The Managerial Constitution:
The Convergence of Constitutional and Corporate Governance Models[1]

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ABSTRACT

This paper proposes the concept of the "Managerial Constitution", which advocates the convergence between constitutional and corporate governance models. Such concept is based on the interpretation of certain features of the Brazilian Constitution enacted in 1988 that may serve as a model for modern democracies in developing countries. According to such model, modern constitutions should be sufficiently detailed to drive public policy and short-term legislative process in specific areas. Under this model, members of the executive, legislative and judiciary branches become less interpreters of principles inscribed in the Constitution and more agents of public policies outlined in the Constitution itself. This model opposes two dominant constitutional models. First, it opposes the model of the constitution as an "instrument of government", characterized by a constitution with a limited number of provisions focused on broad principles and an outline of the government structure. Another characteristic of this model would be that legislative process could hardly change the constitution. Secondly, it opposes the model of the constitution as an "instrument of social engineering", also referred to as the "programmatic constitution". Under this model, constitutions would provide blueprints for the whole organization of society. By contrast, a "Managerial Constitution" provides for a more straightforward model, with clear rules to implement public policies. Such model is inspired by current developments in corporate governance of transnational modern corporations, which seem to demonstrate a greater level of tolerance to means of direct democracy in the governance of the corporation than constitutional theory would accept in the governance of the State. According to such model, constitutions shall be adaptable to changes in the domestic and international institutional environments and responsive to the interests of their citizens, allowing for mechanisms in which their citizens can chance the constitution directly.

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1. Introduction

The purpose of this paper is to challenge traditional views of the separation between public and private law. The objective is to create new alternatives for institutional design that may contribute to the understanding of both constitutional and corporate law. It has been common to address the idea that the structure of constitutional government should serve as a model for the governance of corporations.[2] This paper attempts to do the opposite and investigate why certain institutional arrangements are regarded as unacceptable under constitutional law and acceptable under corporate law. The main idea is that constitutional law has evolved in a way to deny the capacity of individuals to change the constitutional directly. With regards to the corporation, despite the fact that in the last few decades a movement to increase the power of management was also identified, did not reach the level of denying the power of shareholders to change its charters or bylaws if they so desire. It may be difficult, but is still possible. In this endeavor, I will depart from the study of the Brazilian Constitution in an attempt to understand if its current text moves in the direction of the model proposed here of the Managerial Constitution.

Differently from many constitutions from developed and developing countries, the Brazilian Constitution provides not only for basic the structure of the government and

[2] Georges Ripert, ASPECTS JURIDIQUES DU CAPITALISME MODERN, Librarie Générale de Droit et de Jurisprudence (1951).

individual rights but also for certain public policies with specific budget allocations and clear implementation mechanisms.[3] The argument to be developed here departs from the hypothesis that in the areas in which such detailed public policies were provided in the Constitution, the related promises embodied in "principles" or "programs" were fulfilled. On the other hand, in areas in which such "principles" or "programs" were not accompanied by clear rules directing their implementation, they remained as dead promises. Examples of success are the right to health, implemented by means of the constitutionally mandated Unified Health System (*Sistema Único de Saúde*), and the right to education, protected by a rigorous system of budget quotas in the federal, state and municipal levels. In these two areas, there had been substantial statistical improvements in the last two decades. In relation to most other human rights also incorporated into the Constitution as "fundamental rights" or "social and economic rights", no similar advancements have been witnessed.

The hypothesis is completed by the idea that in such areas the constitution only ended up being detailed as a result of the lobby of social movements during the debates leading to the enactment of the Constitution of 1988, mainly by the health movement (*movimento sanitariasta*) and the education movement, spurred, in both cases, by their respective trade unions, but including also a much broader array of social organizations. No other areas in the Brazilian Constitution of 1988 were subject to pressure and lobbying efforts by social movements like health and education. As a result, it is clear that such areas received greater

[3] For the purposes of this paper, I will adopt a shart differentiation between public policies and programs for governmental action. Public policies shall be defined as regulatory mechanisms which provide at least one of two things: (i) resources to implement the promisses; or (ii) a legal requirement that certain steps are taken under a pre-established framework. When included in the constitution, public policies would be stronger if both elements are present. In such cases, there would be less discretion by public officers. On the other extrem are the programs, which are open ended promisses, without resources or clear legal obligations.

constitutional protection than other areas. The broader hypothesis is then that in developing countries, where very substantial institutional changes are necessary, the constitution may become a very important development mechanism only if the constitution can respond to the demands of society. Society shall have the means to change the constitution without the intermediation of congress or judges, and such means shall be construed so that such changes represent a broader consensus in society and prevent the oppression of minorities. There might be mechanisms to slowdown the process of change, in order to allow the process of social choice to mature, but the constitution shall be responsive to avoid social deadlocks.

In summary, this paper is an investigation in the direction of new constitutional models that are more suitable to the needs of developing countries. The "managerial constitution" aspires to be a step towards this direction. Surprisingly enough, the inspiration for such new model shall not be found in constitutional theory or in the theory of democracy, but rather in new developments in corporate governance. In the last century, particularly after World War II, most institutional developments have been in the sense of expanding the model of liberal democracy from the central economies to the periphery,[4] as the initial step towards economic liberalization. In this process, democratic regimes became an institutional package, not open to innovation or challenges, but relying solely on success of prior experiences and focusing only on implementing the "rule of law" as an equivalent to democracy.[5]

[4] For a seminal debate on the chanlenges of such process, *see* Samuel P. Huntington, POLITICAL ORDER IN CHANGING SOCIETIES (1968) and also Samuel P. Huntington, THE THIRD WAVE: DEMOCRATIZATION IN THE LAT TWENTIETH CENTURY (1991).

[5] Most such "packaging" has been done in the last three decades under the framework of "rule of law" projects. For a debate with regards to the "Rule of Law" movement, *see* David Kennedy, *The 'Rule of Law,' Political Choices and Development Common Sense,* in THE NEW LAW AND ECONOMIC DEVELOPMENT, David M. Trubek, and Alvaro Santos, eds., Cambridge University Press, pp. 95-173 (2006).

However, there has been very little innovation on democratic theory in such expansionary process, what may represent a risk if such institutions are not responsive to social changes. Most probably such innovations shall come from developing societies, where institutional experimentalism is still feasible and such developments may also represent the frog's leap that such societies require. The argument presented here is that inspiration for such innovations may come from an unexpected source: corporate law.

In the last few decades, as corporations became transnational, unrestrained by governments and regulatory regimes, governance mechanisms of large corporations evolved substantially as shareholders noticed that they lost control and, as a result, value over their investments. In this process, shareholders also lost power, with the emergence of management control as the main model for corporate organization. This model suffered a backlash in recent year, with certain developments in the direction of greater shareholder power. Some of such developments, many related to the emergence of the "corporate governance" movement after the 1990, may be used to highlight how fossilized the current theory of democracy became. The main elements of the "corporate governance, focused on greater transparency and transference of certain key decisions to shareholder, may serve as an ground for comparison and suggest interesting hypothesis for further investigation. For example, (i) if corporations should file quarterly financial reports so that their shareholders have an understanding of their financial conditions, so should governments; (ii) if shareholders shall have a "say on pay" of managers of their corporations, citizens shall also have a "say on pay" on the compensation of elected officials, and (iii) if corporate managers are bound by their "forward looking" estimates for their companies, which are nothing short of promises made to their shareholders and potential investors, so should politicians be held accountable for the promises made in election processes.

More relevantly for the purposes of this paper, constitutions shall also deliver on their promises and shall not provide for open-ended "principles" or "programs". A lot can be said to demonstrate that shareholder democracy has evolved faster in the last decades than political democracy[6]. This paper will attempt to present a model to reverse this tendency.

In a broader context, this paper is a critique of the movement labeled "new constitutionalism", understood as a broad branch of comparative constitutional law scholarship advocating the strengthening of constitutional courts in certain developing countries as the final step in the transition towards democracy, completing the expansion of the "rule of law" process mentioned above. Examples of such literature are praises for the constitutional courts in South Africa and Colombia for their stands in the protection of social and economic rights. My argument will be grounded on the understanding that such praise is only an attempt from certain scholars to demonstrate that the Anglo-Saxon constitutional model has not reached its institutional limits as a mechanism to articulate social conflicts by praising others for doing what has failed in the United States and Britain. In this sense, it means praising failure, since both South Africa and Colombia have not been able to cure the disease of economic inequality by the force of their constitutional courts.

The paper will be divided in three sections: (i) an analysis of the model of the constitution as "instrument of government"; (ii) an analysis of the theories of the constitution as "instrument of social engineering"; and (iii) a description of the mechanisms that inspired the concept of "Managerial Constitution" in the Brazilian Constitution, being, first, the very flexible

[6] To a great extent, such developments in corporate governance resulted exactly from the successive financial crises, particularly the one started in 2008, caused exactly by the fact that such corporations are no longer bound by national regulations as they were in the past.

mechanism of constitutional change and, second, the examples of policies towards health and education specifically provided in the Constitution. The last section will also include a critique of the Brazilian Constitution highlighting the missing elements that would allow us to regard it as a viable alternative constitutional model.

Based on the evidence provided, this paper shall contribute to the literature by demonstrating that, as the corporate governance rules of modern corporations are becoming more similar to constitutional rules, incorporating, for examples, human rights standards, Constitutions shall also become more like corporations, delivering on their proposed institutional purposes or being declared as a failure. Constitutional law shall become more like corporate law and adopt the equivalent to what I will call here as the "shareholder supremacy", which is understood as the universal institutional framework of corporate law under which shareholders have the ultimate power to alter the charter or bylaws of corporation, even when such changes are difficult to implement.[7] In comparison, in most Constitutional Democracies, the power to change the text of the Constitution directly is denied from their citizens. In this sense, onle of the lessons of corporate law, particularly with regards to amendments to the Constitution, may be a return to the principle of the supremacy of the people. No change to the constitution shall be passed without the ratification of the people and the people shall have the means to change the

[7] The argument presented here of the shareholder supremacy is different from the theory of "shareholder primacy". The argument of shareholder primacy is commonly understood as the purpose of the corporation to return value to its shareholders. *See* D. Gordon Smith, The Shareholder Primacy Norm, 23 J. CORP. L. 277 (1998). The argument of shareholder supremacy is based on the that the corporation shall be driven by the interests of its shareholders and that such interest may be very diverse and not only based on shareholder value. Such interests might be, for example the vanity of a founding entepreneur to retain control of a company. Also, the idea of shareholder supremacy is also not the same as the debate regarding shareholder franchise, which is focused on understanding the capacity of shareholders to prevail in voting proceedings mostly in public corporations. *See* Lucian A. Bebchuk, *The Myth of the Shareholder Franchise*, 93 VIRGINIA LAW REVIEW, 675 (2007). The argument of shareholder supremacy is not related to how often shareholders prevail, or they should or not prevail, but only that they can. In comparison, in most constitutional democracies, citizens simply cannot change the text of the constitution directly.

constitution. Something that should be obvious, but was forgotten in the theory of democracy during last century under the idea that it was unattainable or that it was dangerous. The argument presented here is that as in corporations power was taken away from shareholders by the class of professional managers, also the natural development of democracies toward direct regimes was prevented by the development of a class of professional politicians. The hypothesis of this work is that in the case of corporate law such idea of fully detracting shareholders of their ultimate supremacy and give all power to managers was never accomplished only because corporate law is dominated by ideas of property law and such detraction of powers would be equivalent to expropriation. However, when moving to the field of public law, it seems easier to deny such powers to the people. In summary, moving toward the Managerial Constitution is also a movement toward the ownership of government by the people.

2. Two Dominant Models of the Constitution and their Sublimation

There are many ideals about what the constitution is or means in society. Instead of theories about the constitution, this paper will depart from two opposite constitutional models: first, the model of the constitution as "an instrument of government", and, second, the model of the constitution as "an instrument of social engineering". This debate is framed by many in light of the opposition between a "liberal constitution" based on a view of a minimalist government and a "social-democratic constitution" structuring an interventionist government. However,

most modern constitutions make an attempt to create a compromise between such views.[8] In our analysis, we will take the examples of the Constitution of the United States of America, adopted in 1787 (U.S. Constitution) and of the Constitution of the Federative Republic of Brazil, adopted in 1988 (Brazilian Constitution) as examples of the constitution as "an instrument of government" and the constitution as "an instrument of social engineering", respectively.

By framing the debate in terms of the constitution as "an instrument of government" or as "an instrument of social engineering", I will try to move away from the underlying ideological debate related to the desirable amount of governmental intervention in the economy. Such a debate is dead, as much as the idea of the existence of a public and a private sphere that would be the starting point of a discussion on the desirable amount of governmental intervention on market operations. The lifelong effort of John Rawls to articulate principles of formal and material equality before the law inspired by the constitutional history of the United States may not have proved that such principles may be articulated in an universal theory of what shall constitute a liberal society, but it certainly demonstrated that not only Rawls, but also the interpretation of the U.S. Constitution is also based in the effort of compromise.[9] Hence, the difference between the U.S. Constitution and the Brazilian Constitution is no longer a difference grounded on ideologies, but on form. The differences represent the change of times and one of the hypotheses raised in the article is that if the U.S. Constitution were to be adopted today, it would resemble much more the Brazilian Constitution than its current form.

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[8] José Afonso da Silva, probably the most influential interpreter of the Brazilian Constitution of 1988, accurately mentions that "*As constituições contemporâneas constituem documentos jurídicos de compromisso entre o liberalismo capitalista e o intervencionismo*". José Afonso da Silva, APLICABILIDADE DAS NORMAS CONSTITUCIONAIS, São Paulo (2008), p. 135.

[9] *See* John Rawls, A THEORY OF JUSTICE (Harvard, 1999).

From a pragmatic point of view, the government should be understood as one among many other social organizations, and its size and modes of interaction with other legal entities and individuals shall be disciplined in the same way as other organizations. Even if the constitution itself mentions that it is the supreme law and that all other entities and individuals only exist from a legal standpoint as reflected by the constitution, the historical existence of societies that were not based on constitutional arrangements and also the possibility of overthrowing the constitutional order reveal the limitations of such view. It is not necessary to engage in a debate about the nature of the constitutional order and argue for the pre-existence of fundamental rights based on a natural order to admit this fact. Both models adopted in this paper, of the constitution as "instrument of government" and as "instrument of social engineering", depart from the idea that the government is not the only source of power in society, and, as a result, of the legal order.

In this sense, the attempt provided in this paper to compare constitutional law and corporate law in the grounds that such comparison is impossible, since in any constitutional order corporate law would be subordinated to constitutional law and, as a result, one could not compare the corporation, which is a legal entity that exists in the boundaries provided by the constitutional order, and the constitution, which creates its own boundaries. Hence, the freedom of shareholders to decide the provisions of the corporate charter and bylaws would be restricted by corporate law, first, and, at a higher level, by constitutional law. The argument would them be completed by the idea that the constitution, as the fundamental law, would have no such boundaries and would, in fact, be the source of the whole legal system.

Such opposition is wrong in two ways. First, in the belief that the constitution is produced without legal boundaries by its "founding fathers" or its "original constitutional power"

(*poder constituinte originário*). That idea is the argument behind the "veil of ignorance" of John Rawls, for example. Most would understand that the genius of the argument of the "veil of ignorance" would be to provide that the original legislator would be someone who would not be able to be egoistic and decide based on his or her interests or those of their constituents.[10] As a result, that original compact, which would be the core of the constitution, would be that certain basic set of rules that would also not result from the clash of interest groups.

As mentioned above, the work of John Rawls is profoundly based on the constitutional history of the United States. As a result, it reveals elements of the mainstream constitutional imagination for both the model of the constitution as an "instrument of government" and as an "instrument of social engineering". Most of all, it reveals the idea of constitutional supremacy, which the argument of the "managerial constitution" opposes in the sense that such supremacy shall not be presupposed, but that it shall be constructed based on actual legitimacy of the constitution. For Rawls, the supremacy of the constitution derives from the "veil of ignorance", in the sense that only individuals under such veil could provide for the two basic rules of a liberal society, or his famous first and second principles of justice.[11] The first principle deals with the fundamental rights of each individual, and the second with certain social and economic rights. According to Rawls, such principles would not be implemented, from a legislative perspective, all at once. Individual rights shall be implemented at the constitutional level, and social and economic rights at the under-constitutional level, based on

[10] Ib. Id., p. 11.

[11] "I shall maintain instead that the persons in the initial situation would choose two rather different principles: the first requires equality in the assingment of basic rights and duties, while the second holds that social and economic inequalities, for example inequalities of wealth and authority, are just only if they result in compensating benefits for everyone, and in particular for the least advantaged members of society." Ib. id., p. 13.

regular statutory legislation.[12] Hence, there would be a hierarchy between, first, the constitutional provisions of equality before the law, and the legislative actions related to the protection of social and economic rights, which would involve redistribution.

We will return to the issue of the hierarchy between rights related to equality before the law and economic equality later. At this point, the objective is only to understand that the argument of the "veil of ignorance" serves the purpose of not only creating a formal legitimacy to the existing order, departing from the idea that such order was grounded on decisions by self-less individuals, but also to the purpose of arguing that the constitutional order was created based on a clear slate, without any prior constrains or restrictions.

From a historical perspective, all new constitutional orders would like to fulfill this myth. However, every constitutional order is restrained by the previous constitutional order, by the statutory legislation already in place in a particular society, by the international order and by the competing institutional arrangements already in place in such society. Hence, the Constitution of the United States of America was restrained by the existing State legal orders, by the binding documents of the confederation that preceded it and by its desire to be accepted as an independent political body in the international community.

In the case of the Brazilian Constitution of 1988, the existence of such restraints is even clearer. First, the General Constitutional Assembly was called by means of an amendment

[12] "I imagine then a division of labor between stages in which each deals with different questions of social justice. This division roughly corresponds to the two parts of the basic struture. The first principle equals liberty is the primary standard for the constitutional convention. Its main requirements are that the fundamental liberties of the person and liberty of concience and freedom of thought be protected and that the political process as a whole be a just procedure. Thus the constitution establishes a secure common status of equal citizenship and realizes political justice. The second principle comes into play at the stage of the legislature. It dictates that social and economic policies be aimed at maximizing the long-term expectations of the least advantaged under consitions of fair equality of opportunity, subject to the equal liberties being maintained". Ib. id. , p. 175.

to the Constitution of 1967, and such amendment did not provide for clear rules for election of such assembly, only mentioning that the house of representatives (*Câmara dos Deputados*) and the senate (*Senado*) would vote jointly.[13] But the electoral rules used in the election of the members of the house of representatives were the same rules from the period of the dictatorship. Also, the new constitutional order started without any substantial change in the existing infra-constitutional legal framework and the new Constitution changed very few issues with regards to the separation of power, the structure of the legislative, executive and judiciary, the electoral system, the organization of the military and the police, regulation of communications or natural resources. In summary, the Constitution of 1988 changed very little in the distribution of power in the country. The major changes, which will be discussed below in further detail, relate to the protection of fundamental and social and economic rights.

Surpassing the idea of constitutional supremacy, it is clear that the constitution is also subject to restraints, as much as corporations. However, there is still another objection to be presented to the idea of comparing constitutions and the governing documents of other organizations in society other than the State itself. It is the idea that the corporation is inside a certain constitutional order and subject to a particular set of corporate laws. However, such view has been challenged by the phenomenon of transnational corporations, which can "shop" for jurisdictions that will, in fact, adapt to their needs and requirements, both from a corporate perspective, but also with regards to regulatory matters. Two examples of that are the substantial number of insurance companies that now have their parent companies based on the Bermudas and the consulting companies and law firms with parents in Switzerland. Corporations, as transnational organizations, both frame and are framed by national corporate laws. Similarly to

[13] Amendment no. 26, dated as of November 27, 1985.

what happens to governments, their ability to frame or be framed depends on their power, or, to a certain extent, their legitimacy. Also, many countries did not choose their constitutions, but had their current constitutional orders imposed by external powers. The greatest example of such is the constitution of Japan, which is largely based on drafts provided by Allied Powers after the end of World War II.

Hence, the arguments comingle to return to the idea that constitutional governments, as well as modern transnational corporations, compete for legitimacy, not only domestically but also internationally. It is a very different reality from that described by Weber, for whom political legitimacy was a mater that would affect only governments.[14] As the 2013 protests in Brazil and around the world have proved, democracy may no longer be seen as a process that can be contained within the boundaries of government, since protests do not focus on supporting current or future incumbents, one party or another, but on broader institutional changes that require more than a new political group taking power. To a certain extent, it would require changes not only in government, but also in other institutions in society, like corporations and non-profit organizations, which are also not ready for new forms of social organization in which they may not count with the government as their friend or foe.

Before making an attempt to reach such new models of social organization, we will look back at the two archetypical constitutional models mentioned above, the model of the constitution as an "instrument of government" and as an "instrument of social engineering". In the model of the constitution as an "instrument of government", the objective is to organize the

[14] Weber resists to the idea that economic power could provide a stable source of legitimacy. His famous three souces of legitimate power, charisma, tradition and bureacracy, all focus on sources of legitimacy of political organizations and are grounded on the idea of goverment as the monopolist of violence in society, and, as a result, the idea of soveriegnty. *See* Max Weber, ECONOMY AND SOCIETY (1978), p. 212-300.

operation of the government, particularly in its role as main source of laws, in order to increase its legitimacy before competing organizational arrangements. In the model of the constitution as an "instrument of social engineering", there is the recognition of certain goals to be achieved by society at large and its legitimacy would come from its capacity to force other organizations in society to move in such direction. The question to be answered in analyzing such models is why both deny the capacity of citizens to directly change the Constitution, relying instead of ideals of "founding fathers" or the "original constitutional power". To engage in such discussion, it is necessary to further detail the two models proposed herein.

3. The Model of the Constitution as an Instrument of Government

This model is inspired by the "Instrument of Government", enacted by the Council of State created by Oliver Cromwell after the self-dissolution of the English Parliament on December 6, 1653. The "Instrument of Government" was adopted on December 16, 1653, and had the objective of serving as a written constitution to the "*Commonwealth of England, Scotland, and Ireland, and the dominions thereunto belonging*"[15]. Coming after political turmoil and adopted by a council compounded mainly by military officers, its objective was no other than creating political stability in an attempt to avoid the return of monarchical rule. In such attempt, the "Instrument of Government" provided the first attempt of a modern separation of powers, with the supremacy of parliament to enact laws balanced by the lifelong term of the "lord protector" as chief of the executive branch.

[15] The Instrument of Government, 1653 (available at http://www.constitution.org/eng/conpur097.htm).

The First Article of the "Instrument of Government" provided that "*the supreme legislative authority of the Commonwealth of England, Scotland, and Ireland, and the dominions thereunto belonging, shall be and reside in one person, and the people assembled in Parliament: the style of which person shall be the Lord Protector of the Commonwealth of England, Scotland, and Ireland*". Complementarily, the Second Article determined the authority of the executive branch: "*the exercise of the chief magistracy and the administration of the government over the said countries and dominions, and the people thereof, shall be in the Lord Protector, assisted with a council, the number whereof shall not exceed twenty-one, nor be less than thirteen*". The effective division of power was based on the idea that the Parliament would regulate taxation and the Lord Protector would decide on the allocation of resources.[16] Such division of labor in the administration of government remains until today as the backbone of the separation of powers. Looking at the "Instrument of Government", it also becomes clear that the division of power is based on the procedure to raise money for the government and its expenditure. The question if the government is more or less interventionist, small or big, is more a matter of degree than nature, justifying the argument presented above that the models of constitutions should not be separated based on their ideological underpinnings.

[16] Article VI of the Instrument of Government provided that "VI. That the laws shall not be altered, suspended, abrogated, or repealed, nor any new law made, nor any tax, charge, or imposition laid upon the people, but by common consent in Parliament, save only as is expressed in the thirtieth article." Accordingly, Article Thirtieth provided that the parliament would approve taxation for wars, but that the Lord Protector could raise money to prevent domestic conflicts: "That the raising of money for defraying the charge of the present extraordinary forces, both at sea and land, in respect of the present wars, shall be by consent of Parliament, and not otherwise: save only that the Lord Protector, with the consent of the major part of the Council, for preventing the disorders and dangers which might otherwise fall out both by sea and land, shall have power, until the meeting of the first Parliament, to raise money for the purposes aforesaid; and also to make laws and ordinances for the peace and welfare of these nations where it shall be necessary, which shall be binding and in force, until order shall be taken in Parliament concerning the same".

The "Instrument of Government" was short lived. It lasted during the protectorate of Oliver Cromwell and was substituted by the "Humble Petition and Advice" in 1657 during his son's term as Lord Protector. The Restoration of the Monarchy in 1660 characterized the failure of such attempts to adopt a written constitution in England[17], but despite their brief existence, they lived on as an inspiration to the U.S. Constitution.

The resemblance is immediate in the structure of the text. Such as in the instrument of government, the legislative power is also regulated in its first article. The executive power is described in its second article. The balance between the two was also derived from the power of congress to "lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States", as provided by Section 8 of Article I.[18] The power granted to Congress was greater than in the Instrument of Government, since in the English document there was a clear exception with regards to taxes applicable to immediate defense requirements. However, the development over the last century of a doctrine justifying the "inherent" power of the President as Commander in Chief, as provided in Section 2 of Article II of the U.S. Constitution,[19] to act in the absence of congressional authorization[20] brought the constitution interpretation in the United States closer to the original understanding of the English Instrument of Government, and the position of the President closer to that of the Lord Protector.

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[17] Ralph C. H. Catterall, *The Failure of the Humble Petition and Advice*, 9 THE AMERICAN HISTORICAL REVIEW 36, 1903.

[18] *U.S. Const. art. I, § 8.*

[19] *U.S. Const. art. II, § 2.*

[20] *See* David J. Barron and Martin S. Lederman, *The Commander in Chief at the Lowest Ebb — Framing the Problem, Doctrine, and Original Understanding*, 121 HARV. L. REV. 689 (2008).

The main characteristic of the U.S. Constitution that provides a difference with regards to the English Instrument of Government is that it not only provides for the separation of powers as a means to control the government, but also as a counter-majoritarian mechanism. This objective was famously made explicit by James Madison in his Federalist Paper no. 51 entitled "Separation of Powers". In his article, Madison departs from the idea that "*the great security against a gradual concentration of the several powers in the same department, consists in giving to those who administer each department, the necessary constitutional means, and personal motives, to resist encroachments of the others. The provision for defense must in this, as in all other cases, be made commensurate to the danger of attack. Ambition must be made to counteract ambition. The interest of the man must be connected with the constitutional rights of the place. It may be a reflection on human nature, that such devices should be necessary to control the abuses of government*".[21]

Such idea of the division of powers in order to allow a constant bargaining process between the legislative and executive branches was already present in the Instrument of Government, exemplified by the argument developed above that the core distribution of power was related to the fiscal policy, in which the legislature has the power to raise taxes and the executive has to power to expend it. Each power can lock the other power down, causing political damage to the other. The question here is only of the protection of society against the government, taken as an independent organization in society. But James Madison raised another question. The risk of oppression of the minority by a majority: "*If a majority be united by a common interest, the rights of the minority will be insecure. There are but two methods of providing against this evil: The one by creating a will in the community independent of the*

[21] The Federalist No. 51 (James Madison).

majority, that is, of the society itself; the other by comprehending in the society so many separate descriptions of citizens, as will render an unjust combination of a majority of the whole, very improbable, if not impracticable."[22]

For Madison, the fact that the United States would be a federation would prevent the risk of oppression by a majority. Such argument was embodied in the mechanism provided by the U.S. Constitution to allow any amendments to its text. Article V provides that an amendment would require, first, approval by two thirds of both the House of Representatives and the senate, or by a convention of called by two thirds of the legislatures of the individual States, and, second, the amendment would require "*by the Legislatures of three fourths of the several States, or by Conventions in three fourths thereof, as the one or the other Mode of Ratification may be proposed by the Congress*".[23]

Madison was proved right in that regard. Such mechanism based on federalism would prove any changes to the constitutional, just or unjust, improbable if not impracticable. Since the adoption of the U.S. Constitution on September 17, 1787, only 27 amendments were approved. This would mean one amendment each 8 years. Ten of such amendments represent the Bill of Rights, enacted together on December 15, 1791. Hence, if those amendments are disregarded, we would have one amendment at about every 13 years, being the latest ratified on May 7, 1992, of a proposed amendment presented on September 25, 1789 in conjunction with the Bill of Rights. According to the U.S. Senate, 11,539 measures have been proposed to amend

[22] *Id.*

[23] *U.S. Const. art. V.*

the Constitution from 1789 through January 2, 2013,[24] or, considering that the U.S. Congress has until 2012 its 112th legislature, an average of 103 amendment proposals per legislature. The final result would provide that the rate of success of one proposal for an amendment is about 1 for each 427 attempts.

From a political standpoint, amending the constitution has not been an issue worth initiating any political fight. Constitutional amendments are out of the political agenda with regards to any relevant political matter. Instead, political forces have turned toward the U.S. Supreme Court to alter the content of the U.S. Constitution by means of its interpretation, rather than changing its actual text. Madison did not discuss the role of the Supreme Court, and of the judiciary in general, as a courter-majoritarian tool. It only provided for this possibility, but considered that Federalism would provide a more democratic counterbalance to majority rule. Also, the existence of the judiciary was not provided in the original text of the Instrument of Government and courts were regarded as part of the executive branch. As such, the increasing role of the judiciary as a source of change to the text of the constitution as means of insulating complex political matters, which has initially characterized U.S. politics and is currently expanding to other jurisdictions,[25] is not part of the original model of the constitution as an "instrument of government". It is a hybrid form, representing the attempt to transform the constitution as an "instrument of government" into the idea of the constitution as an "instrument of social engineering".

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[24] Available at http://www.senate.gov/pagelayout/reference/three_column_table/measures_proposed_to_amend_constitution.htm.

[25] Ran Hirschl, TOWARD JURISTOCRACY: THE ORIGINS AND CONSEQUENCES OF THE NEW CONSTITUTIONALISM (Harvard, 2007).

In the first model, the greater objectives are to prevent that the government should be dominated by a minority and turned against its citizens or, that, as a preliminary step, government is controlled by a majority and turned against a minority. As the end there is always the concern with the legitimacy of government and the idea that the government is an organization competing against other organization for its perpetuation.

The constitution as an "instrument of government" may be understood as the perfect embodiment of the Hobbesian ideal of a stable government based on certain restrains to its tendency to violate individual rights. For Hobbes there is no possibility of protecting rights in the state of nature because there is not a third party to mediate conflicts among individuals. For him, the fundamental law of nature is that all persons should seek peace, but they can use all means available to protect themselves.[26] Civil society and individual rights and liberties come as a result of the second law of nature, derived directly from the first. If the fundamental principle of nature is to seek peace while protecting yourself from threats, the second principle is that every person can, in agreement with other people, give up this right to exercise force, creating a reciprocal relationship in which each person has the same amount of liberty as others would have under similar conditions.[27] Since the first law of nature is superior to the first, every time that government turns against its citizens, the citizens would be entitled to overthrow the government to protect themselves and establish a new constitutional order.

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[26] For Hobbes, the fundamental law of nature and reason was "that every man, ought to endeavour Peace, as farre as he has hope of obtaining it; and when he cannot obtain it, that he may seek, and use, all helps, and advantages of Warre." *See* Thomas Hobbes, Leviathan (Cambridge, 1996) at 92.

[27] Hobbes's second law of nature was "that a man be willing, when others are so too, as far forth as for peace and defence of himself he shall think it necessary, to lay down this right to all things; and be contented with so much liberty against other men as he would allow other men against himself." *See* Thomas Hobbes, LEVIATHAN (Cambridge, 1996) at 92.

As a result, the constitutional as an "instrument of government" shall have as its content only the basic elements related to the distribution of power among the several branches of government, no matter how many branches and in how many levels. If such structure is balanced in terms of avoiding the control of government by a minority turning it against its people, it would avoid revolutions, and the concern related to the rule of the majority against minorities is the understanding, which was became clear in the context of federalism, that a majority oppressing a minority is the first step towards the end of majority rule by itself. Madison was thinking not about different religious sects, but about the states. A majority could restrict the rights of a certain state, and then another, until a minority of states was ruling the all the others.

The constitution as an "instrument of government" was based on the ideal of a fully responsive political system, which would not require its values and beliefs to be embodied in the text of the constitution for their protection. The distribution of power by itself would provide for such protection. If an attempt to implement a constitution as an "instrument of goverment" fails, as the original attempt in England failed, the mistake was related to the structure of the distribution of power proposed, not with the idea of the constitution as means to distribute power in government.

In this sense, the U.S. Constitution may be taken as an example of success. Its text was almost untouched since 1787 and government has been stable since then, without any revolutionary movements and a successful result for its civil war, which could have changed such understanding. One could argue that such success in terms of preservation of the political organization is a result of the fact that the U.S. Constitution perfected the model for the constitution as an "instrument of government", remaining sufficiently concentrated in the

division of powers so that it can incorporate ideological changes in society without the requirement of amendments to the constitutional text.

Such understanding is particularly fascinating if we compare the U.S. Constitution with the constitutions of Latin American countries, which are usually long and detailed. The U.S. Constitutions has 7 articles and 27 amendments. Considering all its amendments, the U.S. Constitution would have about 8,000 words. By comparison, the Brazilian Constitution has currently 250 articles, plus 98 transitory provisions, already considering its Amendment 72 of April 2, 2013, and about 70,000 words.

This comparison is certainly unfair, since the U.S. Constitution no longer embodies only its adopted text, as amended, but also the 553 bound versions of the United States Report, containing all decisions of the Supreme Court representing the decisions of the court until October 2007 and their electronic versions since then. It may have become clear up until this point, but one of the arguments provided herein is that the model of the constitution as an "instrument of government" became, at a certain level, an anachronism. The text of the U.S. Constitution does not belong anymore to our times. Its real content is currently in the cases of the U.S. Supreme Court. Cases of the U.S. Supreme Court no longer refer to the text of the U.S. Constitution, but to precedents only. The debates related to the constitutional change are grounded on new appointments to the Supreme Court, not changes to the text of the constitution itself. The real U.S. Constitution is, at once, unknown by its people and also unchangeable.

By comparison with the governance of corporations, the model of the constitution as an "instrument of government" is similar to the current state of the basic documents of business organizations in many jurisdictions. Corporate governance may be regarded as a micro-cosmos of the evolution of governments. Corporations are social organizations much younger than

governments. Their sophistication in terms of organization is also much less developed. However, much of the evolution in the internal organization of corporations has been as a result of the application of governmental structures to business organizations. Modern corporations also have a structure that is based on the separation of powers among shareholders, boards of directors and officers. In most corporations, the board of directors and the board of officers have responsibilities that are comparable to those of the parliament and the executive, respectively, in the English Instrument of Government. Corporations do not have any power equivalent to the judiciary, but in many cases, corporations have been adopting arbitration provisions, which, in practice, correspond to a private judicial mechanism.[28] However, what makes the current basic documents of corporations around the world similar to the structure of the "Instrument of Government" is the fact that such documents only regulate the distribution of power among the parties involved. The more complex self-regulations, such as Codes of Ethics, Sustainable Development Programs, Compliance Programs, Internal Procedures, are all excluded from the charters, bylaws and articles of association, as applicable, and transferred to documents which do not have the same publicity or enforceability of such basic corporate documents.

If, as argued above, constitutions as "instruments of government" became anachronisms, current corporate documents will also become outdated, and certain documents that now are regarded by corporations as "soft law" documents, will with time became part of their constitutional documents with the same level of publicity and enforceability.

As with governments, the complexity of such documents derives directly from the complexity of the organizations, not from theories related to what is the ideal constitution.

[28] In Brazil, for example, the São Paulo Stock Exchange has a listing level, named Novo Mercado, that requires all corporations to have arbitration clauses to solve any disputes related to corporate and securities matters before the arbitration chamber of the Stock Exchange.

4. The Model of the Constitution as Instrument of Social Engineering

As mentioned before, the model of the constitution as an "instrument of social engineering" is also a result of its time. Two historical developments may be related to the idea of using the constitution as means of changing society: first, the consciousness of the new capabilities of government as a result of technological developments resulting from the industrial revolution, and, second, concerns with issues related to social justice also as a result of social transformations caused by the industrial revolution.[29] The good and the bad at once increased the confidence of individuals in the capacity of the state to regulate the economy and created the demand for such intervention.

As with the original "Instrument of Government", probably some of the first historical experiences with constitutions understood as "instruments of social engineering" were also failed or short lived. The Mexican Constitution of 1917 was probably the first example of a constitution that transferred to the government the responsibility for, at once, ameliorating the effects of the inequalities generated by industrialization and also creating the grounds for future industrial expansion.[30] Another example was the German Constitution of 1919. The German Constitution of 1919 is a particular target of criticism towards constitutional social engineering. The reason of such criticism is the fact that the Constitution was short lived, at least with regards to its original text and ideals. The same constitution was formally maintained during the Third

[29] *See* Duncan Kennedy, *Three Globalizations of Law and Legal Thought: 1850-2000*. THE NEW LAW AND ECONOMIC DEVELOPMENT. A CRITICAL APPRAISAL. Eds. Trubek, David M. and Santos, Alvaro. Cambridge: Cambridge University Press (2006), at 63.

[30] Fábio Konder Comparato. A AFIRMAÇÃO HISTÓRICA DOS DIREITOS HUMANOS. 7th ed. São Paulo (2010), p. 65.

Reich, however, it is fair to say that the constitutional order was changed by on March 1, 1933 when the president issued a decree restricting civil liberties in a process that led to the establishment of the Nazi regime. Of course, as the English Instrument of Government, the Weimar Constitution may not be a good reference with regards to the analysis of the model, since there were other issues at stake. Most probably, the failure of the Weimar Constitution was much more related to the economic conditions of Germany as a result of the concessions related to the end of the First World War than with the merits of the constitution itself.

The Mexican Constitution provides an interesting focus of analysis, since it was the first to provide for the protection of social and economic rights and is in force until today. With regards to many relevant social and economic rights, the Mexican Constitution did not formally grant them. With regards to education, for example, its article 3 provided that education would be free and secular, preventing the existence of educational groups supported by religious institutions. It did not provide for any obligation of the government to provide education to those who could not afford it. It only mentioned that the education to be provided by the government would be free, but without any clear obligations for the government with regards to eradicating illiteracy, granting access to education to all, or anything that could be required by its citizens.[31] Actually, Article 31, Section I, of the Mexican Constitution of 1917 provided that it was an obligation of Mexican citizens to take their children below the age 15 to school, public or

[31] "Art. 3o.- La enseñanza es libre; pero será laica la que se dé en los establecimientos oficiales de educación, lo mismo que la enseñanza primaria, elemental y superior que se imparta en los establecimientos particulares. Ninguna corporación religiosa, ni ministro de algún culto, podrán establecer o dirigir escuelas de instrucción primaria. Las escuelas primarias particulares sólo podrán establecerse sujetándose a la vigilancia oficial. En los establecimientos oficiales se impartirá gratuitamente la enseñanza primaria." Constitución Política de los Estados Unidos Mexicanos, Diario Oficial, Tomo V, 4ª. Época, No. 30, Lunes 5 de febrero de 1917, pp.149-161. (available at http://www.diputados.gob.mx/LeyesBiblio/ref/cpeum/CPEUM_orig_05feb1917.pdf).

private, to receive basic and military education.[32] There was no comparable obligation of government to actually offer public education to all children below the age of 15. Article 123, Section VI, while regulating minimum wage also mentioned that wages shall be sufficient to pay for workers to pay for their education, but did not set clear standards for such minimum wage, allowing them to be determined by the individual states of the Mexican Federation.

With regards to health, the Mexican Constitution of 1917 was even more timid. It only regulated health in relation to labor conditions, providing in its article 123, section XV, that the employers should comply with regulations related to their employees labor conditions and avoid health threats in the labor environment.[33] Such provision, as stated, provided little protection to workers, since it only stated that the health standards at the workplace and penalties for violations would be provided by applicable legislation. One possible conclusion is that the provision was useless, since the regulation of health issues in the workplace would already be enforceable, without the need for constitutional grounding.

The Weimar Constitution granted more specific protection on such fields. In its article 143, it mentioned that the government shall provide the youth with education and that the union, the states and municipalities shall cooperate towards that end.[34] With regards to health protection, the Weimar Constitution was not so clear, and it provided only that the government

[32] " Art. 31.- Son obligaciones de los mexicanos: I.- Hacer que sus hijos o pupilos, menores de quince años, concurran a las escuelas públicas o privadas, para obtener la educación primaria elemental y militar, durante el tiempo que marque la ley de Instrucción Pública en cada Estado." Supra note 19.

[33] "XV.- El patrono estará obligado a observar en la instalación de sus establecimientos, los preceptos legales sobre higiene y salubridad, y adoptar las medidas adecuadas para prevenir accidentes en el uso de las máquinas, instrumentos y materiales de trabajo, así como a organizar de tal manera éste, que resulte para la salud y la vida de los trabajadores la mayor garantía compatible con la naturaleza de la negociación, bajo las penas que al efecto establezcan las leyes." Supra note 19.

[34] Free translation of the Constitution of the German Reich of August 11, 1919 (available at http://avalon.law.yale.edu/imt/2050-ps.asp).

would put in place an insurance system to protect the capacity of work of its citizens and that such system would not be supported only be the state and would also have contributions from individuals.

Even though the language in such constitutions was not very precise, the objective of directing the society towards a particular path was clear. Differently from our current perception of the protection of social and economic rights in welfare states, the protection of social and economic rights in such constitutions was much more based on regulation of individuals than on direct investments by the government. Moreover, the centrality of labor relations made policies towards education and health as means towards protecting workers, considering their weaker bargaining power in comparison with employers.

In a sense, the experiences with the recovery from the Great Depression in the United States and the reconstruction of Europe after World War II increased the confidence in the government as a policy maker, and also in its capacity to actually regulate and support the entire education, health and social insurance systems. When the Mexican Constitution of 1917 and the German Constitution of 1919 were written, those experiences did not exist, what may explain why such texts, despite their historical value, did not grant any actual protection to social and economic rights.

When the Brazilian Constitution of 1988 was written, it was profoundly influenced by such prior successful experiences in building welfare states. In particular, the idea of a "driving constitution" prevailed among constitutional experts engaged in the process of drafting the Brazilian Constitution. The Portuguese Constitutional Law scholar José Joaquim Gomes Canotilho inspired the main argument related to the "driving constitution". Since Portugal had recently been through a transition to democracy from military dictatorships in 1974 as a result of

the Carnation Revolution that ended the "Novo Regime", in power since 1933, it was a major source of inspiration for Brazilian politicians and intellectuals. As a result, the Portuguese Constitution of 1976 was a relevant influence in the Brazilian Constitution, and, as a consequence, the theories provided by José Joaquim Gomes Canotilho as well.

According to Canotilho, based on his broad review of other European Constitutions and the Portuguese Constitution in particular, the theory of a "driving constitution" would be based on the tendency of modern constitutions to (1) transform themselves in the legal structure of Goverment and society, and (2) take the position of both rules, as guarantees for citizens, and as tasks, as a direction of the social and political process.[35] Hence, the "driving constitution" would be substantially different from the constitution as an "instrument of government". First, it would be the mechanism of regulation not only of the government, but also of national organization as a whole. Second, it would provide goals for governmental action, and direct the activity of all branches of government towards such goals.

José Joaquim Gomes Canotilho was aware of the risk of confusing the idea of the constitution with the idea of the plan. From his writings, it is clear that the idea of the "driving constitution" is embedded in the social-democratic ideology, trying to reach a middle ground between a planified and a liberal economy, and, as a result a middle ground theory between the idea of the plan as the constitution and the ideal of the "instrument of government". The "driving constitution" would then incorporate parts of a social plan, but all of it. It would also keep the rules to provide guarantees to individuals against governmental actions. Canotilho did not deny

[35] *See* José Joaquim Gomes Canotilho, CONSTITUIÇÃO DIRIGENTE E VINCULAÇÃO DO LEGISLADOR: CONTRIBUTO PARA A COMPREENSÃO DAS NORMAS CONSTITUCIONAIS PROGRAMÁTICAS. Limitada (1994), p. 170.

the risks of such attempt, which would encompass the danger of a "constitutional totalitarianism".[36]

The balance would be stricken by not relying on open-ended principles, which would be, on the one hand, dependent on discretionary powers of the executive and legislative, and, on the other hand, with issues related to administering scarce resources and the role of the judiciary in the management of such resources.

His idea was that constitutional provisions should be based on a program, disregarding the balance of interests and values that would be present in an analysis based on principles, and focusing on the relationship between ends and means.[37] To achieve such objective, three types of rules would be adequate: (1) authorization rules, in which the constitution would indicate the required content of regular statutes; (2) program rules, providing certain goals for the legislative and executive branches; and (3) instrumental rules, which do not have any particular goal to be achieved and their implementation represent, by and on itself, the achievement of the goal.

The effectiveness of such rules would depend on enforcement mechanisms, such as the possibility of a declaration by the courts of unconstitutionality due to omission by the legislators or agencies in the executive, both as a result of laws that should regulate constitutional provisions or public policies demanded by the constitution. In the case of the Brazilian Constitution it provides for one specific law suit to be filed directly before the Federal Supreme Court in order to declare the unconstitutionality by omission in its Article 103, Paragraph 2, and provides that once such omission is declared, the respective branch of government will be

[36] Supra note 23, p. 88.

[37] Supra note 23, p. 200.

notified and, if it is an executive agency, the required measures will be taken in up to 30 days. Moreover, the Brazilian Constitution regards it as an individual right, provided in its Article 5th, Section LXXI, that all individuals shall have the right to an injunction in case that "*any regulation is missing that makes it unviable to exercise the constitutional rights and freedoms and the prerogatives that are inherent to the nationality, sovereignty and citizenship*".

In Brazil, the most influential scholar to develop a theory related to the "driving constitution" was José Afonso da Silva. His analysis has been very influential in the interpretation of the Constitution of 1988, and, as a result, is a good example to test the concept of the constitution as an "instrument of social engineering".

José Afonso da Silva is more straightforward with regards to the social-democratic content of the "driving constitution", mentioning that the conflict between "*liberalism, with it concept of political democracy, and interventionism or socialism is reflected in contemporary constitutions, with its principles of social and economic rights, encompassing a set of provisions regarding both workers rights as the economic structure and the conditions of citizenship. The collection of such principles may be regarded as the social content of the constitutions. That is the source of the driving constitution, from which the Brazilian Constitution of 1988 is a major example, as much as it provides for goals and programs for future action in the sense of a social-democratic orientation*".[38]

José Afonso da Silva developed an argument to classify the rules provided in the "driving constitution" according to their "applicability", meaning the conditions under which such rules could be the grounds for suits against the government to force the government to take

[38] José Afonso da Silva, APLICABILIDADE DAS NORMAS CONSTITUCIONAIS. Malheiros (2008), p. 136 (free translation).

a certain action. The "applicability" of the rules would be a result of their efficacy, and, as a result, José Afonso da Silva proposed four different sets of rules: (i) rules with full efficacy and immediate applicability; (ii) rules with restrained efficacy and subject to rules of contention, representing certain rules that provide the Government with means to prevent individual claims from its citizens, such as those subject to argument related, for example, to the maintenance of public order; (iii) institutional rules, that grant certain rights to individuals in specific conditions, such as rules related to the creation of new states in a federation, but that require factors that are beyond the capacities of any isolated individual; and (iv) programatic rules, which are those that do not generate a individual right to request the government to act in a certain direction, but those that provide individuals with the right to sue the government in case that it is acting against that direction.

In a sense, such categories should be used by courts to understand how to apply the constitutional rules over time. Hence, rules with full efficacy are applicable immediately, on one extreme, and, on the other extreme, programatic rules will be applicable when effectively regulated by the executive or legislative.

As an example, the Brazilian Constitution provides in its article 205 that "*education, right of all and duty of Government and of the family, shall be promoted and stimulated with the collaboration of civil society, aiming at the full development of each individual, preparation for the exercise of citizenship and qualification for work*".[39] If compared with the regulation of the right to education in the original text of the Mexican Constitution of 1917, Article 205 of the Brazilian Constitution already states that education is a duty of Government and not only of the

[39] "Art. 205. A educação, direito de todos e dever do Estado e da família, será promovida e incentivada com a colaboração da sociedade, visando ao pleno desenvolvimento da pessoa, seu preparo para o exercício da cidadania e sua qualificação para o trabalho."

families. If taken alone, such rule could hardly be regarded as a rule of immediate efficacy. It could easily be regarded as a programatic rule, since it does not state that it is a duty of the government to provide free education, but only to promote education. Hence, a poor child without access to school would not be entitled to sue the government for a place in school.

However, the Brazilian Constitution moved a step further, and in Article 208 it provided clearly in which conditions it is a duty of Government to provide free education: "*the duty of Government will be effective by means of the guarantee of: I - mandatory and free basic education from 4 (four) to 17 (seventeen) years old, with guarantee of the free offer to all that did not have access to such education with the proper age*."[40] Article 208 makes a difference with regards to high school education, mentioning that in that regard it is the duty of the government to provide for the "*progressive universalization of mid level education*". There is no question then that with regards to basic mandatory education, its effectiveness is immediate. Every person has the right to sue the government for a place at school for basic education.[41] With regards to mid level education, it is a programatic rule and any individual could sue if she or he can demonstrate that the government is not performing its duty to invest in the progressive universalization of high school education.

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[40] Art. 208. O dever do Estado com a educação será efetivado mediante a garantia de: I - educação básica obrigatória e gratuita dos 4 (quatro) aos 17 (dezessete) anos de idade, assegurada inclusive sua oferta gratuita para todos os que a ela não tiveram acesso na idade própria; II - progressiva universalização do ensino médio gratuito; III - atendimento educacional especializado aos portadores de deficiência, preferencialmente na rede regular de ensino; IV - educação infantil, em creche e pré-escola, às crianças até 5 (cinco) anos de idade; VI - oferta de ensino noturno regular, adequado às condições do educando; VII - atendimento ao educando, em todas as etapas da educação básica, por meio de programas suplementares de material didáticoescolar, transporte, alimentação e assistência à saúde. § 1 - O acesso ao ensino obrigatório e gratuito é direito público subjetivo. § 2 - O não-oferecimento do ensino obrigatório pelo Poder Público, ou sua oferta irregular, importa responsabilidade da autoridade competente. § 3º - Compete ao Poder Público recensear os educandos no ensino fundamental, fazer-lhes a chamada e zelar, junto aos pais ou responsáveis, pela freqüência à escola.

[41] Paragraph 1 of Article 208 provides specificaly that it is an individual right of every individual to sue the goverment to obtain a place at school for basic and free education.

Similarly, Article 196 of the Federal Constitution provides the following with regards to the right to health: "*Health is a right of all and a duty of the State and shall be guaranteed by means of social and economic policies aimed at reducing the risk of illness and other hazards and at the universal and equal access to actions and services for its promotion, protection and recovery*."

As I have already argued in other opportunities,[42] such article, combined with Article 197 ("*Health actions and services are of public importance, and it is incumbent upon the Government to provide, in accordance with the law, for their regulation, supervision and control, and they shall be carried out directly or by third parties and also by individuals or private legal entities*") makes clear that the right to health shall be based on public policies. It is clear from article 196 alone that the right to health is realized by means of public policies that aim at universal access. Universal access is not the point of departure, but the point to which government policies should be moving to. As a result, no individuals are entitled to individual claims against the government for failures in the implementation of such policies.

The theory of the constitution as an "instrument of social engineering" has only one problem: it departs from the idea that lawmakers will get it right when drafting the constitution. In the case of the constitution as an "instrument of social engineering", it should be obvious that rules with immediate efficacy will only be approved in the cases that the governmental budget is capable of paying for the costs related with such rule. Individuals will immediately be entitled to sue the government for such services. Also, with regards to the rules with restricted or

[42] Carlos Portugal Gouvêa, *Derechos Sociales contra los Pobres*, in EL CONSTITUCIONALISMO EN TRANSICIÓN (Alberto do Amaral et al. eds., 2012), p. 13, 25.

programatic efficiency, lawmakers will consider the budgetary needs in order to allow the government to make investments towards such goals.

However, the theory of the constitution as "instrument of social engineering" did not engage with three concrete problems with regards to such assumptions. First, such calculations are immensely complex. Even the most sophisticated lawmakers would hardly be in a position to get it right in terms of understanding if a certain right that is granted in the constitution as a immediately effective rule will cost as much as initially estimated or not. The population may grow, the economy may go through a crisis, and many other factors may create budgetary restrains that are not predictable at all.

Second, lawmakers may purposefully grant such rights knowing from the start that the government will not be able to pay for such services and that the programs suggested will never be implemented. Such rights operate as means to avoid social conflicts, giving the general population the sense that they have certain services, in par with other more developed nations, while, in fact, such services are not provided to all. Some will be excluded from access to such services because they live in remote areas of the country. Other will not even have the knowledge that they are entitled to such services. Those that are more active will eventually start lawsuits and will be granted the services. And politicians will be legitimated to offer such services in the areas where such investment will provide greater returns in terms of votes. Such rights exist only in paper and not in real life. Or worse, they end-up promoting the social and regional inequality that they were supposed to fight.

And third, judges may make mistakes when interpreting which rules are programmatic and which are of immediate efficacy. The case of access to medication in Brazil provides a good example. Despite the fact that Article 196 does not provide for free access to

any kind of medical services as a duty of the government for all, many judges, when faced with the request from individuals to grant free access to medicine not usually provided by the government, tend to grant the request, no matter what the cost or the efficacy of the drug. The judge will believe that she is facing a life or death situation and will take the easiest path, which is to grant the drug. The judge does not run the budget of the municipality that will pay for the drug to know how many children will end up without their basic treatments in other to provide someone else with certain expensive experimental drugs. In certain cases it may be choice between certain deaths to many in exchange for uncertain cure to one.

Those three major failures in the theory of the constitution as "instrument of social engineering" demonstrate that such model is rotten. More than that, as it will be demonstrated in the final section of this paper, not even the Brazilian Constitution may be regarded as a "driving constitution".

5. The Model of the Managerial Constitution

The model of the managerial constitution is a model that attempts to overcome the shortcomings of the "instrument of government" and the "social engineering" models by means of applying current developments on corporate governance to constitutional theory. More than creating a grand theory about the capacity of the constitution to embody the values of society or to drive society to higher grounds, the purpose of this approach is to identify success stories that can be replicated in other areas of constitutional analysis in which success is lacking.

First, I will recant the failure identified in the two prior models and, based on that, indicate a new direction. With regards to the model of the "instrument of government", its failure is that modern governments require rules applicable to public policies that need to be implemented and that may have substantial impact in society, and the Constitution shall regulate them. In most countries, the budgets of the health and education departments are much superior to the military or police budgets. It would make no sense to have provisions in the Constitution to provide how the military budget shall be governed, and have no reference to the investment in public health. That is what I mean by the fact that those that advocate the persistence of the model of the "instrument of government" because they believe in small government and that, as a result, the constitutional shall also be small, lost in the course of history. If government shall be controlled, it shall be controlled where it stands today, not where it was three hundred years ago.

The problem with the model of the "instrument of government" is that the means to change the constitution shall not be so strict as to prevent any politically disputed issue from being approved as an amendment to the constitution. As discussed above, this was what happened in the United States of America, with the Supreme Court currently operating as the only actual alternative to amend the Constitution, incorporating important matters into the constitutional debate, such as the protection of privacy, since it is not possible to approve any change in the text of the constitution by means of the current amendment mechanism.

The problem is that this situation may lead to an institutional crisis if the court is not willing to side with the popular demands for change or if the appointment process to the Supreme Court becomes so political that it affects the role of the court in its traditional sense an independent interpreter of the law as enacted by Congress. The balance of power may be altered so that the Supreme Court becomes the supreme legislator, above elected officials in Congress

and the traditional role of courts is lost. This is dangerous since the ideal of the courts as independent bodies to solve conflicts between the executive and legislative has also played an important role, from a historical perspective, in the preservation of constitutional democracies.

Defenders of the idea of the constitution as an "instrument of government" may be suspicious of the model of the managerial constitution in the sense that giving too much power to citizens directly may lead to the oppression of minorities. However, transferring too much power to courts may lead to the same direction, in the sense that when the executive and the legislative branches really turn to oppress minorities, courts will have no legitimacy to resist, since they will be just another part of the political game of the day.

With regards to the model of the "instrument of social engineering", the problem is also one of legitimacy. A constitution that is full of unfulfilled promises is a constitution that does not bring any respect from the citizenship. As a result, its symbolic power is reduced and the cost of tossing it out becomes minimal. The constitution turns into a threat to democracy and as an invitation to totalitarianism despite its supposedly good intentions. Promises that cannot be fulfilled are nothing but lies.

Also, who provides the goals? Who decides the plan? Very few constitutions, if any, are truly democratic at their source. As mentioned above, the Brazilian Constitution of 1988 is no different, and it is a direct result of the combination of political forces that resulted from the military dictatorship. There was no change of guard in the new constitutional regime in Brazil with respect to electoral law or any other important mechanism of distribution of political power. But even for revolutionary constitutions, enacted in extreme situations, fair elections are seldom possible. Even if the intention of revolutionary movement is to establish a democratic

regime, it would be a danger to democracy to allow a few to set the agenda for millions that were not heard about their plans for the future.

In this respect, the model of the "managerial constitution" is opposed to the model of "social engineering", in the sense that, no matter how good the initial intentions, no "principle" or "plan" provided in the constitution shall be resistant to change, as no provision in the charter of a company shall be restricted from change by its shareholders. No decision should be taken away from the citizenry, as much as no decision in the corporation shall be taken away from shareholders.

In this respect, both the model of the "instrument of government" and of the "instrument of social engineering" failed. Both models did not consider means by which citizens could directly change the text of the constitution and change their rights and protections, the distribution of power among the various branches of government, and the plan embodied in the constitution.

The Brazilian Constitution provides for means of amendment that are superior to those in the U.S. Constitution in the sense that it is easier for an amendment to be approved. The Brazilian Constitution provides in its Article 60, paragraph 2, that an amendment must be voted twice by the House of Representatives and by the Senate and approved, each time, by 3/5 of the members of each house.

As a result of such provision, since it was enacted in October 5, 1988, the Brazilian Constitution was amended 72 times. Considering that this is the sixth legislature after the enactment of the Constitution, this means an average of 12 amendments per legislature. If for the U.S. Constitution we had one amendment for each 8 years, for the Brazilian Constitution we would have one amendment for each four months – a rate that is 16 times greater for a

Constitution which text has about 8 times more words. Considering that the U.S. Constitution also had most of its amendments in the early years, the pace of change is comparable if adjusted by the size and detail of each legal text.

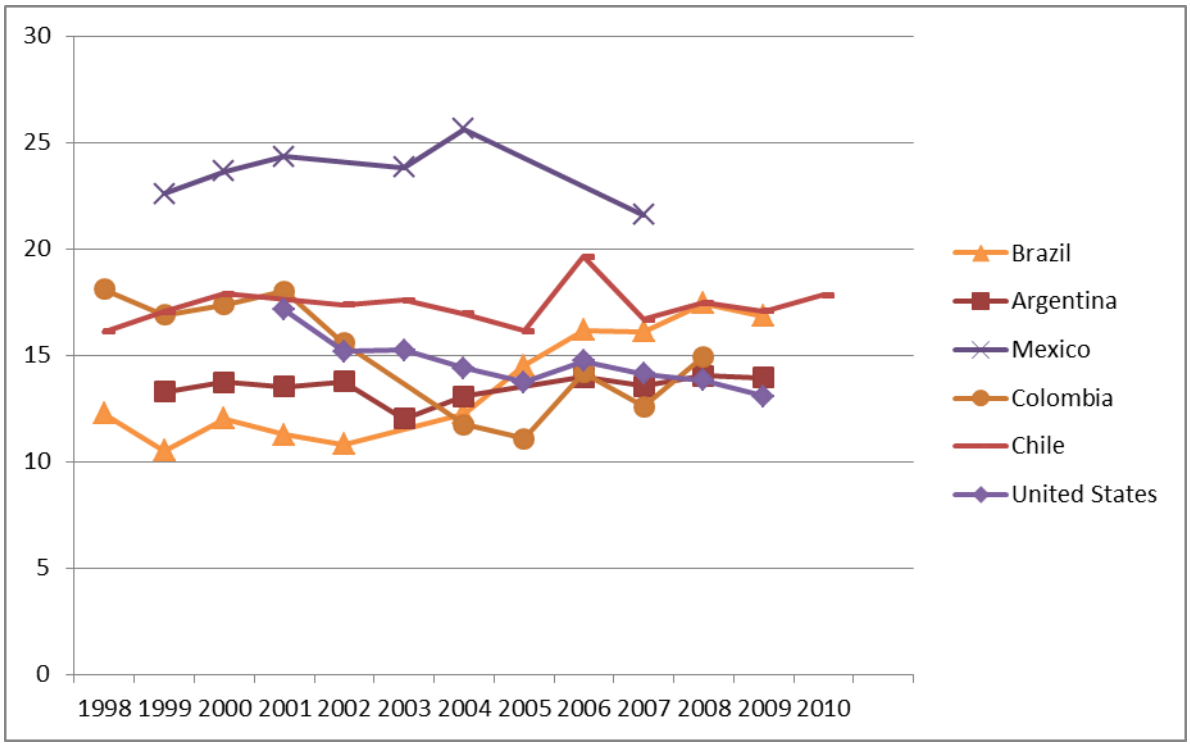
Many of such amendments adjusted aspects of the "program" embodied in the constitution. For example, in its original version, Article 192 of the Brazilian Constitution provided that the financial system would be regulated by a complementary constitutional law, that is, a kind of statute that requires higher quorum than regular statutes. As a result of an intense lobbying effort of financial institutions, Amendment 40 of 2003 excluded such requirement. The same amendment also excluded a provision of Article 192 that limited interest rates in financial operations to 12% per year, excluding inflation adjustment and management fees. Until 2003, no statute had been enacted to regulate financial institutions. Also, banks were charging interest rates far superior to the limit provided by the constitution. The provisions of Article 192 were clearly disregarded and, as a result, instead of insisting on the “program”, the constitution was changed and the programmatic rule was eliminated, since it was being disregarded in practice. It is a far better solution than maintaining a programmatic rule that will not be implemented and, as a result, will end-up challenging the legitimacy of the constitution.

In other cases, such as in the case of Article 208, the Constitution was amended not to reverse the "program" previously established, but to reinforce it. Article 208, Section I was amended to clarify that the duty of government to provide free basic education should be guaranteed to children from age 4 to 17, while the prior language did not specify age limits.

According to information provided by the World Bank in its World Development Indicators, among Brazil, Argentina, Mexico, Colombia, Chile, and the United States, between

the years of 1998 and 2010, Brazil was the only country that showed a steady increase of public spending on education as a percentage of total government expenditure.

Chart 1. Public spending on education, total (% of government expenditure), Brazil, Argentina, Mexico, Colombia, Chile, and the United States between the years of 1998 and 2010



Source: World Bank, World Development Indicators, 2013.

Its current level of expenditure, of about 17% of total govermental expenditure, fairly represents the balance between the investment requirements provided by the Brazilian Constituion. Notwithstading the clear provision in the Constitution with regards to the duty of Government to support free basic education for all, Article 208 of the Constitution requires that the federal government shall invest in education, annually, at least 18%, and the States and

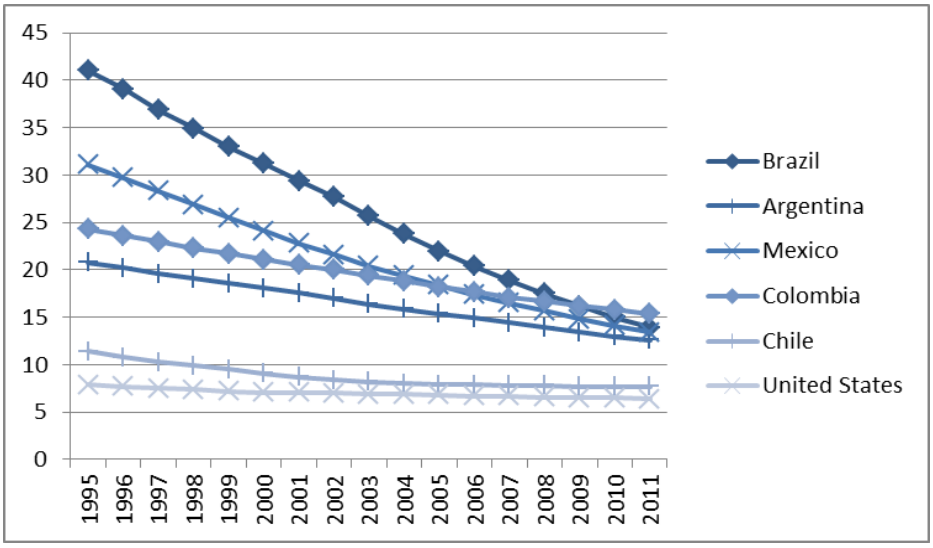
Municipalities at least 25%, of their total tax income. In this particular case, the protection of social and economic rights made full circle, since the Constitution provided, on the one hand, for a clear obligation to the government to provide free basic education and, on the other hand, it provided sufficient resources for such investments.

With regards to health, the Constitution created a different mechanism. First, it provided for the creation of the Unified Health System. Also, in Article 198 of the Constitution it provided that a complementary statute should provide for the minimum investment of the Federal Government on Health and the minimum percentual investment that States and Municipalities should also invest annually on health. Such complementary statute was enacted in 2012 providing that the federal government shall invest not less than it invested in health care in the prior year adjusted by the growth in the Gross Domestic Product of the country and that States shall invest 12% of all State tax incomes and Municipalities shall invest 15% of their tax incomes in health care.

Both in the case of education and health care such constant improvements in the text and in the regulations in order to accomplish the promises of the constitution are an exclusive result of the existence of powerful lobbies by trade unions of both teachers and health professionals. Since the process to enact the constitution, such groups have supported the proposals relating to health care and education. As a result, most of the "programatic" content of such provisions actually came true. As demonstrated by the chart below, infant mortality was dramatically reduced in Brazil, from 41 for each 1,000 births in 1995 to 13.9 in 2011, surpassing Colombia at 16,2 for the same index and Mexico at 14,8, despite Mexico's also substantial reduction from 31.1 in 1995.[43]

[43] *See* Attachment 1 below.

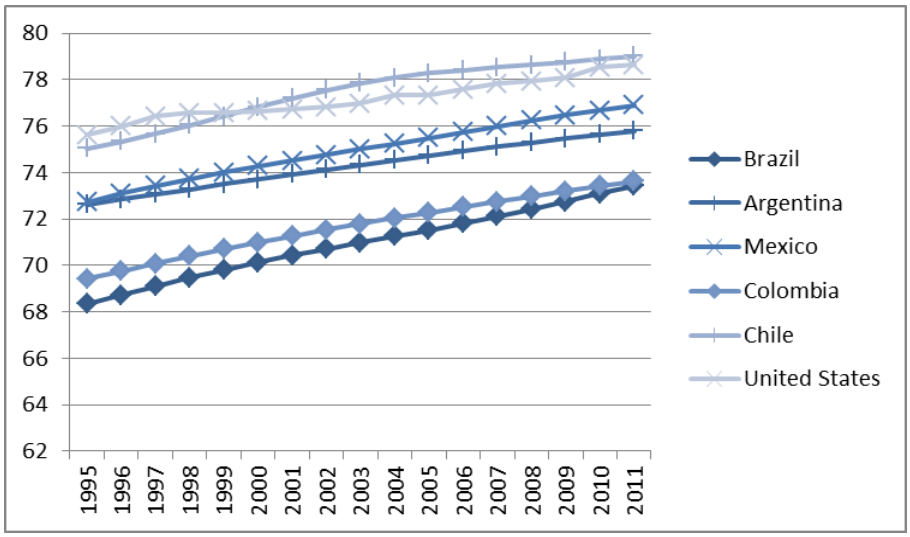
Chart 2. Mortality rate, infant (per 1,000 live births), Brazil, Argentina, Mexico, Colombia, Chile, and the United States from 1995 to 2011



Source: World Bank, World Development Indicators, 2013.

If we look at life expectancy, probably the most important health indicator, improvements in Brazil were on par with other comparable Latin American countries and the United States in the same period between 1995 and 2011, as provided by the chart below:

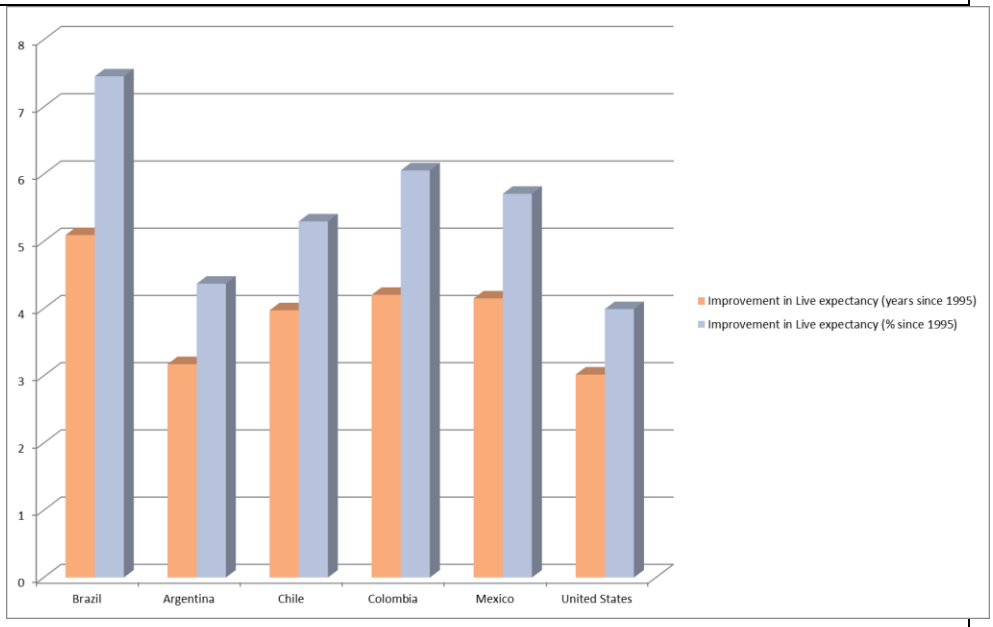
Chart 3. Life expectancy at birth, total (years), Brazil, Argentina, Mexico, Colombia, Chile, and the United States from 1995 to 2011



Source: World Bank, World Development Indicators, 2013.

As demonstrated by the chart below, Brazil presented the highest absolute and relative growth in life expectancy among the countries analyzed.

Chart 4. Life expectancy at birth, Brazil, Argentina, Mexico, Colombia, Chile, and the United States, Improvement in Years and Percentage Points from 1995 to 2011

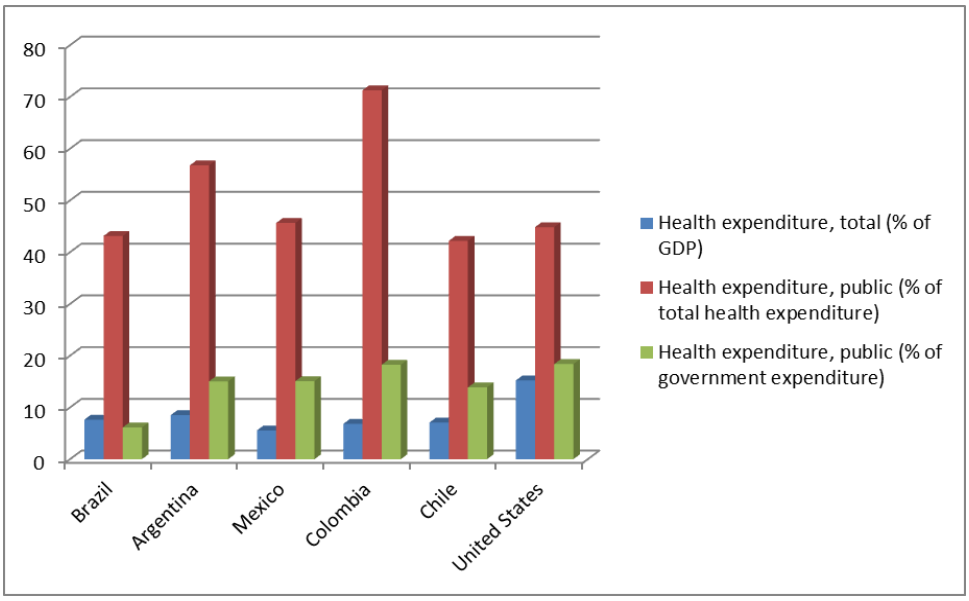


Source: World Bank, World Development Indicators, 2013.

Surprisingly, despite the fact that Brazil obtained the highest gains in terms of improvements of life expectancy in the period, it was the country the invested the least. Hence, it was the country that invested most efficiently in health care. Such efficiency is a result of the structure of the Unified Health System provided by the Brazilian Constitution, according to which such system must be a combined effort of public and private institutions. Also, as discussed above, Article 196 of the Constitution provides that the right to health shall be implemented by means of public policies, allowing the government to direct its resources to the poorest of the poor, and not to wealthy individuals with access to first rate legal services as it would be the case if such rights were provided as individual rights. The action of Brazilian courts with regards to the free distribution of medicine provides for a notable exception to such rule as a result of the misinterpretation of such article by Courts, as I already had the opportunity to discuss in much further detail.[44] In this particular case, an amendment to the Constitution would be required to correct the understanding of the courts.

Chart 5. Average health expenditure, Brazil, Argentina, Mexico, Colombia, Chile, and the United States from 1995 to 2011.

[44] *See*, Carlos Portugal Gouvêa, *Derechos Sociales contra los Pobres,* Supra note 30.



Source: World Bank, World Development Indicators, 2013.

According to the information provided by the World Development Indicators and calculations by the author, in that period, the public investment in health in Brazil as a percentage of the total government expenditure reached only 6.13%, while all the other countries averaged about 16%. Brazil invested less than half of what the other countries did in terms of percentage of total governmental expenditures in health. Despite such limited investment, its results in terms of increases of life expectancy allowed it to close its gap with regards to other Latin American countries.

The table below provides a ratio comparing, for each country, how many percentage points of health expenditure (i) as a percentage of GDP and (ii) as a percentage of total governmental expenditures would be required to improve one year of life expectancy for each country, based on the performance of each country between 1995 and 2011 and assuming that higher investment would result in equivalent improvement in public health.

Table 1. Heath Expenditure to Years of Life Expectancy Ratios		
Country Name	Required increase in health expenditure as a total % of GDP to increase one year of life expectancy	Required increase in public health expenditure as % of total government expenditure to increase one year of life expectancy
Brazil	1,50	**1,20**
Argentina	2,68	4,74
Mexico	**1,34**	3,63
Colombia	1,62	4,34
Chile	1,78	3,49
United States	5,04	6,09

Brazil and Mexico appear better positioned to efficiently invest resources to improve life expectancy. However, investments in public health by the Brazilian Government would represent less of a burden to other areas of public investment, since Brazil achieved equivalent levels of public health in comparison to other Latin American countries based on an investment of a much less substantial portion of its total budget. This may be a result of the structure of the Unified Health System provided by the Brazilian Constitution, which allows for a good balance between public and private investment in public health, since it is a universal system complemented by private insurance. Public resources are directed to the poorest of the poor, who do not have access to private insurance and have to go to public and private hospitals that will be paid by the public health insurance system provided by the Unified Health System. As a result, participation of government in total health expenses in Brazil is low, at an average of 43%, which is inferior to the level of the United States, at 45% of public expenditure considering the total costs of health care in the country. This is a striking result considering that the Brazilian Constitution obliges the government to provide free access to health care, while the U.S. Constitution does not regulate health care at all.

Hence, in modern constitutions, particularly in countries where income inequality and other social problems are extreme, a constitutional order that provides for social and economic rights should also provide details with regards to the sources of funds for such investments and priorities of investment. This is not only to make sure that such investments are made, but also that such investments are made efficiently, benefiting the poorest of the poor. In order to achieve such goal, the constitution may not grant rights to individuals, such as an individual right to health and education. It should actually provide for objective means for such rights to be implemented and exercised by individuals, avoiding that the benefits of the constitutional right to health and education shall be drained by the wealthiest individuals in society. The managerial constitution is no longer an ideological instrument, but an actual map to guide the government every step of the way.

Going back to the comparison with corporations, the movement to include references to budgetary management in the body of the constitution would be equivalent to incorporating also certain budgetary restrictions in the basic documents of corporations. In part, such movement was already implemented with public corporations, since in most jurisdictions they are required to provide details with regards to any forward-looking estimates. But the need to make all budgetary decisions public would completely change the level of oversight that shareholders currently have over their companies. If governments do it first, corporations will also follow in due time.

The same shall apply to the structure of the Constitution. The objective of the managerial constitution is to increase oversight upon those that implement public policies, including members of the Executive, Legislative and also Judiciary branches. Such oversight is possible because the constitution itself provides clear guidelines for public policies.

With respect to oversight, powerful lessons can be learned from improvements in corporate governance in the last few decades. With regards to disclosure requirements, it can be said that in most countries with developed capital markets, shareholders have much more information about the financial condition of the companies in which they invest than about their governments. This creates an immediate legitimacy deficit in the government in comparison with corporate organizations. Citizens pay taxes and they are entitled to as much transparency as investors in large corporations.

Hence, the model of the managerial constitution shall also include clear requirements providing that certain governmental entities, such as the main branches of federal government and states, shall issue annual or quarterly financial reports. Also, all other governmental agencies with budgets superior to a certain threshold shall also issue individual financial reports. Such reports would have to be issued according to strict accounting principles, and courts would have an important role in providing oversight with regards to the issuance of such reports.

The final element of the managerial constitution is that it shall be subject to change directly by the citizenry. Unfortunately, the Brazilian Constitution does not provide for any means of direct change of the Constitutional text by the people. Article 60 of the Constitution provides that only the president, one third of the members of each of the houses of Congress, or more than half of the legislative branches of the States may propose amendments to the Constitution. In its Article 14 the Constitution provides for bills based on popular initiative, but only for regular legislation. Also, Amendments to the Constitution do not require ratification by the people. As a result, currently, with only a majority of 3/5 of each of the houses of Congress, a governmental coalition may change the Constitution to attend to its interests. The mechanism

to amend the Constitution is currently the most significant threat to the maintenance of a democratic regime in Brazil.

Most recently, after the Supreme Court of Brazil convicted high profile members of Congress for corruption for the first time since the enactment of the 1988 Constitution,[45] several proposals to amend the Constitution in order to avoid new investigations and restrict the power of the Supreme Court were presented. The most relevant instance thereof was the Amendment Proposal 37 (*Proposta de Emenda Constitucional no. 37/2011*). Originally proposed only as means to distribute competences between the federal and state prosecutors offices and the police with regards to criminal investigations, its legislative process was accelerated after such convictions as a means to demonstrate that Congress may have the power to limit the actions of prosecutors. If such amendment were approved, many corruption investigations would be transferred to the police, which does not have the same constitutional protections as prosecutors offices with regards to the budgetary independence, for example. Such combination of factors transformed Proposal 37 in one of the major targets of the 2013 demonstrations in Brazil, which focused on protests against corruption. As a result, in a lighting speed vote, the house of representatives of Brazil rejected Proposal 37 on June 25, 2013 by 430 votes against 9, with 2 abstentions,[46] and politicians who voted in favor of it apologized in the following day, arguing that they voted in favor of the proposal by mistake.

As it happened with the case of the health and education systems, in which intense social mobilization changed the text of the Constitution, also with regards to the powers of investigation of prosecutors, social mobilization put such provisions at a higher standard of

[45] Supremo Tribunal Federal, Ação Penal 470.

[46] Available at http://www.camara.gov.br/proposicoesWeb/fichadetramitacao?idProposicao=507965

constitutional protection, in the sense that the memory of demonstrations will always remind Congress that this issue should not be touched.

In order to prevent such misuses of the constitutional amendment process to attend to the interests of certain occasional majorities in Congress, the best remedy is to require that constitutional amendments shall be subject to a referendum. The ideal model would be to provide that such amendments shall also only be put to a vote in the election following its approval, so that elected officials would not have incentives to change constitutional rules prior to electoral periods to attend their own interests or to restrict changes of their competitors. In the case of PEC 37, for example, members of the Brazilian Congress of would be afraid of putting this issue to a vote at the same time in which they would also be running for election. Demonstrations in such case could not be necessary because the people would have the final word on the matter with very high costs to incumbents who eventually were perceived as having voted to change the Constitution to their own benefit.

Another mechanism that would complete the model of the managerial constitution would be the popular initiative to change the Constitution. Such mechanism would be based on a requirement of a minimum number of signatures to support a proposal to amend the constitution that would be put to vote in the following national election period. Since such consultations would be related to changes to the constitution, the voting thresholds shall be higher than those applicable to regular referendums. For example, in the case of Brazil, a threshold of 3/5 of the valid votes cast would be a good reference, since it would be equivalent to the 3/5 of the members of the houses of Congress required to approve an amendment. The citizenry would also retain its power to change the Constitution even against the will of Congress. One classic example of the importance of such recourse is with regards to changes to

the electoral system. No incumbents would vote for changes to the electoral system that would create uncertainties with regards to their capacity to be reelected. As a result, electoral systems for parliaments are hardly changeable if not by means of direct democracy.

This raises another important question, which is related to the limits to possible changes to the constitution. The memories of the Weimar Constitution and the rise of Nazism are still fresh in the memories of Western societies, and for good reasons. Autocratic governments can be legitimized by means of sudden changes to the Constitution by means of direct democracy. But the same could happen to purely representative democracies, as was actually the case of the Weimar Constitution. Democracies are always fragile, and taking power away from the people will only make them weaker.

To avoid such a problem, the Brazilian Constitution provided for an awkward solution. Section 60, paragraph 4, provides for certain subjects that may not be infringed by constitutional amendments: (i) the federative form of government; (ii) direct, secret, universal and periodic voting rights; (iii) separation of powers; and (iv) individual rights. Those are the so-called "stone clauses" that cannot be changed. Of course, such provisions are symbolic, in the sense that they can be changed, but in that case a new constitutional order would be in place.

Corporate governance may also provide a valuable lesson in such regard. In Brazilian corporations that were listed in the Novo Mercado, the listing level of the São Paulo Stock Exchange with the highest levels of governance requirements, many companies decided to implement clauses in their charters according to which new stock would be issued to current shareholders in the case of a hostile takeover. Such clauses are named "entrenchment clauses" in the sense that they protect management and current controlling shareholders. Some charters of companies in Novo Mercado provided that such clauses could not be changed by shareholders,

or that such clauses could only be changed considering abnormally high quorums. On June 23, 2009, the Brazilian Securities Commission (*Comissão de Valores Mobiliários*) issued an opinion considering such provisions to be illegal in accordance with Brazilian corporate law, since they would restrain the powers of shareholders to change the charters in order to protect incumbent managers.

In a sense, the current state of the Brazilian Constitution and the constitution of most liberal democracies is that the lack of means to change the constitution directly provides for inherent "entrenchment clauses" since it is impossible to change the rules according to which politicians are elected. Those are the real "stone clauses".

In general, the model of "stone clauses" would not be against the model of the "managerial constitution". Going back once more to the analogy with corporations, when one shareholder decides to buy shares of a particular corporation, she or he is also choosing a legal model with certain rules that could not be changed. Prior to that, there is a choice of buying stock of different companies, in different countries, with different regulatory frameworks. In this sense, the model of the managerial constitution would also admit certain "stone clauses" that would define the kind of governmental organization that will be ruled by such constitution. However, to be legitimate, such clauses would have to subject to a referendum by the people. Only after such approval that one could be certain that the model proposed was the one chosen by the people, and not by entrenched groups that want to protect their status in the government.

The move to a managerial constitution provided herein is based on one simple principle: supremacy of the people. The constitution is dependent on people supporting it, and requiring popular acclaim for any changes in the constitution also mean that voters will own the constitution, as much as shareholders own corporations. Without such means of direct

democracy, new constitutions will represent only new painting for old houses. It might look good at first, but it will go down when the storm comes. It is high time that constitutional law regains its democratic foundations. The idea of a managerial constitution aims to be a step towards that direction.

Attachment 1 – Health Related Data

Country Na	Indicator Name	1995	1996	1997	1998	1999	2000	2001	2002	2003	2004	2005	2006	2007	2008	2009	2010	2011
Brazil	GDP growth (annual %)	4,416831993	2,15	3,37493882	0,0355122	0,255597103	4,305745715	1,314896121	2,655974267	1,14674906	5,71391692	3,15635239	3,95541527	6,09545498	5,169299014	-0,32824804	7,53361545	2,73250924
Brazil	Health expenditure, total (% of GDP)	6,652336412	6,84885709	6,80873453	6,73858722	7,086882441	7,164161047	7,268958081	7,19452275	7,02514253	7,13057649	8,16970072	8,48247973	8,47019401	8,28338067	8,753647276	9,00820307	8,89761081
Brazil	Health expenditure, public (% of total health expendit	43,0143059	40,5383897	42,9500813	42,6391854	42,72960671	40,30413495	42,2905363	44,64187361	44,3661844	47,0247038	40,1412586	41,6939067	41,8168671	42,76085026	43,57221952	47,019059	45,7432926
Brazil	Health expenditure, public (% of government expendi	8,360473797	8,13038032	7,03160844	5,62540785	5,479752205	4,08448287	4,745938909	5,003356356	4,41139538	5,1466089	4,70163509	5,14720651	5,4198479	5,728598562	5,860936413	10,7386273	8,6894268
Brazil	Mortality rate, infant (per 1,000 live births)	41	39,1	36,9	34,9	33	31,2	29,4	27,7	25,7	23,8	22	20,4	18,9	17,5	16,2	15	13,9
Brazil	Life expectancy at birth, total (years)	68,34063415	68,731561	69,1090976	69,4712439	69,81446341	70,13826829	70,43963415	70,72409756	70,9961463	71,2617805	71,5295366	71,8109268	72,1099512	72,42709756	72,75980488	73,0995366	73,4352195
Argentina	GDP growth (annual %)	-2,84520961	5,52668983	8,11104676	3,85017887	-3,38545705	-0,78899892	-4,4088397	-10,8944848	8,83704078	9,02957332	9,17895022	8,46606271					
Argentina	Health expenditure, total (% of GDP)	8,310988609	8,02499336	8,3613648	8,53592233	9,355148564	9,212756846	9,375891335	8,313925817	8,21606599	8,18813868	8,32966843	8,25579044	8,21230976	8,284209144	9,408163815	8,28736963	8,11174285
Argentina	Health expenditure, public (% of total health expendit	59,75751924	57,7152015	54,4533834	54,1735246	55,07464937	53,9013864	54,03149918	53,55999173	51,7403934	51,4928058	53,5266956	54,6982902	58,2496864	61,84381018	66,02416905	64,3901886	60,6432718
Argentina	Health expenditure, public (% of government expendi	15,29528311	15,169567	15,0115395	14,9459959	15,0660066	14,71575742	14,21054829	15,25587207	14,470502	14,7010915	13,9495587	13,8432982	13,2855507	13,3768333	14,38218901	17,6885997	20,4113871
Argentina	Mortality rate, infant (per 1,000 live births)	20,8	20,2	19,6	19,1	18,6	18,1	17,6	17	16,4	15,9	15,4	14,9	14,4	13,9	13,4	13	12,6
Argentina	Life expectancy at birth, total (years)	72,62363415	72,8462927	73,0673902	73,2864634	73,50346341	73,71797561	73,9295122	74,13860976	74,3442927	74,5455854	74,7414634	74,931439	75,1149756	75,29253659	75,46409756	75,6321463	75,7976585
Mexico	GDP growth (annual %)	-6,21798676	5,13982763	6,77554931	4,90652571	3,873255441	6,601984351	-0,15698419	0,826684579	1,35152863	4,05343933	3,2054321	5,15015203	3,2602468	1,190604448	-5,95394085	5,53237533	3,91061367
Mexico	Health expenditure, total (% of GDP)	5,149522216	4,67818721	4,80412487	4,89049103	5,101810305	5,070948255	5,445707117	5,619366973	5,78215161	5,97577052	5,87127868	5,68437091	5,77787042	5,839525599	6,425393877	6,32989064	6,15656797
Mexico	Health expenditure, public (% of total health expendit	42,134241	41,4055323	44,7064312	46,0234794	47,81004856	46,56211514	44,74370839	43,83810163	44,167155	45,1614921	45,0338955	45,2173913	45,3988181	46,97993386	48,19733898	48,9818561	49,4483072
Mexico	Health expenditure, public (% of government expendi	15,04593284	13,2935928	14,1523582	15,8031446	17,27547284	16,62087302	16,55907829	15,67838674	15,5381515	17,4119335	16,5023203	15,9095247	15,4953564	14,95714744	11,91041352	12,1311495	12,0327452
Mexico	Mortality rate, infant (per 1,000 live births)	31,1	29,7	28,3	26,9	25,5	24,1	22,8	21,6	20,4	19,4	18,4	17,4	16,5	15,7	14,8	14,1	13,4
Mexico	Life expectancy at birth, total (years)	72,73763415	73,0942927	73,4260488	73,731878	74,0132439	74,2742439	74,52046341	74,76207317	75,0047317	75,25	75,4989024	75,7499756	75,9971463	76,23634146	76,46556098	76,6837805	76,8895122
Colombia	GDP growth (annual %)	5,202437593	2,05585471	3,43029368	0,56978409	-4,20401524	4,419993	1,677898308	2,503980465	3,9182719	5,33302207	4,70655593	6,69751526	6,90062766	3,546804886	1,651549245	4,00118517	5,91402786
Colombia	Health expenditure, total (% of GDP)	6,756850075	8,16065798	8,95554088	8,72644583	8,671890322	5,879214151	5,927438827	5,645249437	5,90583303	5,52300697	6,01766947	6,46472036	6,84820904	6,785582186	6,994227547	6,52791573	6,11577081
Colombia	Health expenditure, public (% of total health expendit	55,06367274	62,0980149	62,4631625	69,9418584	74,48493942	79,29839113	78,70001533	80,25656245	82,7204361	72,6728985	69,6936579	69,1931809	64,7640544	68,11144093	72,80221195	74,605506	74,8485092
Colombia	Health expenditure, public (% of government expendi	17,20967816	20,3629082	22,128222	22,6850325	20,99568948	19,30496348	16,8816462	16,71941133	18,5979576	15,1183042	15,2617196	16,2120737	16,31588	17,74455693	18,22952048	17,829884	18,5313161
Colombia	Mortality rate, infant (per 1,000 live births)	24,3	23,6	23	22,3	21,7	21,1	20,5	20	19,4	18,8	18,2	17,7	17,1	16,7	16,2	15,8	15,4
Colombia	Life expectancy at birth, total (years)	69,43668293	69,7576098	70,0852439	70,4051951	70,71182927	71,00097561	71,27365854	71,53402439	71,7882195	72,0367805	72,2797805	72,5187561	72,7537805	72,98434146	73,20997561	73,4296829	73,6419024
Chile	GDP growth (annual %)	10,62757722	7,41349152	6,60557963	3,23087871	-0,76085481	4,495792997	3,348180391	2,166908634	3,95674848	6,04108674	5,55945253	4,58994932	4,60028487	3,662326241	-1,03643176	6,09520565	5,98822656
Chile	Health expenditure, total (% of GDP)	6,480040031	6,98141101	6,96983034	7,42843667	7,607859486	7,673720588	7,57721032	7,408726522	7,00639175	6,64754423	6,52022147	6,21093224	6,50625341	7,097821824	7,673377446	7,36984878	7,46424493
Chile	Health expenditure, public (% of total health expendit	38,51325381	38,0821679	38,8841613	40,2540329	41,91034563	43,66291579	43,26305032	43,066681	39,2933211	40,0829644	40,0342751	41,9874156	42,5956888	43,5302325	47,58214618	47,2231774	46,9539769
Chile	Health expenditure, public (% of government expendi	12,69116533	12,7492265	13,0034088	13,5557765	13,36440384	14,12142912	13,85685092	13,43127457	12,1881651	12,6934688	12,8032039	13,8151244	15,602228	15,3443103	15,77003482	15,7675943	15,1316826
Chile	Mortality rate, infant (per 1,000 live births)	11,4	10,8	10,3	9,9	9,5	9,1	8,7	8,4	8,2	8	7,900001	7,900001	7,8	7,8	7,7	7,7	7,7
Chile	Life expectancy at birth, total (years)	75,04146341	75,3396341	75,6698049	76,0330244	76,42282927	76,82173171	77,20721951	77,55521951	77,8511707	78,0895854	78,2749756	78,4158537	78,5342683	78,64721951	78,76270732	78,8857317	79,0167561
United States	GDP growth (annual %)	2,548972794	3,78607302	4,50573632	4,40142285	4,868902857	4,173240844	1,093376112	1,827997979	2,55260615	3,47977418	3,07562308	2,65912148	1,9072133	-0,35908828	-3,52747152	3,02171711	1,7
United States	Health expenditure, total (% of GDP)	13,59871311	13,5545972	13,3892321	13,3677226	13,35061343	13,40859764	14,07449877	14,82363067	15,6856952	15,7786791	15,8291739	15,9301649	16,1523958	16,60110624	17,6733619	17,6116778	17,8547767
United States	Health expenditure, public (% of total health expendit	44,91095718	44,970525	44,6706526	43,5110746	43,06455143	43,19718269	44,16482869	44,10090507	43,7606364	44,0815949	44,2165874	45,0191837	45,1893236	45,96971881	47,31144958	48,180916	45,9369202
United States	Health expenditure, public (% of government expendi	16,401193	16,5873473	16,8231246	16,8015532	16,82820908	17,09712241	17,77216852	18,21412786	18,9251212	19,2890602	19,270511	19,9096476	19,8093867	19,52117903	19,46645955	19,9210894	19,803564
United States	Mortality rate, infant (per 1,000 live births)	7,900001	7,7	7,5	7,4	7,2	7,1	7,1	7	6,9	6,9	6,8	6,7	6,7	6,6	6,5	6,5	6,4
United States	Life expectancy at birth, total (years)	75,62195122	75,9965854	76,4292683	76,5804878	76,58292683	76,63658537	76,73658537	76,83658537	76,9878049	77,3390244	77,5878049	77,8390244	77,93902439	78,0902439	78,5414634	78,6414634	
Brazil	Improvement in Live expectancy (years since 1995)		0,39092683	0,76846341	1,13060976	1,473829268	1,797634146	2,099	2,383463415	2,6555122	2,92114634	3,18890244	3,47029268	3,76931707	4,086463415	4,419170732	4,75890244	5,09458537
Brazil	Improvement in Live expectancy (% since 1995)		0,57202693	1,12446047	1,65437411	2,156592907	2,630403081	3,071379167	3,487622619	3,88570025	4,27439162	4,66618796	5,07793456	5,51548448	5,979551501	6,466388243	6,96350348	7,45469431
Argentina	Improvement in Live expectancy (years since 1995)		0,22265854	0,4437561	0,66282927	0,879829268	1,094341463	1,305878049	1,51497561	1,72065854	1,92195122	2,11782927	2,30780488	2,49134146	2,668902439	2,840463415	3,0085122	3,17402439
Argentina	Improvement in Live expectancy (% since 1995)		0,30659239	0,61103538	0,91269086	1,211491656	1,506866843	1,798144728	2,086064168	2,36928179	2,6464542	2,91617088	3,17776011	3,43048306	3,674977809	3,91121079	4,14260761	4,37051165
Chile	Improvement in Live expectancy (years since 1995)		0,29817073	0,62834146	0,99156098	1,381365854	1,780268293	2,165756098	2,513756098	2,80970732	3,04812195	3,2335122	3,37439024	3,49280488	3,605756098	3,721243902	3,84426829	3,97529268
Chile	Improvement in Live expectancy (% since 1995)		0,39734131	0,83732571	1,3213508	1,840803458	2,372379498	2,886079241	3,349822862	3,74420645	4,06191699	4,3089674	4,49670101	4,65449995	4,805018364	4,958917021	5,12285891	5,29746157
Colombia	Improvement in Live expectancy (years since 1995)		0,32092683	0,64856098	0,9685122	1,275146341	1,564292683	1,83697561	2,097341463	2,35153659	2,60009756	2,84309756	3,08207317	3,31709756	3,547658537	3,773292683	3,993	4,20521951
Colombia	Improvement in Live expectancy (% since 1995)		0,46218629	0,9340322	1,39481345	1,83641598	2,252833253	2,645540559	3,020509297	3,38659119	3,744559	4,09451812	4,43868146	4,77715441	5,109199327	5,434148816	5,75056272	6,05619297
Mexico	Improvement in Live expectancy (years since 1995)		0,35665854	0,68841463	0,9942439	1,275609756	1,536609756	1,782829268	2,024439024	2,26709756	2,51236585	2,76126829	3,01234146	3,2595122	3,498707317	3,727926829	3,94614634	4,15187805
Mexico	Improvement in Live expectancy (% since 1995)		0,49033563	0,94643528	1,36689063	1,753713564	2,112537442	2,451041045	2,783207136	3,1168151	3,45401096	3,79620306	4,14137949	4,48119084	4,810037277	5,12516921	5,4251783	5,7080191
United States	Improvement in Live expectancy (years since 1995)		0,37463415	0,80731707	0,95853659	0,96097561	1,014634146	1,114634146	1,214634146	1,36585366	1,71707317	1,71707317	1,96585366	2,21707317	2,317073171	2,468292683	2,9195122	3,0195122
United States	Improvement in Live expectancy (% since 1995)		0,49540397	1,06756975	1,26753749	1,27076278	1,341719078	1,473955814	1,60619255	1,8061603	2,27060152	2,27060152	2,59958071	2,9317852	3,064021932	3,263989679	3,86066763	3,99290437