I. INTRODUCTION

1. It is a great pleasure and an honor to be here, and to share with everyone some ideas and thoughts on the role of constitutional courts in new democracies. I kindly thank the New York University, the Center for European and Mediterranean Studies, and Professor Christine Landried for the kind invitation. Just to introduce myself in one sentence, I was an activist in the student movement against the military regime in Brazil in the second half of the 70s; I am a professor of constitutional law at the State University of Rio de Janeiro since the mid-80s; I did my LL.M at Yale Law School (1988-89) and was a visiting scholar at Harvard Law School (2011). In June of 2013 I joined the bench as a Justice of the Brazilian Supreme Court, the Supremo Tribunal Federal.

2. Brazil has been under civilian rule since 1985 and under a new democratic constitution since 1988. We are one of the largest democracies – about 110 million people voted in the presidential elections last year – and one of the ten largest economies in the world. Recently, we are experiencing a serious political and economic crisis in the wake of far-reaching corruption scandals and economic recession. These recent years have posed a vigorous test to Brazilian democratic institutions, which have nonetheless proved to be solid, despite the widespread feeling that, in different areas of national life, evil has prevailed.

3. As with Latin American countries in general, it is often said that Brazil has a tradition of hegemony by the Executive Branch, and of a fragile and venal
Legislature. The big news in the Brazilian political landscape of the past two decades is that of a strong and active Judiciary, especially the Supreme Court. The country is experiencing a period of significant judicialization of the big political, social, and moral issues. This judicialization is magnified and made more visible by some peculiarities of the Brazilian model of constitutional jurisdiction.

4. The power of the Supreme Court and this significant degree of judicialization of life constitute the object of my presentation, which I divide into two parts. In the first, I briefly present some characteristics of the Brazilian model of constitutional jurisdiction. In the second, I try to identify the different roles played by the Supreme Court over the past years.

Part I

*THE BRAZILIAN MODEL OF CONSTITUTIONAL JURISDICTION*

I. A HYBRID SYSTEM

5. Brazil has its own system of constitutional adjudication – the Brazilian System. In its origins it is a hybrid or eclectic system of judicial review, which combines aspects of the American system and the European system. From the American system we derived an incidental and concrete form of review: every judge or court has authority to adjudicate on claims of constitutional violation arising in cases brought before them. In order to adjudicate such claims, the judge or court interprets the Constitution and may modify or cease to apply any infraconstitutional norm it deems unconstitutional. From the European system we adopted the possibility of bringing direct constitutional lawsuits before the Supreme Court, in which the constitutionality of a law can be discussed in abstract (i.e., regardless of a case or controversy). The Brazilian System then adds its own additional institutional features to constitutional review. I will mention a couple of them.
II. WHO HAS STANDING TO BRING CONSTITUTIONAL LAWSUITS DIRECTLY BEFORE THE SUPREME COURT?

6. A noteworthy feature of the Brazilian system is the extensive roster of agencies, public officials, and private entities with legal standing to file a direct suit before the Supreme Court. The Constitution itself expressly provides the right to initiate these lawsuits, which can be exercised, for example, by federal authorities (President of the Republic, Head of the Federal Prosecutors Office – PGR), by state authorities (the Governors of the States) and public bodies (Senate, House of Deputies, Legislative Assemblies). But more uniquely, direct suits can also be initiated by the Bar Association, by political parties, by national professional associations, and the trade union confederations.

7. The existence of direct lawsuits with ample standing leads to two important consequences. The first is that any matter of significance can be brought directly for discussion before the Supreme Court. The second is that the Court often has to assess legal questions and materials firsthand, without the benefit of any prior discussion of them in the other courts. And there is no way for the Court to decline jurisdiction in these cases because direct suits are not subject to discretionary review of admissibility (constitutional questions that come through the standard appeals pipeline require general interest for their admissibility, or "repercussão geral," which allow the Supreme Court to engage with issues not dissimilar to those considered by the US Supreme Court in the writ of certiorari). In cases brought directly before the Brazilian Supreme Court, the only possible thing to do – and the Court sometimes does that – is to delay the appreciation of the matter.

III. PUBLIC HEARINGS AND LIVE BROADCAST OF THE COURT SESSIONS ON NETWORK TV

8. There are two other peculiarities of the Brazilian system of constitutional jurisdiction worth mentioning. The first is the possibility that the Justice acting as rapporteur of a case may convene a public hearing on the merits of the case. It is not uncommon for representative stakeholders and experts to be called on to present their
views to the Court before it starts judgment on the matter. I have myself summoned one, in the first semester of the year, to discuss the issue of religious education in public schools, and invited representatives of all major religions in Brazil – Christianity, Judaism, Islam, Buddhism, Afro-Brazilian religions – as well as agnostics and atheists to express their views on the place, if any, of religion in public education. I intend to have the case heard before the Court in the first half of next year.

9. The second peculiar feature is the live broadcast on network television of both the oral arguments (hearings) and the discussions and deliberations by the Justices (which in the United States and most of the world is done in closed-door conferences), as well as the proclamation/reading of the opinions of the justices. While somewhat atypical, it is part of the Brazilian tradition that with the exceptions specified in law, most court proceedings in Brazil, including the phase of discussion and deliberation, are public. What is very particular in regards to the Supreme Court is the live broadcast on television. There are many critics of this model, on the grounds that visibility makes it difficult to build consensus and carries the risk of undue politicization, to the extent that the Justices, in a way, may be influenced by the audience of public opinion. In reality, the biggest problem is that the opinion of Justices became longer, as demonstrated in an empirical survey undertook for a doctoral dissertation that I advise.

10. Despite some disadvantages of live broadcasting, I think the benefits outweigh the harms. Brazil is a country where the social imaginary assumes that behind every closed door murky transactions are taking place. In this context, the image of 11 judges debating in an intense – and generally civil – fashion to bring forth a solution is good for the justice system in general. The increased visibility and a certain didactic nature of court sessions benefits the country’s justice system and legal culture overall.

Part II

THE DIFFERENT ROLES PERFORMED BY THE BRAZILIAN SUPREME COURT

I. THE ROLES OF CONSTITUTIONAL COURTS
11. Supreme courts and constitutional tribunals around the world play, at least potentially, three major roles or functions. The first is the counter-majoritarian role, which is one of the topics most discussed by constitutional theory in the different countries. Secondly, constitutional courts also perform a representative role. This role, which has become particularly relevant in Brazil, has been largely ignored by legal scholarship in general, which seems to be unaware of its existence. Finally, and thirdly, supreme courts and constitutional tribunals may exercise, in certain contexts, the role of enlightened vanguard. The following is a brief note about each of these three functions.

II. THE COUNTER-MAJORITARIAN ROLE

12. The counter-majoritarian role identifies, as is well known, the power of the supreme courts to invalidate laws and normative acts issued by the Legislature and the Executive. The possibility of unelected judges superimposing their interpretation of the Constitution and overriding that of elected public officials was nicknamed "the counter-majoritarian difficulty" (Alexander Bickel, *The least dangerous branch: The Supreme Court at the bar of politics*, 1986, p. 16 et seq. The first edition of the book is from 1962).

13. As noted, this is one of the most studied topics in constitutional theory. Despite the survival of divergent views, it is understood that this is a legitimate role of the courts, especially when they act on behalf of the Constitution, to protect fundamental rights and the rules of the democratic game, even against the will of the majority.

14. In Brazil, the Supreme Court plays this role with parsimony and self-restraint. The number of federal laws declared unconstitutional is relatively low. Here an observation is important: the level of judicialization in the country is very high, because of a comprehensive Constitution, which takes care of a wide variety of matters which, in most countries, is left to legislation and to the majoritarian political process. Issues such as research on embryonic stem cells, racial quotas for admission into public universities, and demarcation of indigenous lands, to name three examples, have had their last chapter
before the Supreme Court. But the existence of judicialization should not be confused with judicial activism.

15. Here it is worth mentioning a distortion that has become highly evident in Brazil. When the law that sanctioned embryonic stem cell research was enacted in Congress, there was little public debate and almost no visibility of the matter. However, when the law was challenged before the Supreme Court, there was a national debate in the media and within society on the subject. That is, in the current Brazilian context, the judicial debate had more exposure and public participation than the legislative debate. As it is intuitive, that is not how it ought to be.

16. Summing up the three cases mentioned above – stem cell research, racial quotas, and demarcation of indigenous lands, despite the judicialization and the public debate that they ignited, the decisions handed down at the end were self-restrained, upholding the laws passed by Congress in the first two examples, as well as the act of the President, in the third. It is true, however, that the cases in which the Supreme Court declares the unconstitutionality of a law, although limited, have high visibility. See two recent examples:

**Example 1.** The Supreme Court declared the law governing the participation of corporations in electoral campaign funding unconstitutional. (Some Justices considered that the right to political participation only applied to persons, not to corporations. Others felt that companies can take part in campaign financing if Congress so decides, but that the law was unconstitutional because it would have been required to impose certain minimum restrictions – such as, for example, that a company that donates funds may not contract with a government that it helped get elected, or that a company that obtained loans from public banks cannot participate in electoral funding.)

**Example 2.** On a case still ongoing, and suspended by a *pedido de vista* ², or request for examination, there are already three opinions for the decriminalization of the possession of marijuana for personal consumption, declaring unconstitutional the law that

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² A request for *vista* is the ability of a judge to suspend the examination of a case that has already started in order to conduct additional examination of the matters.
typifies the conduct as a crime. I myself opined along these lines. This issue has sparked a national debate.

III. THE REPRESENTATIVE ROLE

17. Constitutional courts in general and the Brazilian Supreme Court in particular, play, too, in many situations, a representative role. This means that it acts (i) to meet social demands that were not met in due time by the Legislature, (ii) as well as to make up for absence of specific law in situations of unconstitutional legislative omission.

18. A few examples illustrate what has been stated. The first: in a direct lawsuit, the Supreme Court declared unconstitutional any and all appointment of relatives up to the third degree of family relationship for discretionarily filled positions in the civil service within the three branches. The conventional wisdom would be to require federal and state laws to impose this kind of restriction. However, despite wide public support for such laws, the laws would not come. Thus, the Court interpreted the prohibition from the constitutional principles of administrative morality and impersonality.

19. A second example. There is large public demand in Brazil for reform of the political system. One of the complaints coming from society is the constant switching from one party to another by elected parliamentarians. Congress, however, would not pass legislation restricting this practice. The Supreme Court, in one of its most proactive decisions, understood based on the democratic principle that “party hopping” defrauded the will of the voter. And, consequently, it established that parliamentarians who switched parties after the Court decision would lose their seats.

20. Now an example of representative judicial intervention in light of a failure of Congress to pass laws regulating a non-self-executing constitutional provision. The Brazilian Constitution of 1988 provides for the right of public servants to strike, but it subordinated this right to the prior enactment of a law by the Legislature, dealing with the matter. After 20 years of the Constitution entering into effect, the law had not yet been passed, generating great controversy about the possibility of civil servant strikes and what requirements it should observe. For that reason, the Court itself addressed the matter,
ordering that be applied to public servants, by analogy, the law that deals with strikes in the private sector, until Congress finally acts to pass the law. A curiosity: in view of the multiplication of strikes in the public sector, I myself requested *vista*, or examination, of a case, with the goal of contemplating the creation a forum to negotiate and resolve disputes between the parties to avoid or shorten public sector strikes. Within the options under consideration by me is a Court-issued interim regulation until Congress acts.

21. Finally, in examples that lie between the counter-majoritarian role and representative role decisions of the Supreme Court, the Court has interfered with the implementation of public policies of the executive branch. Along these lines, there are decisions involving the materialization of social rights, in which the court orders active measures such as the provision of drugs, improvement in the state of hospitals and schools, execution of sanitation projects, and renovation of prison facilities, among others.

IV. THE ENLIGHTENED VANGUARD ROLE

22. Finally, in exceptional situations, with great self-restraint and parsimony, constitutional courts should play an enlightened role. In other words: they should promote, in the name of rational values, some measure of civilizational progress and push history further. These are decisions neither properly counter-majoritarian, for they do not involve the invalidation of a specific law; nor representative, for they do not necessarily express the wishes of the majority.

23. Still, they are required to protect fundamental rights and to overcome discriminations and prejudices. Fit in this category the decision of the US Supreme Court in *Brown v. Board of Education*, delegitimizing racial discrimination through segregation in public schools, as well as the decision by the Constitutional Court of South Africa banning the death penalty. In Brazil, this was the case with the decision of the Supreme Court that granted same-sex unions status equal to conventional common-law marriages, paving the way for the marriage of persons of the same sex that soon followed.
24. Recently, the Supreme Court began the judgement of a case involving the right of transgender individuals to be recognized according to their gender identity. This includes social name, pronoun treatment, and use of public bathrooms, to name a few of the relevant issues. Who can protect the rights of such a stigmatized minority if not the Supreme Court? Here too there has been a request for examination on the part of one of my colleagues on the Court and the case is temporarily suspended.

25. One last point before articulating my conclusion. Since I joined the Court, in June 2013, I have sought, in certain cases, to establish an institutional dialogue with Congress. Although, from a formal point of view, it is incumbent on the Supreme Court to have the last word on the interpretation of the Constitution, this responsibility should not mean institutional monologues, much less lead to judicial arrogance. In more than one case where there was omission by the legislator or a vacuum resulting from the declaration of unconstitutionality of a law, I have proposed a solution that would only go into effect 180 days or a year later, so that the Congress could deal with the matter during this time if so desired. The idea has not yet become dominant, but I think it has a reasonable chance of being adopted in some situations.

CONCLUSION

26. The ideas I defend for Brazil are different to some extent from the positions advocated by distinguished authors such as Ran Hirschl, Mark Tushnet, and Jeremy Waldron, the latter two participants in this event. The differences are due in part to the specific reality of Brazil and, in part, to different conceptions of democracy and the roles of the legislative and constitutional courts.

27. I will not have time here to examine the subject in depth. I remark only that, in Brazil, Professor Hirschl’s premise that the Judiciary has become the last refuge of the elites in the democratization of society does not hold true. In Brazil, due to various circumstances, the Judiciary and the Supreme Court itself are generally more
liberal/progressive than the Legislature, where, observers have argued, the influence of economic power has become excessive and distorting of representation.

28. Regarding Professor Waldron’s position, unfortunately there do not exist in Brazil the preconditions ("assumptions") set out by him and that make constitutional jurisdiction expendable or less relevant (personally, I doubt that any country in the world fully meets such conditions, but this is rather another story). As for Prof. Tushnet’s points, I think my defense of institutional dialogues, which in Brazil may have a more real perspective than, for example, in Canada, is closer to his latest view on the matter.

29. Brazil faces many age-old problems. We may have come a long way, but we are still running behind, and in a hurry. For this reason, we must seek solutions and original answers, out of the box. The debate of ideas must be universal, but solutions must be specific. Not everything that I think and said can be universalized. Every nation carries its own history, its circumstances and its challenges. However, in the fortunate words of Albert Einstein, "We cannot solve our problems thinking the same way as we thought when we created them".