in Brazil do not encompass them.

The first set of cases addresses police powers of the state over municipalities. In the *Slaughter-House* cases, the U.S.S.C. held that the state had an exclusive right under its police power to determine the localities where slaughtering was allowed to occur.<sup>30</sup> The U.S.S.C. also found that the laws of the federal constitution (in particular, Thirteenth and Fourteenth Amendments) were not applicable.<sup>31</sup> There were, however, vigorous dissents.<sup>32</sup>

The *Slaughter-House* cases represent a pioneer effort to challenge the former understanding of the Court about federalism occurring for the first time after the enactment of the amendments of the Reconstruction.<sup>33</sup> Under the traditional (Founding) federalism, such monopoly remains within the purview of the state. After the Reconstruction era, there was a valid challenge, although the majority's decision denied the departure proposed by the plaintiffs.<sup>34</sup> The majority decision was criticized on the grounds that it ultimately made the Privileges or Immunities Clause meaningless.<sup>35</sup>

Another case dealing with the police powers arising out of the protection of health and morals was *Holden*, where the Court determined that state police power might validly limit the right of contract. For the Court, the sheriff of Salt Lake County was merely executing the state law.<sup>36</sup>

*Holt* considered the exercise of police powers outside the limits of the city of Tuscaloosa, Alabama.<sup>37</sup> The Court upheld a statute which expanded the city's police powers to residents within a three miles radius of the municipal corporate limits. For the U.S.S.C., the city's police powers were not in violation

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<sup>30</sup> *Slaughter-House Cases*, 83 U.S. 36 (1872). Technically, this decision rejected the application of the Privileges and Immunity clause as well as the Equal Protection and Due Process contained in the Fourteenth Amendment. For a discussion of how the Court modified the interpretation regarding the latter, see ERWIN CHERMERINSKY, *CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES* 494-98 (4th ed. 2006).

<sup>31</sup> For a review of previous cases securing state power to regulate domestic affairs (including local governments), and contending that the Fourteenth Amendments was not applicable, see RAUL BERGER, *FEDERALISM: THE FOUNDERS' DESIGN* 158-61 (1987).

<sup>32</sup> *Slaughter-House Cases*, 83 U.S. 36 (1872).

<sup>33</sup> See BRUCE ACKERMAN, *WE THE PEOPLE: FOUNDATIONS* 94 (1993).

<sup>34</sup> *Id.* at 95, 115 (contending that the Court refused to apply the Reconstructions amendments beyond the limited scope of race).

<sup>35</sup> See JOHN HART ELY, *DEMOCRACY AND DISTRUST* 22-23 (1980) (noting that the final decision made the Privileges or Immunities Clause meaningless, and emphasizing that the Court changed its opinion about the Equal Protection Clause from *The Slaughter-House Cases*, but it has not done so as to the Privileges or Immunities Clause).

<sup>36</sup> See *Holden v. Hardy*, 169 U.S. 366 (1898).

<sup>37</sup> See *Holt Civic Club v. City of Tuscaloosa*, 439 U.S. 60 (1978).

of the understanding of “government without franchise being a fundamental violation of the Due Process Clause.”<sup>38</sup>

The cases comprised in that first set address a core question of the U.S. federalism, namely, police powers. As a rule, protection of health and safety can be regulated by the state under its police powers. The *Slaughter House* cases confirmed so, at a time when freedom of contract was perceived as unlimited. *Holt* authorizes the city to exercise police powers even outside its borders, further blurring the division lines. It also provides an example of the geographical, economic, political, and social functions of the U.S. boundaries, which justified the expansion of police powers based on the effect that the lack of regulation could have within the boundaries of a city.

The second set of cases addresses the question of the succession of liability of counties. In *Commissioners of Laramie County*, the U.S.S.C. decided that absent a state constitution, the legislature has the power to reduce or enlarge the area of a county, whenever public necessity or convenience requires.<sup>39</sup> The Court specifically stressed that if part of the territory of a town and its inhabitants is separated by annexation to another town (or by creation of a new corporation), the former corporation retains all property, powers, rights, and privileges, remaining subject to all its obligations and duties, unless some new provision was made by the act authorizing the separation.<sup>40</sup>

With similar reasoning, the U.S.S.C. affirmed that new towns formed by annexation of parts of an old town remained severally liable for the bonds of

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<sup>38</sup> “From a political science standpoint, appellants' suggestions may be sound, but this Court does not sit to determine whether Alabama has chosen the soundest or most practical form of internal government possible. *Authority to make those judgments resides in the state legislature, and Alabama citizens are free to urge their proposals to that body . . .* The Alabama Legislature could have decided that municipal corporations should have some measure of control over activities carried on just beyond their ‘city limit’ signs, particularly since today's police jurisdiction may be tomorrow's annexation to the city proper. Nor need the city's interests have been the only concern of the legislature when it enacted the police jurisdiction statutes. Urbanization of any area brings with it a number of individuals who long both for the quiet of suburban or country living and for the career opportunities offered by the city's working environment. Unincorporated communities like Holt dot the rim of most major population centers in Alabama and elsewhere, and state legislatures have a legitimate interest in seeing that this substantial segment of the population does not go without basic municipal services such as police, fire, and health protection.” *Id* at 73–74 (dicta) (emphasis added). All the internal citations to cases hereinafter are omitted, unless stated differently.

<sup>39</sup> See *Comm'rs of Laramie Cty. v. Comm'rs of Albany Cty.*, 92 U.S. 307 (1875). This case was cited as precedent for *City of Worcester v. Worcester Consol. St. Ry. Co.*, 96 U.S. 539, 548–49 (1905) (“The city is a creature of the State . . . A municipal corporation is not only a part of the State, but is a portion of its governmental power.”).

<sup>40</sup> See *Comm'rs of Laramie Cty.*, 92 U.S. at 310–11.

the dissolved town.<sup>41</sup> Therefore, when a municipal corporation is dissolved and a new corporation is created and predominantly composed of the same community, it becomes the successor of the old corporation, liable for its debts. The status of “being the same community” was defined as relating to the taxable property being substantially the same, and having the same purposes of the former municipal corporation. Further, the Court determined that the U.S. Constitution forbids any legislative enactment that withdraws or limits the remedies for the enforcement of obligations assumed by a municipal corporation, if no substantial equivalent is provided.<sup>42</sup>

In another decision, the U.S.S.C. held that, upon annexation, authorities of towns or villages who were previously entitled to receive contractual benefits from such entities will no longer receive. For the Court, the grant was nonexistent, because the underlying obligation no longer exists, with the ordinances of the city being extended over the territory immediately at the moment of the annexation.<sup>43</sup>

With regard to the annexation of a township to a city and the contractual expiration of reduced fares, the U.S.S.C. cited *Blair v. Chicago*, reiterating that grants must be interpreted strictly and with no contractual rights enlarged by implication. Moreover, it involved no violation of contractual obligations by the city or the taking of property without due process of law.<sup>44</sup> The U.S.S.C. later distinguished and reduced the scope of this interpretation by considering the facts underlying such a contract, ultimately determining that an extension of the diminished price would violate Article 1, § 10 of the Constitution and the general prohibition of states impairing the obligation of contracts.<sup>45</sup>

The second ensemble of decisions illustrates the interpretation of the Court regarding contractual claims modified due to annexation. The Court distinguished the annexation effects when considering bonds (which, as a rule, had to be honored by the new entity) from the general contractual benefits.

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<sup>41</sup> See *Town of Mount Pleasant v. Beckwith*, 100 U.S. 514 (1879).

<sup>42</sup> See *Mobile v. Watson*, 116 U.S. 289 (1886).

<sup>43</sup> See *Blair v. City of Chicago*, 201 U.S. 400, 488–89 (1906).

<sup>44</sup> See *Detroit United Ry. v. Detroit*, 229 U.S. 39, 44 (1913).

<sup>45</sup> See *Detroit United Ry. v. Michigan*, 242 U.S. 238, 252–53 (1916).

Those benefits should be interpreted as nonexistent after the annexation, if legal doubt existed. The Court considered values of morality and transparency, which should inform public actions, even when they occurred in the closest sphere to the public (local government).

In a third set of cases, classification was based primarily on the possibility of review by the judiciary of state statutes regarding annexation. The first case addressed procedures pertinent to annexation.<sup>46</sup> It considered the annexation of counties to the state of West Virginia after the Civil War, determining that such annexation was valid, provided that the counties' population voted for it in an election. The U.S.S.C. held that it had jurisdiction over the lawsuit between the new state of West Virginia and the state of Virginia, with allegations of fraud in the election not being relevant, to the extent that the governor had certified the annexation in good faith.<sup>47</sup>

In a different case, the decision affirmed that the validity of proceedings under a statute for the annexation of a territory to a city was a determination of judicial nature, not a matter solely of legislative cognizance.<sup>48</sup> The U.S.S.C. decided that, when the legislature acted validly in annexing new territory to a city, the jurisdiction of the Court was not dependent on the form that legislative action is expressed, but upon "its practical effect and operation as construed and applied by state court of last resort, and this irrespective of the process of reasoning by which the decision is reached, or the precise extent to which reliance is placed upon the subsequent legislation."<sup>49</sup>

Another matter concerns the annexation of federal territory by a city. In this regard, the U.S.S.C. previously stated that it has jurisdiction to decide the case. The majority of the justices decided that the tax income levied on employees of the federal plant was valid.<sup>50</sup>

In another decision addressing the relationship between federal law and state powers with the potential effect in annexation,<sup>51</sup> a unanimous Court

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<sup>46</sup> See *Virginia v. West Virginia*, 78 U.S. 39 (1870).

<sup>47</sup> *Id.* at 62–63.

<sup>48</sup> See *Forsyth v. Hammon*, 166 U.S. 506, 515 (1897).

<sup>49</sup> *Detroit United Ry. v. Michigan*, 242 U.S. 238, 247 (1916).

<sup>50</sup> See also *Howard v. Comm'rs of Sinking Fund*, 344 U.S. 624 (1953).

<sup>51</sup> See *FTC v. Phoebe Putney Health Sys.*, 133 S. Ct. 1003 (2013) (not directly about annexation, but effects of this boundary change were considered in the rationale developed by the Court).

declined to recognize state action immunity to a former state hospital purchased by the local government. For the Court, because this hospital was the only one in town, antitrust law did not authorize such immunity<sup>52</sup>. In a different context removed from annexation, but also referring to limits of state power, the Court determined that the Equal Protection Clause of the Fourteenth Amendment should apply to state action that selects the party for discriminatory treatment by subjecting the party to taxes not imposed on others in the same class.<sup>53</sup>

The cases of the third set are relevant because they reiterate the judicial review of state law regarding annexation. The first case, *Allegheny Pittsburgh Coal Co. v. Cty. Comm’r.*, stated that the political question doctrine does not preclude the Court from deciding claims that arise out of boundary disputes between states, even when such lines were determined in an agreement by both states and Congress.<sup>54</sup> It advanced the power of the governor over the counties that were present in the governor’s state. The remaining cases emphasized that judicial review did not jeopardize separation of powers, a recurrent theme since *Marbury v. Madison*.<sup>55</sup> Considering, specifically, *FTC v. Phoebe Putney Health System*, the interpretation of the Court was consistent with the state action doctrine, which fosters federalism by reserving an area of state sovereignty.<sup>56</sup> The doctrine of state action considers that the government has to obey the Constitution, regardless of whether it resorted to a corporate form. Ultimately, the decision did not encompass the hospital within the public function exception.<sup>57</sup>

The fourth set of cases comprises alleged violations to the due process Clause protected by the Fourteenth Amendment. In the first case, the U.S.S.C. decided that there was no violation of federal law or the Constitution in a lawsuit arising out of an annexation case that plaintiffs argued had occurred in

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<sup>52</sup> *Id.*

<sup>53</sup> See *Allegheny Pittsburgh Coal Co. v. Cty. Comm’r.*, 488 U.S. 336, 345–46 (1989).

<sup>54</sup> See *Virginia v. West Virginia*, 78 U.S. 39, 60–61 (1870).

<sup>55</sup> *Marbury v. Madison*, 5 U.S. 137 (1803).

<sup>56</sup> See ERWIN CHERMERINSKY, *CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES* 513 (4th ed. 2006).

<sup>57</sup> The public function exception refers to services that have been traditionally within the exclusive prerogative of the government. For a complete review of the exceptions, see CHERMERINSKY, *supra* note 55, at 517–38 (noting that utility companies are not a public function). As such, the Constitution does not always have to apply. It is noteworthy that the so-called public function exception is quite complex. An in depth analysis of its impact its outside the scope of this article.

violation of their due process of law.<sup>58</sup> The Court dismissed the case, noting that it had no jurisdiction because the claim did not show a real and substantial dispute with regard to the effect or construction of the Constitution, or under color of federal law. In another case, the Court ruled that the discrimination between individuals and corporations regarding the annexation to a city of lands held for agricultural purposes cannot be attacked as unconstitutional.<sup>59</sup> Hence, discrimination among agricultural lands and other lands considering the right of a city to annex them is not in violation of constitutional guaranties of due process Clause and equal protection of the laws because it is within the power of the state to classify objects of their legislation.<sup>60</sup>

Still considering annexation and potential violation of the due process clause of the Fourteenth Amendment, the U.S.S.C. held in *Hunter*:

Municipal corporations are political subdivisions of the state, created as convenient agencies for exercising such of the governmental powers of the state as may be entrusted to them. For the purposes of executing these powers properly and efficiently they usually are given the power to acquire, hold, and manage personal and real property. The number, nature and duration of the powers conferred upon these corporations and the territory over which they shall be exercised rests in the absolute discretion of the State. . . . In all these respects the state is supreme, and its legislative body, conforming its action to the State Constitution, may do as it will, unrestrained by any provision of the Constitution of the United States.<sup>61</sup>

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<sup>58</sup> See *McCain v. Des Moines*, 174 U.S. 168 (1899) (emphasizing the existence of state constitution determining the issue, and the absence of violation to the U.S. Constitution).

<sup>59</sup> See *Clark v. Kansas City*, 176 U.S. 114 (1900).

<sup>60</sup> *Id.*

<sup>61</sup> See *Hunter v. City of Pittsburgh*, 207 U.S. 161, 178-79 (1907). It is noteworthy that state law provided for the annexation of cities, with the smaller being annexed to the larger. The majority of both cities approved the annexation, but the majority of voters in Allegheny (the smaller city) were opposed to the annexation. The lower courts and the U.S.S.C. affirmed the consolidation decree, also based on the nonexistence of a contract between the citizens and the city of Allegheny for a given taxation, which would be against the nature of municipal corporations. Moreover, the Court decided that there was no deprivation of property without the due process in light of the increased taxation applicable after the incorporation.

Both cases in the fourth set deal with claims arising out of the Fourteenth Amendment, showing how restrictively the Court has interpreted them. Accordingly, municipalities were empowered through the interpretation developed by the Court, who understood them as extension of the states.

The fifth and final group of cases focuses on the decisions of the U.S.S.C. with regard to racial discrimination and the right to vote.<sup>62</sup> Chronologically, this study begins with *Gomillion*,<sup>63</sup> when the U.S.S.C., for the first time in the context of annexation cases, limited the absolute power of states conceived in *Hunter*.<sup>64</sup> The Court held:

Thus, a correct reading of the seemingly unconfined dicta of *Hunter* and kindred cases is not that the State has plenary power to manipulate in every conceivable way, for every conceivable purpose, the affairs of its municipal corporations, but rather that the State's authority is unrestrained by the particular prohibitions of the Constitution considered in those cases.<sup>65</sup>

The U.S.S.C. further remarked that the Constitution limits legislative control of municipalities, as any state power.<sup>66</sup> This limitation warrants emphasis that in the excerpt above the Court made an analogy with contractual rights in order to secure the right to vote. The Court considered that the new boundaries were a violation to the Fifteenth Amendment, depriving the citizens of the right to

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<sup>62</sup> For previous analysis of decisions about the right to vote in local elections, see Richard Briffault, *Who Rules at Home? One Person/One Vote and Local Governments*, 60 U. CHI. L. REV. 339 (1993).

<sup>63</sup> See *Gomillion v. Lightfoot*, 364 U.S. 339, 342 (1960).

The complaint amply alleges a claim of racial discrimination. Against this claim, the respondents have never suggested . . . any countervailing municipal function which Act 140 is designed to serve. The respondents invoke generalities expressing the State's unrestricted power – unlimited, that is, by the U.S. Constitution – to establish, destroy, or reorganize by contraction or expansion its political subdivisions, to wit, cities, counties, and other local units. We freely recognize the breath and importance of this aspect of the State's political power. To exalt this power into an absolute is to misconceive the reach and rue of this Court's decisions in the leading case of *Hunter v. Pittsburgh*, and related cases relied upon by respondents.

The Court further stressed that *Lamarie* was authoritative only regarding the general nonexistence of a constitutionally protected obligation arising between a state and its subordinate governmental entities, exclusively as the result of their relationship. See *Gomillion*, 364 U.S. at 343.

<sup>64</sup> See *Hunter*, *supra* note 60 (holding that municipal corporations were merely political subdivisions of the state and created upon states' discretion).

<sup>65</sup> *Gomillion*, 364 U.S. at 344.

<sup>66</sup> *Id.* at 344–45.

vote due to their race.<sup>67</sup> It reaffirmed that state power is immune to judicial review if such power was exercised completely within the domain of state interest. This is thus different from the case at bar, wherein the state power was used to circumvent a federally protected right.<sup>68</sup> In addition, in *Avery v. Midland County*, the Court stated that the Equal Protection Clause applies to the exercise of state power, regardless if it was directly exercised by the state or by a political subdivision.<sup>69</sup>

In another decision, the U.S.S.C. upheld the modifications of Virginia's reapportionment statute for elections of members of the House and Senate, which determined that legislative districts should not change. This would be the case, despite the modification of boundaries after annexation.<sup>70</sup> According to the majority opinion, the reapportionment plan did not violate the Equal Protection Clause of the Fourteenth Amendment.<sup>71</sup> In another similar decision,

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<sup>67</sup> *Id.* at 345–46.

A statute which is alleged to have worked unconstitutional deprivations of petitioners' right is not immune to attack simply because the mechanism employed by the legislature is a redefinition of municipal boundaries. According to the allegations here made, the Alabama legislature has not merely redrawn the Tuskegee city limits with incidental inconvenience of the petitioners; it is more accurate to say that it has deprived the petitioners of the municipal franchise and consequent rights and to that end it has incidentally changed the city's boundaries. While in form this is merely an act redefining metes and bounds, if the allegations are established, the inescapable human effect of this essay in geometry and geography is to despoil colored citizens, and only colored citizens, of their therefore enjoyed voting rights.

*Id.* at 347.

<sup>68</sup> *Id.* at 347–48. The concurring opinion by Justice Whittaker located the federal protection right within the Equal Protection Clause of the Fourteenth Amendment. *Id.* at 349 (Whittaker, J., concurring).

<sup>69</sup> *Avery v. Midland Cty.*, 390 U.S. 474, 479 (1968). Importantly, this litigation was about an election for County Commissioners in Texas – not a direct annexation procedure, but it was included because it addressed annexation in dicta. It further stated that the Fourteenth Amendment guaranteed that citizens have equal representation in political subdivisions that exercised policy-making functions. *Id.* at 481.

<sup>70</sup> See *Mahan v. Howell*, 410 U.S. 315 (1973).

<sup>71</sup> The Court held that there was no violation of the principle of one person, one vote, because it understood the state's objective of preserving the integrity of political subdivision as rational, to the extent that it corroborated the legislative goal of facilitating enactments of statutes referring solely to local matters. *Id.* at 326–28. Nevertheless, Justice Brennan partially dissented, citing that the deviation of 16,4% between the most overrepresented and the most underrepresented legislative districts in a state's lower legislative house is constitutionally impermissible and cannot be justified on the ground that the state adhered to political subdivisions lines when designing the districts. *Id.* at 345–49 (Brennan, J., concurring in part and dissenting in part).

the Court also found no violation of such clause, justifying its holding in *Hunter*.<sup>72</sup>

In *Perkins v. Matthews*, the U.S.S.C. considered violations to §5 of the Voting Rights Act of 1965 (42 U.S.C.S. §1973c) in the context of annexations and related changes to the boundaries of adjacent areas that aimed to expand the number of eligible voters.<sup>73</sup>

The U.S.S.C. further explained the meaning of §5 of the Voting Rights Act in *City of Richmond v. United States*, a lawsuit that arose out of a post-annexation statute that reduced the African American population by 10% in comparison with the pre-annexation electoral base.<sup>74</sup> *City of Richmond* was later used as precedent to validate other actions with similar impacts, despite not being related to annexation.<sup>75</sup>

In addition, the U.S.S.C. determined that it was necessary for political units of a state covered within the jurisdiction of the Voting Rights Act to comply with the mandatory preclearance procedures of §5 of the Act, holding

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<sup>72</sup> For a case demonstrating a new county charter that required approval under New York law, by a referendum of separate majorities of the voters who lived in the city within the county, and of those who lived outside city boundaries, see *Town of Lockport v. Citizens for Cmty. Action at the Local Level, Inc.*, 430 U.S. 259 (1977).

<sup>73</sup> *Perkins v. Matthews*, 400 U. S. 379 (1971). The case arose out of a Mississippi's city statute changing the location of polls, modification of boundaries changes, among others, in an election for mayor and aldermen. It emphasized that the Voting Rights Act of 1965 covered the city. The U.S.S.C. further stresses that section five was conceived to address changes that hold a potential for racial discrimination in voting. *Id.* at 388 (citing *Gomillion v. Lightfoot*, 364 U.S. 339 (1960)).

<sup>74</sup> *City of Richmond v. United States*, 422 U.S. 358 (1975).

<sup>75</sup> See *United Jewish Org's., Inc. v. Carey*, 430 U.S. 144, 160 (1977).

that the city failed to prove that there was no discrimination.<sup>76</sup> Along those lines, the Court determined that the new boundaries, resulting from two consolidations and one annexation in Texas,<sup>77</sup> were in violation of §5, due to insufficiently neutralizing the adverse impact on minority voting.<sup>78</sup>

In another landmark decision, the U.S.S.C. concluded that annexation of inhabited land by a municipality was also subject to the preclearance requirement of §5, because it constituted a change in the voting practices.<sup>79</sup> The Court also attended to the nonexistence of African Americans in the previous annexation configuration as not being relevant, because the impermissible purpose under §5 referred to contemporary and future circumstances.<sup>80</sup> In another case of reapportionment in the context of the Voting Rights Act, the Court ruled that the scheme was so irrational on its face that it could be understood solely as an effort to segregate districts on the basis of racial classifications.<sup>81</sup>

Notwithstanding the previous case law concerning the Voting Rights Act, the Court decided that the Act was not applicable to the changes made in

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<sup>76</sup> See *City of Rome v. United States*, 446 U.S. 156 (1980). Technically, the annexations are in reference to elections for City Commission and Board of Education. The decision in *City of Rome* asserts: "Congress plainly intended that a voting practice not be pre-cleared unless both discriminatory purpose and effect are absent." *Id.* at 172 (emphasis in original).

[T]he District Court properly concluded that these annexations must be scrutinized under the Voting Rights Act. See *Perkins v. Matthews*, 400 U.S., at 388-90. By substantially enlarging the city's number of white eligible voters without creating a corresponding increase in the number of Negroes [sic], the annexations reduced the importance of the votes of Negro [sic] citizens who resided within the pre-annexation boundaries of the city. In these circumstances, the city bore the burden of proving that its electoral system 'fairly reflects the strength of the Negro [sic] community as it exists after the annexations.' *City of Richmond v. United States*, 422 U.S. 358, at 371. The District Court's determination that the city failed to meet this burden of proof for City Commission elections was based on the presence of three vote-dilutive factors: the at-large electoral system, the residency requirement for officeholders, and the high degree of racial bloc voting. Particularly in light of the inadequate evidence introduced by the city, this determination cannot be considered to be clearly erroneous.

*City of Rome*, 446 U.S. at 187.

<sup>77</sup> See *City of Port Arthur v. United States*, 459 U.S. 159 (1982).

<sup>78</sup> *Id.* at 162. The Court considered two previous plans and related findings of their discriminatory effect in order to determine that the third plan at bar was also tainted. *Id.* at 168.

<sup>79</sup> See *Pleasant Grove v. United States*, 479 U.S. 462, 467 (1987) (citing *City of Rome*, where the majority of the annexations were of vacant land).

<sup>80</sup> *Id.* at 471.

<sup>81</sup> See *Shaw v. Reno*, 509 U.S. 630, 640-52 (1993). This case does not encompass any annexation procedure directly, but it is included because the majority decided that appellants were able to state a cause of action (citing annexation in *dicta*), and the case appeared in our online search.

the allocation of powers of the county commissions.<sup>82</sup> According to the majority of the U.S.S.C., §5 was applicable only to changes that affected voting, candidacy requirements and qualifications, or the composition of the electorate.<sup>83</sup>

In a case involving the dilution of votes of governing authorities of counties in Georgia,<sup>84</sup> the Court distinguished the application of §2 of the Voting Rights Act from §5.<sup>85</sup> In another case, the Court decided that there was no dilution of minority votes in a reapportionment plan from the Florida legislature.<sup>86</sup>

This research considered the decision of *Shelby v. Holder*, to the extent that the Court discussed the federalism pact in order to rule §4(b) of the Voting Rights Act unconstitutional.<sup>87</sup> According to the majority, the formula used in

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<sup>82</sup> See *Presley v. Etowah Cty. Comm'n*, 502 U.S. 491 (1992).

<sup>83</sup> *Id.* at 501–09.

<sup>84</sup> See *Holder v. Hall*, 512 U.S. 874 (1994).

<sup>85</sup>

Retgression is not the inquiry in section 2 dilution cases (whether voting practice ‘results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color’; . . . Plaintiffs could not establish a section 2 violation merely by showing that a challenged reapportionment or annexation, for example, involved a retrogressive effect on the political strength of a minority group’). Unlike in section 5 cases, therefore, a benchmark does not exist by definition in section 2 dilution cases. And as explained above, with some voting practices, there in fact may be no appropriate benchmark to determine if an existing voting practice is dilutive under section 2. For that reason, a voting practice that is subject to the preclearance requirements of section 5 is subject to the preclearance requirements of section 5 is not necessarily subject to a dilution challenge under section 2.

*Id.* at 884–85.

<sup>86</sup> See *Johnson v. De Grandy*, 512 U.S. 997, 1019 (1994) (emphasizing that *Richmond v. United States* referred to territorial annexation designed to dilute African American votes was forbidden by section five of the VRA, regardless of its actual effect).

<sup>87</sup> See *Shelby Cty. v. Holder*, 133 S. Ct. 2612 (2013).

the Act was forty years old and no longer reflected the realities in the states covered by it.<sup>88</sup> The U.S.S.C. asserted:

The Voting Rights Act of 1965 employed extraordinary measures to address an extraordinary problem. Section five of the Act required States to obtain federal permission before enacting any law related to voting—a drastic departure from basic principles of federalism. And section four of the Act applied that requirement only to some States—an equally dramatic departure from the principle that all States enjoy equal sovereignty. This was strong medicine, but Congress determined it was needed to address entrenched racial discrimination in voting. As we explained in upholding the law, “exceptional conditions can justify legislative measures not otherwise appropriate.”<sup>89</sup>

In light of U.S. federalism, the Court explained that the federal government is not generally authorized to review and veto state enactments before they go into effect. This is true despite such power being considered at the time of the Convention, and denied in favor of the Supremacy Clause and related potential challenges occurring after the effect of state law.<sup>90</sup> Also, the Court reaffirmed that the Tenth Amendment grants to the states all the powers not specifically granted to the federal government, and that “not only do States retain sovereignty under the Constitution, there is also a ‘fundamental principle of equal sovereignty’ among the States.”<sup>91</sup> The dissenting opinion justified the

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<sup>88</sup> The decision emphasizes that African American voter turnout actually increased in five of the six states originally covered by the VRA, of 1965. *Id.* at 2619. Shelby County is located in Alabama. The following states were originally covered by section five: Alabama, Georgia, Louisiana, Mississippi, South Carolina and Virginia. Arizona and Texas were included in 1972, also in their totality. The majority of the Court noted in *Shelby* that by 1965 the Act divided the states among those which have literacy tests (coupled with low voter registration and turn out) and those which did not; nowadays, for the Court: “the Nation is no longer divided along those lines, yet the Voting Rights Act continue to treat it as if it were.” *Id.* at 2628. At the time of the *Shelby* decision, Florida, New York, North Carolina, South Dakota and Michigan were partially included, according to data from the Department of Justice of the United States. There is no information available with regard to the current jurisdictions covered after *Shelby* (and its potential bail out effect). *Jurisdictions Previously Covered By Section 5*, U.S. DEPARTMENT OF JUSTICE (last updated Aug. 6, 2015), [http://www.justice.gov/crt/about/vot/sec\\_5/covered.php](http://www.justice.gov/crt/about/vot/sec_5/covered.php).

<sup>89</sup> *Shelby Cty.*, 113 S. Ct. at 2618.

<sup>90</sup> *Id.* at 2623.

<sup>91</sup> *Id.*

exceptions based on the remaining necessity of differentiated treatments for the states mentioned in the Act.<sup>92</sup>

The majority holding in *Shelby* can be understood as being aligned with the current trend of using tradition to limit the judicial review of the democratic process at state and local levels.<sup>93</sup> Nevertheless, tradition itself has been subject to criticism, because the U.S. experience is founded on multiple traditions.<sup>94</sup> In addition, the assurance of the legislative representation of minorities remained the core of the Act, and it is unclear, as of today, how the decision of the Court affects those to whom the protection was designed.<sup>95</sup>

Still considering the *Shelby* decision, a related topic of particular interest for this comparison with Brazil is the fact that the U.S.S.C. determined that Congress did not act – or did not consider doing so – despite the warning given by the U.S.S.C. in a decision dating back to 2009, determining that the formula of §2 must be updated.<sup>96</sup>

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<sup>92</sup> The dissent opinion written by Justice Ginsburg – joined by Justices Breyer, Sotomayor and Kagan – specifically addresses annexation as a form of discrimination in different passages where it was emphasized that Pleasant Grove, a city in a neighbor county of Shelby, acted with purposeful discrimination when annexing all white areas and denying the annexation request of an adjacent black neighborhood. *Id.* at 2535, 2646 (Ginsburg, J., dissenting) (citing *Pleasant Grove v. United States*, 479 U.S. 462 (1987)).

<sup>93</sup> See CASS R. SUNSTEIN, *DESIGNING DEMOCRACY: WHAT CONSTITUTIONS DO?* 80–81 (2001) (arguing as potential explanations for such approach as follows: the fact that the U.S. Constitution is better understood for the Court if being preservative, and that the due process clause is better interpreted in a very restrictive form. According to the author, both understandings would reduce the Court's discretion).

<sup>94</sup> *Id.* at 82–87 (criticizing the use of tradition regarding race).

<sup>95</sup> See DONALD HOROWITZ, *Constitutional Design: Proposals versus process*, in *THE ARCHITECTURE OF DEMOCRACY: CONSTITUTIONAL DESIGN, CONFLICT MANAGEMENT AND DEMOCRACY* 19 (Andrew Reynolds ed., 2002).

<sup>96</sup> *Shelby*, 113 S. Ct. at 2615 (referring to *Nw. Austin Mun. Utils. No. One v. Holder*, 557 U.S. 193 (2009)). The *Shelby* decision emphasizes that Congress could have updated such formula when it extended the Voting Rights Act of 1965 through its reauthorization in 2006. *Id.* The Court stated:

Our decision in no way affects the permanent, nationwide ban on racial discrimination in voting found in section two. We issue no holding on section five itself, only on the coverage formula. Congress may draft another formula based on current conditions. Such a formula is an initial prerequisite to a determination that exceptional conditions still exist justifying such an 'extraordinary departure from the traditional course of relations between the States and the Federal Government.

*Presley v. Etowah Cty. Comm'n*, 502 U.S. 491, 500–01 (1992). "Our country has changed, and while any racial discrimination in voting is too much, Congress must ensure that the legislation it passes to remedy that problem speaks to current conditions." *Id.* at 2631. The dissent opinion vehemently criticizes such an understanding. *Id.* at 2632–33 (Ginsburg, J., dissenting).

### 3. THE BRAZILIAN SCENARIO

Brazilian re-democratization process started in 1979, with the appointment of the moderate military João Figueiredo as President, leading to the gradual ending of the overcentralized military ruling. In 1982, the first direct election for governors since the 1964 coup d'état was held.<sup>97</sup> After a long deliberation,<sup>98</sup> the Constitution of the Brazilian Republic was approved on October 5, 1988 by a Constitutional Convention that included federal congressional representatives (deputies) and senators.<sup>99</sup> Mayors and governors were among the most powerful actors in lobbying for decentralization, fomenting a constitutional order that became a “center-constraining federation unprecedented in Brazilian history.”<sup>100</sup>

In light of the above, Brazilian federalism has shown complex dynamics.<sup>101</sup> The President needs to engage in as many coalitions of political parties as possible, while reconciling local and regional demands that dominate each party.<sup>102</sup> Accordingly, national interests are often belittled if conflicting with state or local demands. In this scenario, the ongoing constitutional amendments impacting local governments and political scandals involving Presidents loomed in the background as the S.T.F. decided the cases in our

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<sup>97</sup> For information concerning Brazilian elections for state governors, federal deputies, and senators from 1945 until 1990, see *Brazilian Superior Tribunal for Electoral Law*, TSE (Feb. 20, 2015), <http://www.tse.jus.br/eleicoes/eleitos-1945-1990/cronologia-das-eleicoes>. Direct elections brought a “dramatic change in the executive-legislative relations (even though a military President remained in office until 1985),” because democratic state elections pressured the President and ultimately led to state governors conquering more decentralization of revenues. SAMUELS, *supra* note 17, at 169

<sup>98</sup> The Constitutional Convention met between February 1987 until September of 1988. The Brazilian Constitutional Convention was not elected nor formed by delegates directly elected to write the Constitutional text itself, due to a compromise during the transition period from the military ruling to democracy. CLÁUDIO PEREIRA DE SOUZA NETO & DANIEL SARMENTO, *DIREITO CONSTITUCIONAL: TEORIA, HISTÓRIA E MÉTODOS DE TRABALHO* 156 (2013).

<sup>99</sup> The less populated states of North and Center West were favored in the unbalanced representation of their states' senators in the Convention, because all states have equal representation in the Brazilian Senate. The non-updated number of federal deputies per state (disregarding population growth in the Southeast) also disfavored the southeast states, see SOUZA NETO & SARMENTO, *supra* note 97, at 160.

<sup>100</sup> Celina Souza, *Brazil: The Prospects of a Center-Constraining Federation in a Fragmented Polity*, 32 *PUBLIUS.*, 23, 31 (2002). It is noteworthy that Brazil has had lasting periods with state governors being very empowered, such as during the so-called Old Republic.

<sup>101</sup> Local forces have long united forces with their respective state authority to pressure the federal government. The local authority is very empowered. A classical reference on this understanding and peculiarities that impact federalism, see VÍCTOR NUNES LEAL, *CORONELISMO, ENXADA E VOTO: O MUNICÍPIO E O REGIME REPRESENTATIVO NO BRASIL* (7th ed., 2012).

<sup>102</sup> SCOTT MAINWARING, *Multipartism, Robust Federalism, and Federalism in Brazil*, in *PRESIDENTIALISM AND DEMOCRACY IN LATIN AMERICA* 83-4 (Scott Mainwaring & Matthew Soberg Shugart eds., 1999).

dataset. And, as any Supreme Court in the world, the S.T.F. has to consider its own political capital and incentives for compliance by the involved parties.

This research is limited to the decisions that occurred during the Constitution of 1988 until February of 2014.<sup>103</sup> The reasons for choosing this time period are threefold. First, the Constitution of 1988 modernized the Brazilian tradition, as previously mentioned, by elevating municipalities to the status of federal actors (with states and the federal union). Second, the Constitution of 1988 technically ended the transition phase from the end of the military regime (1985) to democracy. Third, new constitutions are most susceptible to risk of replacement within their first nineteen years.<sup>104</sup> Consequently, this study covers a temporal duration greater than this critical period.<sup>105</sup>

With regard to the composition of the lawsuits, this dataset indicates that the S.T.F. was not called upon to decide cases involving fundamental rights.<sup>106</sup> The issues at bar relate to the application (including clarification) of the objective constitutional requirements of annexation. It is worth noting that the U.S. concept of annexation is equivalent, in practice, to the concept of “dismemberment through annexation” in the Brazilian constitutional text. According to this Brazilian modality, both municipalities remain in existence.<sup>107</sup> The regions that presented a highest number of lawsuits were the Northeast (mainly due to the federative state of Bahía) and the Center West (because of Mato Grosso).<sup>108</sup>

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<sup>103</sup> This search was conducted using the website of the S.T.F.: *Pesquisa de Jurisprudência*, SUPREMO TRIBUNAL FEDERAL, <http://www.stf.jus.br/portal/jurisprudencia/pesquisarJurisprudencia.asp> (last visited Aug. 4, 2016). Table 2 contains the final decisions of the S.T.F.. No singular or panel decisions were considered, because only the Court *en banc* has jurisdiction to decide a unique and novel constitutional question or to departure from previous case law.

<sup>104</sup> See ZACHARY ELKINS, TOM GINSBURG & JAMES MELTON, *THE ENDURANCE OF NATIONAL CONSTITUTIONS* 129 (2009).

<sup>105</sup> Establishment, merger, fusion, and dismemberment of municipalities appeared together in the search mechanisms of the S.T.F., due to the writing of the constitutional provisions and the less technical terminology used by litigants. After the appropriate exclusions (mainly referring to annexation as a term of commercial law), this research analyzed sixteen decisions (*see* tbl 2).

<sup>106</sup> See Chart 2, which illustrates the lawsuits over time.

<sup>107</sup> For detailed definitions of dismemberment in the context of state law see ALEXANDRE DE MORAES, *DIREITO CONSTITUCIONAL* 308-10 (28th ed., 2009).

<sup>108</sup> Bahía is the third state in number of municipalities. Mato Grosso is within the national average. *Notícias*, SENADO FEDERAL, <http://www12.senado.gov.br/noticias/entenda-o-assunto/municipios-brasileiros> (last visited on August 4, 2016).

Concerning the dynamics of the federative pact, we note that the vast majority of the Adins were started either by the Attorney General of the Republic or by national parties.<sup>109</sup> The direct board of a legislative assembly of a state filed only one Adin.<sup>110</sup> Hence, the litigation became a national one, as it was no longer limited to the local level.

At this point, the focus is the legal issues decided. The Court declined to rule on the constitutionality of a resolution for the state assembly of the state of Rio de Janeiro.<sup>111</sup> It specified that for the annexation of municipality, the previous plebiscite must occur in accordance with the federal Constitution, while declaring that the municipality was also a creature of the member state.

After the Constitutional Amendment 15/96, the S.T.F. determined that all the procedures referring to municipal boundary changes must be suspended until the federal complementary law was approved.<sup>112</sup> The Court also distinguished the municipality as autonomous under article 18 of the Constitution. In this decision, the S.T.F. stressed that municipalities could no longer be matters of the private interest of the state, as in previous Constitutions.<sup>113</sup> The S.T.F. also dismissed allegations attacking the constitutionality of the Constitutional Amendment 15. Those allegations were based in an arguable violation of the federative pact in which protection is granted among the immutable clauses of the Constitution (article 60, paragraph 4, I).<sup>114</sup> The S.T.F. decided that Amendment 15/96 did not violate the essential nucleus of the autonomy of the member states when the amendment was modified from state complementary law to federal law.

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<sup>109</sup> The Attorney General of the Republic filed the following ten Adins: ADI 1372 MC/RJ; ADI 1373 MC/PR; ADI 2702/PA; ADI 2632/BA; ADI2994/BA; ADI 3149/SC; ADI 3489/SC; ADI 3316/MT; ADI 3682/MT; and ADI 4992 MC/RO. Political parties initiated five Adins: ADI 2381MC/RS; ADI 2632MC/BA; ADI 3615/PB; ADI 2240/BA; ADI 3689/PA.

<sup>110</sup> See ADI 2395 /DF.

<sup>111</sup> See ADI 1372 MC/RJ, of 1995. Also determining that the plebiscite must occur before the changes in the municipal boundaries: ADI 1373 MC/PR, of 1995. Attention should be given to the fact that those decisions occurred prior to the Constitutional Amendment 15/1996. Although, the necessity of previous plebiscite has been maintained by the amended text.

<sup>112</sup> See ADI 2381 MC/RS, of 2001.

<sup>113</sup> The leading case is the ADI 3682/MT, of May 05, 2007, when the S.T.F. considered that after eleven years after the Constitutional Amendment 15, of 1996, it was unreasonable for Congress to not have promulgated the federal complementary law, despite several legislative proposals. Neither the House nor the Senate actually discussed (let alone voted) the federal complementary law. GILMAR FERREIRA MENDES & PAULO GUSTAVO GONET BRANCO, CURSO DE DIREITO CONSTITUCIONAL 1160 (8th ed., 2013).

<sup>114</sup> In this direction: ADI 2381 MC/RS, of 2001; ADI 2395/DF, of 2007.

Several later decisions required that the modifications of municipal boundaries could only be valid if two conditions were met. First, the promulgation of federal complementary law and, second, previous approval by plebiscite of the involved population.<sup>115</sup>

The change of paradigm in the understanding by the S.T.F. occurred in 2007, when the Court judged several direct actions of unconstitutionality on the same date, despite those actions presented different justices as rapporteurs (reporters).<sup>116</sup> Importantly, further decisions reiterated the new position of the Court.<sup>117</sup>

The most recent decisions of the S.T.F. still deny annexation of municipalities when based on state laws, if those boundary changes were enacted after the Constitutional Amendment 57/2008. The Court stressed that the Constitutional Amendment 57, modifying the Act of Transitory Dispositions of the Constitution, validated solely the boundary changes enacted by municipalities between the Constitutional Amendment 15/96, and December of 2006.<sup>118</sup> Accordingly, the Court interpreted the modification of the Transitory Acts quite literally, and as restrictively as possible, in order to protect the constitutional order as a whole. The Court was mindful of potential discontinuity of the legal order and related uncertainties.

This study contends that local actors in Brazil must be restrained and act in accordance with constitutional commands. This recommended course of action consists in obeying the S.T.F. and refraining from annexing municipalities in the absence of the pertinent federal complementary law. It also consists of complying with specific constitutional principles of legality,

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<sup>115</sup> In the same vein: ADI 2632 MC/BA, of 2002 (*in limine*, i.e., by injunction); ADI 2702/PR, of 2003; ADI 2632/BA, of 2004 (final decision); ADI 2994/BA, of 2004, ADI 3149/SC, of 2004; and ADI 3615/PB, of 2006.

<sup>116</sup> ADI 2240/BA, of May, 5 2007, whose rapporteur was Justice Eros Grau, granted twenty-four months for the Congress to legislate. ADI 3489/SC was also judged on the same day and with the same rapporteur, but it determined eighteen months for Congress to act. All of the decisions were unanimous, concerning as matters of unconstitutionality, although the majority decided as to the unconstitutionality of the boundaries change. Another case decided on the same date and with Justice Eros Grau as rapporteur, but establishing eighteen months: ADI 3316/MT. In the direct action of unconstitutionality by omission, ADI 3682/ MT, from the same date, but having as rapporteur Justice Gilmar Mendes, it was emphasized that the inaction of Congress was unconstitutional and that the twenty-four months deadline did not refer to Congress to act; it referred solely to the state laws altering the boundaries of the municipalities to remain valid.

<sup>117</sup> See ADI 3689/PA, of 2007.

<sup>118</sup> See ADI 4992 MC/RO, of 2013.

efficiency and morality, which are mandatory to all public administration.<sup>119</sup> Those principles will support informed conduct, including detailed assessment of the financial feasibility of annexation. Therefore, local forces cannot remain unchecked, with the municipal boundaries being altered in a clear violation of the constitutional order.

#### **4. DISCUSSION OF RESEARCH FINDINGS**

This section is divided into two subsections. Subsection A focuses on the general analysis of the comparison, including fundamental rights. Subsection B discusses the impact of these findings based on constitutional design. The decisions of both Supreme Courts were approached with no preconceptions.

##### **4.1. GENERAL ANALYSIS OF THE COMPARISON AND RELATED CONSEQUENCES FOR FUNDAMENTAL RIGHTS**

This research considers annexation as proxy for local powers in two distinguished constitutional experiences. Our findings validate the claim that local governments are more empowered in the United States in light of the reduced number of national litigation in the U.S.S.C.. The decisions of the S.T.F. are higher in relative numbers, while presenting limited subject matters in comparison with the decisions of the U.S.S.C.. The first explanation refers to the period of time, since the analyzed U.S. decisions date back to the inception of the Constitution. Having thirty-one annexation cases in our dataset (and considering that the U.S. Constitution was signed in 1787) does not corroborate the understanding that the absence of local governments in this founding document is necessarily negative.<sup>120</sup> There is no evidence that the absence of constitutional provisions about local governments nowadays contributes to an increase of litigation. Remarkably, the bulk of U.S. litigation analyzed in the

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<sup>119</sup> See CONSTITUIÇÃO FEDERAL [C.F.] art. 37 (Braz.).

<sup>120</sup> See Hirschl, *supra* note 12, at 1348.

context of annexation has been after the Voting Rights Act of 1965.<sup>121</sup> If such cases were to be disregarded, the number of litigation in both courts is almost the same (twenty in the United States versus sixteen cases in Brazil).<sup>122</sup> This occurs, despite the U.S. Constitution being largely the same document, since 1787.<sup>123</sup>

In the United States, annexation varies across states.<sup>124</sup> Race and class biases are present in annexation, reflecting seminal conflicts relating to property rights and redistribution.<sup>125</sup> The core of U.S.S.C. decisions referring to annexation address questions of exclusion. In this sense, the cases in our dataset corroborate the view that boundaries of a municipality carry a remarkable exclusionary function, which determines who is entitled to participate in the redistribution of the resources in a given community.<sup>126</sup>

In Brazil, however, demographic exclusions occur on account of a lack of resources. This research corroborates previous claims for the general creation of a national level policy in Brazil. The current chaos of decentralization enhances inequalities among Brazilian regions, neglecting the poorest segments of society.<sup>127</sup> Debates pertinent to local interests tend to be far from the citizen with a different experience than traditional portrays typical of the United States.

Comparative constitutional law is concerned with the existence and scope of Bill of Rights provisions.<sup>128</sup> As the U.S.S.C. decisions demonstrate, those provisions are necessary for the protection of rights and the rule of law. Our dataset indicates how the issues judged by the U.S.S.C. evolved. Initially, the Court was mainly focused on patrimonial disputes. After the enactment of

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<sup>121</sup> For a complete list of the cases, year, and main issues discussed by the U.S.S.C. and the S.T.F., see tbl.1 and 2, respectively.

<sup>122</sup> Chart 1 illustrates the comparison between the decisions of the U.S.S.C. (from 1870 until 2014) and the Brazilian S.T.F. (from 1988, when the Constitution inaugurated the inclusion of municipalities in the federal pact, until 2014).

<sup>123</sup> For arguments claiming that the interpretation of the U.S.S.C. amounted to a complete new Constitution despite the text remaining the same during the New Deal, see ACKERMAN, *supra* note 33, at 58-80.

<sup>124</sup> See Robert D. Zeinemann, *Overlooked Linkages Between Municipal Incorporation and Annexation Laws: An In-depth Look at Wisconsin's Experience*, 39 URB. LAW. 257, 311 (2007).

<sup>125</sup> See Tyson, *supra* note 2, at 519.

<sup>126</sup> *Id.*

<sup>127</sup> See SAMUELS, *supra* note 17, at 96.

<sup>128</sup> See SUJIT CHOUDHRY, *Bridging Comparative Politics and Comparative Constitutional Law*, in CONSTITUTIONAL DESIGN FOR DIVIDED SOCIETIES 9-13 (2008).

the Voting Registration Act, of 1965, its docket radically changed. The U.S.S.C. became particularly concerned with asserting the effectiveness of federal rights. The docket also shows different actors from previous years. This occurred because the states mentioned in the Act became an object of intense litigation. Regarding the protection of rights, research findings demonstrate that this protection has increased after World War II, as the importance of constitutional adjudication increased to protect minorities.<sup>129</sup>

The S.T.F. decisions protect the rule of law, but do not prove to be supportive of any fundamental rights protection. This is different from what was expected, because the S.T.F. carried a long tradition of fundamental rights protection.<sup>130</sup> After two constitutional amendments and radical modifications in the case law of the S.T.F., Brazil remains in a grey area, in practice and legal matters. Therefore, municipalities were not necessarily more empowered simply by virtue of their inclusion in the Brazilian Constitution. In this sense, the federal pact chosen was not capable of continuing as initially planned. Despite warnings by the S.T.F., local actors are, *de facto*, annexing cities without the existence of federal complementary law.<sup>131</sup>

Importantly, this study's results validate Shapiro and Stone Sweet's hypothesis of the expansionary role of courts for protecting rights.<sup>132</sup> The U.S.S.C. and the S.T.F. expanded their roles from the traditional and very restrictive separation of powers doctrine. Hence, both courts shifted the lines from what may be regarded previously as a clear separation. The U.S.S.C. accomplished this task by reviewing its initial interpretation of the Fourteenth

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<sup>129</sup> See CHARLES R. EPP, *THE RIGHTS REVOLUTION: LAWYERS, ACTIVISTS AND SUPREME COURTS IN COMPARATIVE PERSPECTIVE* 38-39 (1998) (noting that the increased presence of cases involving the due process clause and equality began 1918 (after the World War I), but the U.S.S.C. rejected such claims until the 1960s).

<sup>130</sup> Historically, the S.T.F. remains protective of fundamental rights, including the time of the military ruling. See MATTHEW M. TAYLOR, *JUDGING POLICY: COURTS AND POLICY REFORM IN DEMOCRATIC BRAZIL* 34-35 (2008).

<sup>131</sup> Research findings are consistent with the balanced role played by the S.T.F. in the transition to democracy. See *e.g.* DIANA KAPISZEWSKI, *HIGH COURTS AND ECONOMIC GOVERNANCE IN ARGENTINA AND BRAZIL* 207 (2012).

<sup>132</sup>

[T]he more judges consider effective rights protection to be their constitutional duty. . . . the less likely judicial review will conform to, or be contained by, separation of powers doctrines. . . . in systems in which the supremacy of the constitutional law within the general hierarchy of norms is defended by a authority, all separation of powers notions are contingent because they are secondary to, rather than constitutive of, judicial function.

MARTIN SHAPIRO & ALEC STONE SWEET, *ON LAW, POLITICS & JUDICIALIZATION* 364 (2011).

Amendment, extending the prohibition of discrimination to states, and by upholding the constitutionality of the Voting Rights Act at least for several years until the *Shelby* decision (2013). The S.T.F., on its turn and in a bold movement, declared the unconstitutionality of the Congressional enactment of the federal complementary law, defining the general requirements for the annexation of municipalities.

#### 4.2. INSIGHTS BASED ON CONSTITUTIONAL DESIGN

Constitutional clauses determining competences, powers, and structures of the government are perceived with less enthusiasm than provisions of rights.<sup>133</sup> The role of the U.S.S.C. as a safeguard of federalism was questioned recently.<sup>134</sup> Federalism and judicial review are often named along the structural provisions of the U.S. Constitution that have been very influential abroad.<sup>135</sup> This research considers the different federal experiences of the United States and Brazil.

Since its inception in the U.S. constitutional scheme, federalism remains a complex concept.<sup>136</sup> Federalism is traditionally defined as an arrangement in which a written constitution expressly determines powers of the central and regional spheres of governments, with direct elections for national and regional governments. Additionally, in this way, distinguished spheres of government act independently from each other, and a high court remains independent to decide on matters of conflict among them.<sup>137</sup> Federalism is, therefore, a response to concrete political tensions. It is often addressed among constitutional design choices that impact power sharing, including the participation of representatives of the relevant groups of society

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<sup>133</sup> See Günter Frankenberg, *Comparing Constitutions*, 4 INT'L. J. CONSTIT. L. 439, 455-56 (2006) (emphasizing the reduced appeal of constitutional provisions about political organization as an object of comparative constitutional law).

<sup>134</sup> See Carol S. Weissert, *Beyond Marble Cakes and Picket Fences: What U.S. Federalism Scholars can Learn from Comparative Work*, 73 J. POLIT. 965, 968 (2011) (acknowledging the existence of the debate in the U.S. constitutional scheme).

<sup>135</sup> See David S. Law & Mila Versteeg, *The Declining Influence of the United States Constitution*, 87 N.Y.U. L. REV. 762, 785 (2012).

<sup>136</sup> See G. EDWARD WHITE, *THE AMERICAN JUDICIAL TRADITION: PROFILES OF LEADING AMERICAN JUDGES* 19 (2006).

<sup>137</sup> See For the specific definition of classical federalism, see CHOUDHRY & HUME, *supra* note 10, at 357.

in political decision-making.<sup>138</sup> The absence of constitutional provisions pertaining to local governments was recognized as a failure of constitutional design relating to future matters.<sup>139</sup>

In the United States, cities only have the powers that were delegated to them by states and that were not limited by judicial interpretation.<sup>140</sup> Municipalities' power to tax is significantly constrained by state rules and the Commerce Clause.<sup>141</sup> In this sense, the choice of locating cities as subordinated to states was adopted in view of the federal system.<sup>142</sup> It was based on an assumption that, had it been different, the unified political system under the Constitution would have been jeopardized.<sup>143</sup>

As previously explained, annexation in the United States is defined by state laws. According to principles of constitutional law, Congress may act when (implied or express) authorization exists in the Constitution.<sup>144</sup> In this context, powers not granted to the national government are reserved for the states. The states did not grant the federal government authority to modify municipal boundaries, and state legislatures may directly alter municipal boundaries or establish procedures that local governments must obey when altering them.<sup>145</sup> As such, there is no uniform national law regulating annexation, illustrating the self-determination of the states. Based on evidence provided by this research, general-purpose local governments in the United

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<sup>138</sup> See Arend Lijphart, *Constitutional Design for Divided Societies*, 15 J. DEMOCR. 96, 97 (2004) (articulating the concept of power sharing).

<sup>139</sup> See Hirschl, *supra* note 12, at 1348. In addition, article V of the U.S. Constitution, with its rigidity towards amendments, was perceived as greatly condescending to state powers while being too hostile to local interests. Aziz Z. Huq, *The Function of Article V*, 162 U. PA. L. REV. 1165, 1187 (2014).

<sup>140</sup> See Gerald Frug, *The City as a Legal Concept*, 93 HARV. L. REV. 1059, 1062 (1980).

<sup>141</sup> On the general constraints imposed by state powers and by the Commerce Clause, *see, id.*, at 1064 (emphasizing that the abilities of cities to borrow money suffered even stronger limitations). The author remarks that even in "home rule" states (i.e., where powers of purely local matter would be granted to cities), state law considers cities as "creatures of the state". *Id.* at 1063 (quoting *Hunter v. City of Pittsburgh*, 207 U.S. 161 (1907)).

<sup>142</sup> *Id.* at 1065–67 (outlining the consequences of locating municipalities as forbidden to exercises of general governmental power, while not capable of freedom granted to private corporations).

<sup>143</sup> *Id.* at 1106. See also, ROBERT A. DAHL, *HOW DEMOCRATIC IS THE AMERICAN CONSTITUTION?* 12 (2001) (noting that the states would encompass the federation (and that the unitary government was excluded, due to historical experiences present at the time of the Framers), and contending that the only question at the Convention in that regard was how much autonomy to confer to the central government).

<sup>144</sup> See CHEMERINSKY, *supra* note 56, at 234.

<sup>145</sup> See GREY LINDSEY, *Annexation Activity and Policy in the US*, in REDRAWING LOCAL GOVERNMENT BOUNDARIES: AND INTERNATIONAL STUDY OF POLITICS, PROCEDURES AND DECISIONS 56 (John Meligrana ed., 2004).

States are more powerful than those in Brazil. This claim is supported by the fact that United States local governments are capable of defining their own boundary limits in general, without interference from the federal union. States in Brazil have a mitigated version of self-determination, being subject to a uniform national procedure.

Importantly, the Brazilian Constitution explicitly determines that the S.T.F. has the duty to safeguard the Constitution, and federalism is listed among the so-called constitutional immutable clauses.<sup>146</sup> In Brazil, local governments were conceived as federal actors, with much financial autonomy being granted. Hence, there is an interest in creating and annexing municipalities in order to receive such revenues but not necessarily in excluding particular citizens, as it has occurred in annexations in the United States.<sup>147</sup>

Urbanization and the politics of the military ruling are relevant factors for explaining the Brazilian departure of comparative constitutional design, with Brazilians writing their own peculiar federalism pact.<sup>148</sup> Brazil's increased number of municipalities supports the understanding that in federal systems where units are heterogeneous, politicians have higher incentives to cooperate with each other at the local spheres, before working on the central level.<sup>149</sup> This is particularly relevant in the Brazilian context, where municipalities have weak ties with their own state.<sup>150</sup> In addition, municipalities had secured financial autonomy and revenue levies in an unprecedented fashion.<sup>151</sup> The

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<sup>146</sup> CONSTITUIÇÃO FEDERAL [C.F.] c. I, art. 60, para. 4; art. 102 (Braz.).

<sup>147</sup> See SAMUELS, *supra* note 17, at 98.

<sup>148</sup> Brazil borrowed several constitutional provisions from the U.S. experience, such as: the nomination of S.T.F. justices, the residual powers of states if the Constitution is silent, mechanisms authorizing judicial review on the state level, among others. Hence, the fact that Brazil decided not to borrow the absence of local governments provisions indicate the degree to which local actors wielded power at the time. For explanations on why borrowing may not occur due to political factors, see Lee Epstein & Jack Knight, *Constitutional Borrowing and Nonborrowing*, 1 I-CON, INT'L J. CONSTIT. L. 196, 200 (2003).

<sup>149</sup> See *e.g.* HOROWITZ, *supra* note 95, at 25 (arguing such advantage for federal systems that are heterogeneous).

<sup>150</sup> LUIZ CESAR DE QUEIROZ RIBEIRO & SOL GARSON BRAULE PINTO, *LOCAL GOVERNMENT AND METROPOLITAN REGIONS IN FEDERAL SYSTEMS: A GLOBAL DESIGN ON FEDERALISM* 75 (Nico Steytler ed., 6<sup>th</sup> ed. 2006).

<sup>151</sup> The Brazilian Constitution established a complex system of revenues for municipalities. CONSTITUIÇÃO FEDERAL [C.F.] [CONSTITUTION] art. 156 (Braz.) (outlining exclusive municipal taxes); art. 158 (determines municipal revenue sharing); art. 159 (supplements mandatory transfers from federal union); art. 153, para. 5 (secures more revenues for municipalities). The current Constitution significantly reduced federal revenues from the union, and that change of revenues toward states and municipalities was not accompanied by administrative responsibilities, which

decentralization implemented by the constitutional text, with municipal revenue sharing, brought significance to the “elevation of municipalities to separate federal status” under the Constitution of 1988.<sup>152</sup> The Brazilian experience is remarkably different from the U.S. design. The Constitution of 1988 is the only one to expressly locate municipalities accompanying the federal union and states as members of the federation.<sup>153</sup> Hence, the residual powers of the Brazilian states are defined as those not granted to the federal union as well as the powers that were not conferred to municipalities.<sup>154</sup>

In this scenario, once the original scheme proved inadequate, it led to a centralization of the general rules in the federal sphere, through a national complementary law. Albeit, annexation shall occur through state laws in accordance with the general provisions to be determined by such federal complementary law. Moreover, considering the analysis of federalism after the Constitutional Amendment 15/1996, states lost power to the union. It is noteworthy that annexation is still addressed in state law, but those laws must be subordinated to a general federal complementary law that does not exist – even after more than eighteen years of the edition of Constitutional Amendment 15.

Nevertheless, there are similarities between both Supreme Courts on the matter of inter-branch relations. The U.S.S.C. and the S.T.F. declared that it is necessary for the U.S. and Brazilian Congresses, respectively, to update or enact a particular legislative act.<sup>155</sup> The S.T.F. was considerably patient and deferent to Congress, waiting more than eleven years to declare the *inertia deliberandi* of Congress.<sup>156</sup> This fact also proves the strength of local politicians who benefitted personally from the absence of a national scheme in Brazil. The

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contributed to fiscal crisis. KURT WEYLAND, *The Brazilian State in the New Democracy*, in DEMOCRATIC BRAZIL 42 (Peter R. Kingstone & Timothy J. Power eds., 2000).

<sup>152</sup> See KENT EATON, *Decentralization and Federalism*, in ROUTLEDGE HANDBOOK OF LATIN AMERICAN POLITICS 42 (Peter Kingstone & Deborah J. Yashar eds., 2012).

<sup>153</sup> See Hirschl, *supra* note 12, at 1348 (observed the Brazilian Constitution and its modern allocation of powers to local governments).

<sup>154</sup> CONSTITUIÇÃO FEDERAL [C.F.] art. 25 (Braz.).

<sup>155</sup> For a discussion of the U.S.S.C.: see Part II of this paper, when the *Shelby* Court emphasized that the U.S.S.C. determined that Congress did not act – or did not consider – despite previous warnings by the U.S.S.C. in a decision dating to 2009. The decision stated the necessity of an updated formula of section two. It took forty years for the U.S.S.C. to require an updated formula and four years to judge Congress delayed.

<sup>156</sup> For more information, see discussion in Part III of this paper.

recently ousted President of Brazil vetoed a law that her own cabinet drafted. Hence, local political forces are very powerful in Brazil. In contrast, local governments are not, because they remain in an uncertain legal situation that denies the minimum standards for their own existence. In Brazil, local spheres are not embedded in the democratic experience traditionally associated with American localism, where local governments are perceived as the core of U.S. citizenship.<sup>157</sup>

Accordingly, the absence of provisions for local governments in the U.S. Constitution can generally be considered as a successful experience. Findings of this study corroborate the idea that constitutional silence on issues that might be controversial at the time of the writing carries a positive impact in the future.<sup>158</sup> The proper relationship between state and cities was, in fact, a disputed political issue.<sup>159</sup> In this sense, the lack of provisions with regard to local matters was the preferred solution, to the extent that it would increase the chances of success in the future.<sup>160</sup> It would be naïve to argue that local governments should have been in the Constitution since its inception, because it would jeopardize the strength of federal union vis-à-vis states and local forces.

This study's findings are consistent with the understanding that constitutional amendments are not aimed at modifications of the

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<sup>157</sup> Tocqueville remarked, in 1835, how local government was key for the principle of popular sovereignty in America. ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 69 (1835) ("In the town as elsewhere the people are the source of all social power, but nowhere do they exercise their power more directly."). More recently, disenchantment with this view emerged.

City discretion of any kind evokes images of corruption, patronage, and even foolishness. This sense of necessity and desirability has made local powerlessness part of our definition of modern society, so that decentralization of power appears to be a nostalgic memory of an era gone forever or a dream of romantics who fail to understand the world as it really is.

See Frug, *supra* note 133, t 1067.

<sup>158</sup> For a discussion on incomplete theorization, see SUNSTEIN, *supra* note 93, at 58.

(Most of their virtues involve the constructive uses of silence. . . . Especially in a diverse society, silence – on something that may prove false, obtuse, or excessively contentious – can help minimize conflict, allow the present to learn from the future and save a great deal of time and expense. What is said and resolved is no more important than what is left out.)

<sup>159</sup> See Frug, *supra* note 133, at 1105–07 (pointing out the different conceptions of local government, namely the Jeffersonian view of local government as "elementary republic," as opposed to the skeptic Madisonian view). For the latter, see discussions by Madison on Federalists 10 and 51 regarding the advantages of the union over states to control factions, and how the federal system encapsulates a dual protection for the people. ALEXANDER HAMILTON, JOHN JAY, JAMES MADISON, *THE FEDERALIST PAPERS* 320–22 (Clinton Rossiter ed., 1999).

<sup>160</sup> See Walter F. Murphy, *Theories of Constitutional Design: Designing a Constitution: of Architects and Builders*, 87 *TEX. L. REV.* 1303–37 (2009).

constitutional text, but at authorizing legislative and popular actors with an increased mechanism to pressure the interpretation of the highest court regarding that design.<sup>161</sup> Amendment procedures are tied to questions of judicial interpretation. The more difficult it is to amend a constitution, the higher the pressure on constitutional courts to decide issues addressing challenges posed by new conditions.<sup>162</sup>

The constitutional design adopted in Brazil authorized constitutional adaptation to the extent that the amendments aimed at eliminating the existence of several municipalities created or annexed for political interests only, without any concern for public needs. The amendments, however, increased litigation. The rate of annexation cases involving Brazilian municipalities jeopardizes economic growth, due to a lack of certainty regarding formation or modification. Accordingly, the design of the Brazilian Constitution cannot be deemed as successful, considering the litigation involving the annexation of local governments.

It has been argued that the impact of constitutional law in Latin America is different than in the United States due to the ease by which constitutional provisions can be ignored or changed.<sup>163</sup> The existence of two constitutional amendments about annexation and their current undefined legal situation, most unfortunately, prove that this remains the case. The decisions of the S.T.F. regarding annexations, however, indicate that there are grounds for optimism. The Court has been protecting the Constitution, striking a balance regarding the principle of separation of powers. As for the amendments, they ultimately contributed to the endurance of the democratic pact. The changes implemented by the amendments aimed at curbing the abuses that occurred when the constitutional requirement was merely one of state complementary law, instead of a national complementary law.

Finally, historical reasons and the related differences of their democratic experiences explain the two countries' distinct choices of constitutional design and the function served by each Supreme Court. It is clear

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<sup>161</sup> See Rosalind Dixon, *Constitutional Amendment Rules: a Comparative Perspective*, in *COMPARATIVE CONSTITUTIONAL LAW* 96, 98–99 (Tom Ginsburg & Rosalind Dixon eds., 2011).

<sup>162</sup> See TUSHNET, *supra* note 8, at 1239.

<sup>163</sup> See Miguel Schor, *Constitutionalism Through the Looking Glass of Latin America*, 41 *TEX. INT'L L.J.* 1, 3–6 (2006).

that Brazil can no longer contend that its own local governments are among the most empowered, if the rules for their own boundaries are not defined completely. In this direction, this analysis highlights potential reasons why there was not a full transplant of the U.S. federalism to the constitutional pact established in 1988. Local elites in Brazil were powerful enough to reject the general rule of the global constitutional market regarding the existence of two level spheres in federal systems (not three, as the Constitution of 1988 created).<sup>164</sup> Brazilians currently pay a high price for such innovation, despite the efforts of the S.T.F. in mitigating abuse.

## 5. CONCLUSION

This research investigates the decisions about annexation made by the U.S. Supreme Court and its Brazilian counterpart, the S.T.F., during the tenure of each current Constitution. This research discusses the impact of constitutional provisions concerning local governments on two different perspectives, as follows: protection of rights and constitutional design.

The decisions of both Supreme Courts demonstrate significant differences between their case law in subject matters of annexation. The U.S.S.C. initial decisions were about police powers and contractual claims, with significant deference to state powers. As the docket of the Court evolved over time, protection of fundamental rights, especially equality in light of the Voting Rights Act, became the bulk of litigation. Thus, the original unlimited conception of state power was reviewed in light of the national protection granted to fundamental rights. The discussed findings indicated that it is only recently that the U.S.S.C. became more involved in the litigation of federal rights in the context of annexation. After all, the Court has been acting in a careful and self-constrained fashion, being vigilant of its broad interpretation of the constitutional pact that grants states significant powers. Because local

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<sup>164</sup> See also, Günter Frankenberg, *Constitutional Transfer: the IKEA Theory Revisited*, 8 INT'L. J. CONSTIT. L. 563, 570-76 (2010) (defining the concept of a global constitutional market and the importance of understanding the reasons why particular provisions are transferred differently to other jurisdictions in the field of Comparative Law).

governments are still perceived as a qualified extension of states, they are remarkably powerful, albeit the absence of reserved constitutional provisions about them.

In sharp contrast with the U.S. scenario, all of the cases decided by the S.T.F. relate to formalities and constitutional procedures, with no single case protecting fundamental rights. In this way, the results of the comparison with the U.S.S.C. are counterintuitive, because one would expect the S.T.F. to be more involved in litigation regarding the protection of fundamental rights. This would be the case, if nothing else, due to the detailed provisions of the Brazilian Constitution, which generally confer many rights, increasing the chances of litigation.

In addition, local governments in Brazil did not turn to higher democratic spheres nationally, and they are not more inclusive of the less wealthy population. The current economical deficit of municipalities proves that, in Brazil, the exclusion of certain demographics of essential services may be accounted for by the lack of resources that this same population should be granted access. The decisions of the S.T.F. aimed to balance the system established by the Constitution of 1988. Nevertheless, the Court has its own limitations with regard to other branches of power and influential local forces. Despite the decisions of the S.T.F., local governments are, *de facto*, annexing each other without the existence of the federal complementary law. This is a clear violation of the rule of law, and it generates great uncertainty as for the legal regime applicable to those municipalities that are changing their boundaries. It also produces unnecessary litigation, which is a considerable burden on the allocation of resources and budget matters.

This research uses annexation as a proxy for local powers, and it does not argue that one constitutional design is necessarily superior to the other. The silence of the U.S. Constitution and the recent inclusion of municipalities as federal actors in Brazil are considered as choices to reach the best feasible option at the time of constitutional writing. In that view, as any controversial constitutional choice, it was a product of compromise. Therefore, this research maintains that the absence of provisions about local governments in the U.S. Constitution can be generally viewed as successful, in light of the current

constitutional design literature about the lack of provisions relating to controversial matters at the time of the convention.

After two constitutional amendments and recent decisions of the S.T.F. rendering unconstitutional the current inaction of Congress in approving the required federal complementary law, no evidence was found to support the proposition that the inclusion of municipalities as federal actors is necessarily superior to the current comparative trend that uses the dual spheres system of the U.S. federalism as a paradigm. The findings do not validate propositions considering the constitutional design after 1988 as a failure, either. This is so because the S.T.F. tried to minimize abuses referring to annexation in different cases. Further, the current Constitution has less than thirty years of existence. This timeframe is considerably short when compared with the more than 200 years of the U.S. Constitution. Therefore, our findings do not support that the U.S. system, i.e., the absence of provisions of local governments, should be transplanted to the Brazilian Constitution.

In conclusion, as it is often the case with legal transplants, there are different foundations upon which the texts rest. The people of the United States are largely concerned with their local governments, with this sphere of power traditionally viewed as a manifestation of their democracy. Brazil is different. On the one hand, Brazil has been an exploit colony of Portugal, survived dictators and decades of military rulings, which are examples of a centralization of powers in the federal sphere. On the other hand, the democratic Constitution of 1988 innovated in the sense of having local governments explicitly named as federal actors, adding complexity to the balance of federal powers. Constitutional design is a process in which “ non-ideational obstacles are strong, . . . the interests affected are non uniform, and retrogression is possible after adoption.”<sup>165</sup> The comparison about the reasoning of U.S. Supreme Court and Brazilian Supreme Court provides reasons to be optimistic about the future, to the extent that both Supreme Courts have been fierce guardians of the rule of law and related constitutional values.

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<sup>165</sup> HOROWITZ, *supra* note 95, at 16.

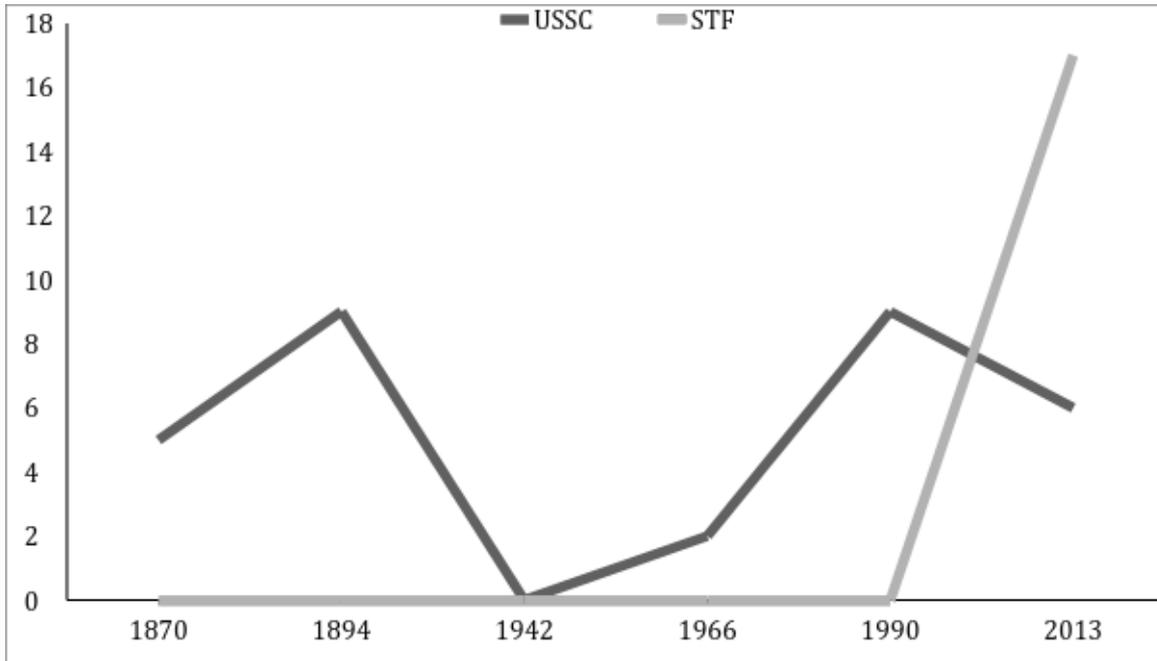
Table 1: Final List of Annexation Cases by the U.S.S.C.

Final List of Cases	Year	Issue
Virginia v. West Virginia, 78 U.S. 39	1870	Annexation of counties in Virginia
Slaughter-House Cases, 83 U.S. 36	1872	Police powers of the state
Comm'rs of Laramie v. Comm'rs of Albany, 92 U.S. 307	1875	County reduction and debt payment
Mt. Pleasant v. Beckwith, 100 U.S. 514	1879	Bonds and extinction municipality
Mobile v. Watson, 116 U.S. 289	1886	City's legal successor
Forsyth v. Hammond, 166 U.S. 06	1897	Tax and county comm. Board ann.
Holden v. Hardy, 169 U.S. 366	1898	Utah police powers
McCain v. Des Moines, 174 U.S. 168	1899	Annexation under color of law
Clark v. Kansas City, 176 U.S. 114	1900	Individuals and corp. annexation land
Worcester v. Worcester Consol. St. Ry. Co., 196 U.S. 539	1905	State interfering with municipality
Blair v. City of Chicago, 201 U.S. 400	1906	Right of the city to grant license
Hunter v. Pittsburgh, 207 U.S. 161	1907	Consolidation of two cities and taxes
Detroit United Ry. v. Detroit, 229 U.S. 39	1913	Contractual rights
Detroit United Ry. v. Michigan, 242 U.S. 238	1916	City fares and Contract Clause
Howard v. Comm'rs of Sinking Fund, 344 U.S. 624	1953	Annexation of federal area by munic.
Gomillion v. Lightfoot, 364 U.S. 339	1960	State limited powers: disenfranchise
Perkins v. Matthews, 400 U.S. 379	1971	Voting Rights Act
Mahan v. Howell, 410 U.S. 315	1973	Virginia's reapportionment statute
Richmond v. United States, 422 U.S. 358	1975	Voting Rights Act
United Jewish Orgs., Inc. v. Carey, 430 U.S. 144	1977	Voting Rights Act
Town of Lockport v. Citizens for Cmty. Action at the Local Level, Inc., 430 U.S. 259	1977	Equal Protection of Fourteenth Am.
Holt Civic Club v. Tuscaloosa, 439 U.S. 60	1978	State police powers
City of Rome v. United States, 446 U.S. 156	1980	Voting Rights Act
Port Arthur v. United States, 459 U.S. 159	1982	Voting Rights Act
Pleasant Grove v. United States, 479 U.S. 462	1987	Voting Rights Act
Presley v. Etowah Cty. Comm'n, 502 U.S. 491	1992	Voting Rights Act
Shaw v. Reno, 509 U.S. 630	1993	Voting Rights Act
Holder v. Hall, 512 U.S. 874	1994	Voting Rights Act
Johnson v. De Grandy, 512 U.S. 997	1994	Voting Rights Act

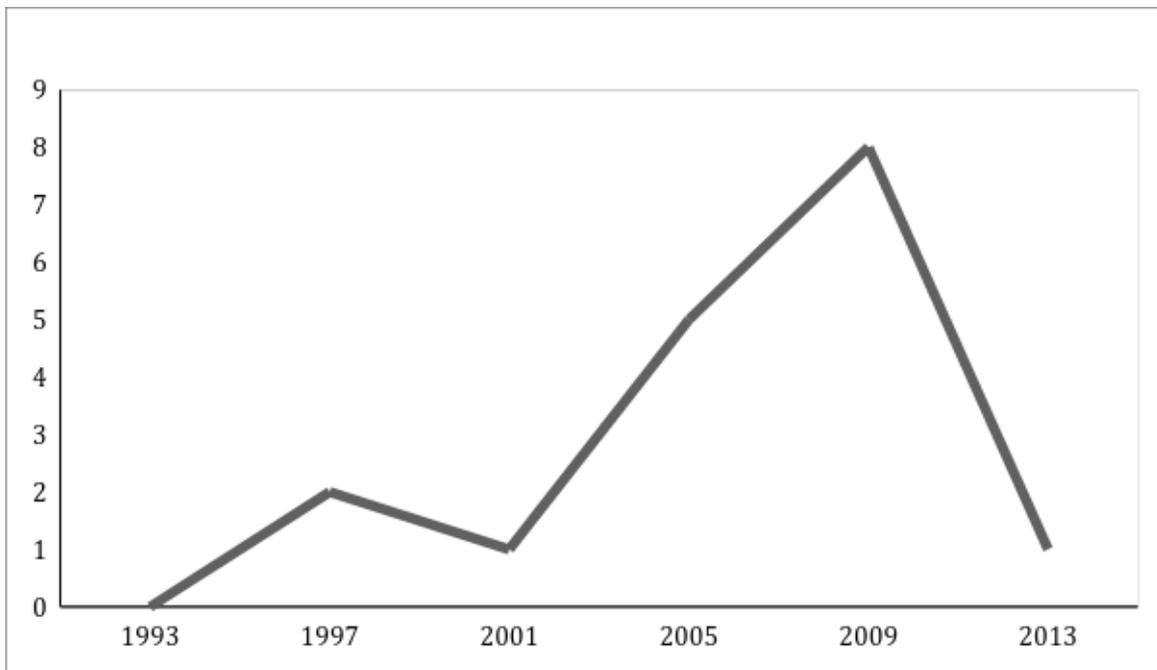
FTC v. Phoebe Putney Health Sys., 133 S. Ct. 1003	2013	State legislative power and the city
Shelby Cty. v. Holder, 133 S. Ct. 2612	2013	Voting Rights Act as unconstitutional

Table 2: Final decisions of the S.T.F.

Final list of cases of S.T.F. decisions	Year	Issue
ADI 1372 MC/ RJ	1995	Plebiscite
ADI 1373 MC/ PR	1995	Plebiscite
ADI 2381 MC/ RS	2001	Suspension/perennial clause
ADI 2632 MC/BA	2002	Condition fed. complementary law
ADI 2702/PA	2003	Condition fed. complementary law
ADI 2632/BA	2004	Condition fed. complementary law
ADI 2994/BA	2004	Condition fed. complementary law
ADI 3149/SC	2004	Condition fed. complementary law
ADI 3615/ PB	2006	Condition fed. complementary law
ADI 2240/BA	2007	Change of S.T.F.'s case law
ADI 3489/SC	2007	Change S.T.F.'s case law
ADI 3316/MT	2007	Change S.T.F.'s case law
ADI 3682/MT	2007	Change S.T.F.'s case law
ADI 3689/PA	2007	Reiterate change in S.T.F.'s case law
ADI 2395/DF	2007	Denial of federalism perennial clause
ADI 4992MC/RO	2013	Denial of annexation based on CA 57



Picture no. 1: Comparison of the decisions of the U.S.S.C. and the S.T.F.: Number of lawsuits from 1870 until February, 2014 involving annexation of local governments



Picture no. 2: Decisions of the S.T.F.: Number of lawsuits from 1988 until February, 2014