

Comparative Political Studies

<http://cps.sagepub.com>

Government Capacities and Policy Making by Decree in Latin America: The Cases of Brazil and Argentina

Gabriel L. Negretto

Comparative Political Studies 2004; 37; 531

DOI: 10.1177/0010414004263663

The online version of this article can be found at:
<http://cps.sagepub.com/cgi/content/abstract/37/5/531>

Published by:

 SAGE Publications

<http://www.sagepublications.com>

Additional services and information for *Comparative Political Studies* can be found at:

Email Alerts: <http://cps.sagepub.com/cgi/alerts>

Subscriptions: <http://cps.sagepub.com/subscriptions>

Reprints: <http://www.sagepub.com/journalsReprints.nav>

Permissions: <http://www.sagepub.com/journalsPermissions.nav>

GOVERNMENT CAPACITIES AND POLICY MAKING BY DECREE IN LATIN AMERICA The Cases of Brazil and Argentina

GABRIEL L. NEGRETTO

Centro de Investigación y Docencia Económicas

What is the effect of constitutional decree authority (CDA) on the policy-making process of a presidential regime? Despite recent efforts to answer this question, there is still much uncertainty in the literature about the extent to which decree powers may allow presidents to control the legislative process. This article argues that in a separation-of-powers system, the existence of CDA effectively enhances executives' ability to act as agenda setters. This capacity, however, is not uniform across all cases. Developing a simple spatial model of decree games, the author argues that the bargaining power of an executive to promote legal changes through decrees varies according to three interrelated factors: decree approval rules, the extent of the executive's partisan support in the legislature, and the strength of the presidential veto. These propositions are supported by a comparative analysis of the process of constitutional design and the implementation of decrees in Brazil and Argentina, two cases presenting significant variation in each of the independent variables.

Keywords: *presidentialism; decree powers; policy making; Latin America; Brazil; Argentina*

Recent institutional studies show that presidential regimes present significant differences in terms of the distribution of powers between presidents and assemblies. These variations are particularly evident in the area of legislative powers. Although some presidential regimes invest execu-

AUTHOR'S NOTE: *I would like to thank Charles Cameron, Kent Eaton, Mark Jones, Fabrice Lehoucq, Eric Magar, Ana María Mustapic, Jorge Vianna Monteiro, Benito Nacif, Jorge Schiavon, Matthew Shugart, Juan Carlos Torre, and two anonymous reviewers of Comparative Political Studies for their comments on a previous version of this article. I am also grateful to the Flora Hewlett Foundation for its financial support during this research.*

COMPARATIVE POLITICAL STUDIES, Vol. 37 No. 5, June 2004 531-562

DOI: 10.1177/0010414004263663

© 2004 Sage Publications

tives with the power only to oppose legislative change, others provide them with a wide array of instruments to promote it, including constitutional authority to initiate new policy by decree. What exactly is the impact of this proactive power on the development of executive-legislative relations?

In spite of different efforts to answer this question, there is still a great deal of uncertainty in the literature about the extent to which decree powers may allow an executive to control the legislative process. This article argues that in separation-of-powers systems, such as presidential regimes, constitutional decree authority (CDA) effectively enhances the ability of executives to introduce policy changes that legislators might not have initiated and might not have approved in the absence of this instrument. This capacity, however, is not uniform across all cases. Developing a simple spatial model of decree games, I show that the greater or lesser bargaining power of an executive to promote legal changes through decrees and control the legislative agenda varies according to three interrelated factors: the rules governing the approval of decrees, the extent of the executive's partisan support in the legislature, and the strength of the presidential veto.

To illustrate the logic behind these propositions, I use Brazil and Argentina as comparative case studies. Both countries incorporated provisions of decree authority in constitutions previously characterized by a large number of actors invested with the power to prevent rapid and radical departures from the status quo. Moreover, both constitutions were made during or immediately after periods of deep economic crisis that made desirable and even necessary drastic changes from the existing patterns of state-led development to market-oriented economics. However, variations in the rules regulating the approval of decrees, in the partisan support of executives, and in the strength of the presidential veto produced different outcomes in terms of the effectiveness of decrees as instruments of policy making. With more demanding requirements for legislative approval, a less solid basis of partisan support in a bicameral legislature, and a weaker veto, executives in Brazil have usually been less able than their Argentine counterparts to promote policy change according to their preferences.

This article is divided into three sections. Section 1 develops a spatial model to understand the impact of institutional variables on the ability of an executive to legislate through decrees. Section 2 explains the origins and implementation of CDA in Brazil from 1989 to 2000. Section 3 provides a parallel analysis of the emergence and use of this power in Argentina from 1983 to 2001. The article concludes with a brief reflection on the normative and positive implications of the preceding analysis from the point of view of constitutional design.

CONSTITUTIONAL DECREE AUTHORITY

The most accepted interpretation of “government by decree” in new democracies associated this practice with the challenges faced by countries experiencing “dual” transitions from authoritarianism to democracy and from statist to market economies. Observing that since the mid-1980s, democratizing countries such as Bolivia, Argentina, Peru, and Brazil have adopted stabilization plans and structural reforms by decree, students of democratic transitions and economic reform reached an almost unanimous consensus in seeing in the practice of *decretismo* an absolute impediment to the consolidation of representative institutions (Haggard & Kaufman, 1995; O’Donnell, 1994; Przeworski, 1991).

The early studies on legislation by decree raised an important normative concern. It is clear that in a democratic regime, the process of lawmaking should not be in the hands of a unipersonal and nondeliberative body. The main problem with this literature, however, was its lack of an empirical and positive analysis about the causes that led to the initiation of policy by decree in certain contexts or about the extent to which executives were in fact using this instrument to legislate in a unilateral manner. On one hand, no distinction was made between the cases in which the executives were using decrees of legislative content on a de facto basis and those in which executives were acting under explicit constitutional provisions or under legislative or judicial authorization. On the other hand, when the use of decree powers was validated by the constitution or by some judicial doctrine, those studies did not consider how institutional variations might affect the ability of executives to impose their policy preferences. Whatever the case, the predominant interpretation assumed that the use of decrees of legislative content represented a form of unilateral policy making by executives.

It was not until the works of Matthew Shugart, John Carey, and Scott Mainwaring that a systematic effort was made to compare variations in the legislative authority of executives across countries (Carey & Shugart, 1998; Mainwaring & Shugart, 1997; Shugart & Carey, 1992). These authors showed that decrees of legislative content are often delegated to executives by legislators or used with perfect legality under the authorization of explicit constitutional provisions. Moreover, Shugart and Carey proposed, against the conventional view, that legislators themselves may support the creation of constitutional provisions authorizing the use of decrees, particularly when they belong to parties with weak internal discipline and localist orientations (Shugart & Carey, 1992, pp. 174-193; Shugart, 1998).

This line of research has also noticed that the total strength of presidents over policy results from the interaction between the constitutional and

partisan legislative powers of executives. In this sense, Mainwaring and Shugart (1997, p. 395) indicate that the potential dominance of presidents invested with substantive legislative powers may not be fully realized if the presidents' parties hold small minorities or, holding pluralities or majorities in the legislature, they are highly fractionalized and undisciplined. More specifically, and against the image of executive despotism often associated with CDA, Carey and Shugart (1998, p. 9) argue that this power will not allow executives to impose their policy preferences against the opposition of cohesive legislative majorities, particularly when the former lack strong reactive powers to veto adverse decisions by the legislature.

In spite of these contributions, there is still a great deal of uncertainty about the extent to which executives are able to use decrees to manipulate or even dominate the legislative agenda. In this sense, along with the idea that the constitutional powers of an executive may not be as effective at low levels of partisan powers, Mainwaring and Shugart (1997) also note that "presidents with substantial legislative powers may have a significant influence over legislators even if their party lacks a legislative majority—indeed *even* [italics added] if their party is a minor one" (p. 41).¹ Moreover, even though CDA by itself is not supposed to create executive dominance in the legislative process, case studies about countries with very different institutional configurations seem to indicate that in practice, because of either the fragmentation of the assemblies or the costs implied in reversing decrees, it threatens the ability of legislators to participate meaningfully in the policy process (Eaton, 2000, p. 362; Ferreira Rubio & Goretti, 1998b; Power, 1998).

An important question, then, remains without a clear answer: What specific conditions weaken or strengthen the constitutional capacity of an executive to promote policy change through decrees? The purpose of this article is precisely to contribute to this debate by showing, in a comparative perspective, how the relative capacity of an executive to control the legislative agenda by means of decrees is subject to variations depending on the particular interaction between the rules for the approval of these instruments, the extent of partisan support of the executive in the legislature, and the number of legislative votes required to override a presidential veto. To justify this proposition, I start with a positive analysis of the nature and working of CDA.

CONCEPT

This article focuses on a particular type of decree that Carey and Shugart (1998, p. 13) have identified as "constitutional decree authority," that is, the

1. On this point, see also Mainwaring (1999, p. 357, note 2).

constitutional capacity of an executive to issue decrees of legislative content without a previous delegation by the legislature.² From a legal point of view, there are three defining characteristics of CDA: First, it finds explicit recognition in the constitution or in a judicial doctrine formulated by a constitutional court; second, it is supposed to proceed only under circumstances of extreme urgency that make it impossible or highly inconvenient to follow ordinary lawmaking procedures; and third, it allows an executive to initiate policy changes that become effective as law without previous deliberation by the assembly.³

In most constitutions, the existence of some exceptional or critical situation appears as the *raison d'être* of CDA. This situation generally refers to a domestic crisis, usually economic, that requires an immediate solution, and the legislative assembly is either unable to act or its action would be inappropriate given the urgency of the circumstances.⁴ The constitutional requirement that CDA should proceed only under circumstances of extreme urgency does not mean, of course, that it would be used only when a real emergency exists. Because an executive is often the one who declares the existence of an emergency, he or she has ample ground to manipulate the facts justifying the extent of the emergency. This in itself constitutes an important advantage for an executive.⁵

The second important characteristic of this type of decree is that once issued, it produces an immediate change in the legislative status quo without the assembly having the opportunity to discuss *ex ante* the merits of a proposal.⁶ This trait differentiates CDA not only (and obviously) from the

2. CDA must also be differentiated from other types of executive orders, such as administrative decrees, which regulate matters of the exclusive competence of an executive as chief of an administration, and regulatory decrees, which fill out the details necessary for the implementation of laws passed by a legislative assembly.

3. This characterization of CDA departs from the one provided by Carey and Shugart in that they include in the category cases in which an assembly has the opportunity to debate a measure before it takes effect, but it becomes law if legislators take no action.

4. In this sense, see the constitutions of Argentina (article 99.3), Brazil (article 62), Chile (article 32.22), Colombia (articles 213 and 215), and Peru (article 118, § 19).

5. There is in this sense an important analogy between CDA and so-called emergency powers. Typical emergency powers (state of siege, martial law, etc.) allude to the authority of an executive to suspend constitutional guarantees in times of political unrest and do not usually include the possibility of initiating policy by means of general laws (although there are exceptions, such as the state of emergency of article 213 of the Colombian constitution). Both types of decisions, however, belong to the type of exceptional measure that allows an executive to temporarily suspend the normal working of the constitution in times of crisis.

6. Strictly speaking, delegated decree authority shares with CDA this characteristic in the sense that once an assembly delegates legislative powers in a certain area, an executive can use decrees to implement policy changes that also have the immediate force of law. The important

authority presidents may have to submit bills to assemblies but also from other forms of "proposal power," which, like decrees, may also enhance the capacity of executives to have their proposals accepted as new laws even if legislative majorities prefer different policies to the status quo.

A typical form of agenda power found in both parliamentary and presidential systems is the ability of an executive to submit a bill that the assembly must vote within a certain time limit and/or under closed or restricted rules of amendment. Several presidents in Latin America, for instance, have these powers when they propose budget laws or when they are allowed to submit bills for "urgent" treatment. Moreover, in some of these cases, the constitutions establish that the proposals become new laws if the assemblies fail to act within constitutionally defined time limits.⁷ The similarity between decree authority and these forms of agenda power is that in both cases, an executive acts as an agenda setter and the legislature as a veto player, somehow reversing the order in which proposals are supposed to be made in separation-of-powers systems (Huber, 1996, p. 183; Tsebelis, 1995, 2002, p. 67). The important difference is that only decrees allow an executive to enact new policy without previous legislative intervention.

From this point of view, the main effect of CDA is to force an assembly to take action *ex post*, choosing not between the status quo ante and a proposal but between a new policy and the reversionary outcome that would obtain when the decree is rejected or amended after it produces legal effects. This feature alone makes decree authority the most powerful form of agenda power. If legislators prefer the status quo to a decree but the latter to the reversionary outcome, the decree would stand. Moreover, even if legislators prefer the reversionary policy to the decree and they are able to repeal it, the decree would also stand if the costs of rejection outweigh the costs of acceptance, as is often the case with measures whose effects are immediate and imply radical departures from the status quo.⁸ These general advantages notwithstanding, the extent to which CDA can be used to control the legislative agenda is subject to variations.

difference, of course, is that before a delegation, an assembly has the opportunity, which it lacks in the case of CDA, to discuss the scope and limits of the use of decree powers.

7. See, in this sense, the constitutions of Chile (article 64), Paraguay (article 210), and Uruguay (article 168).

8. This is the case with measures adopted in the context of anti-inflationary plans, such as the creation of a new currency.

VARIATIONS

Two types of rules matter to measure the power of an executive to have a decree approved in the form it was originally proposed. The first, and most obvious, is whether the assembly can simply accept or reject the decree as a take-it-or-leave-it proposal (closed rule) or whether it can also amend the decree through a new bill (open rule). The second important rule is the one that defines what constitutes legislative "consent" after a decree has been issued. There are two possibilities. One is the rule of explicit approval, which means that a decree stands as the existing legal policy if and only if it receives an affirmative vote from the legislative assembly. In this case, legislative inaction after some constitutionally defined time limit implies the rejection of the measure and the invalidation of the decree. Another is the rule of tacit approval, according to which a decree becomes a new law unless the legislative assembly explicitly rejects the measure. This means, in other words, that mere legislative inaction is sufficient to let the decree stand as a regular law.

Whether the rules regulating the approval of decrees take one or the other form has the most significant consequences in terms of the capacity of an executive to change the status quo and the ability of legislators to limit or control executive initiatives. Although open rules allow legislators to choose between rejecting, approving, or amending a decree, closed rules force legislators to choose between only the decree and the reversionary outcome that results from rejecting the decree after it produces legal effects. The rule of tacit approval requires only the absence of majority opposition to sustain a decree in its original form, whereas the rule of explicit approval demands majority support in the legislature to convert a decree into a permanent law.

To illustrate the impact of these rules, let us imagine an executive and a legislature bargaining over economic policy in one dimension, say, how far to go from a state-led to a market-led economy measured by the number of enterprises to be privatized. It is assumed that each policy maker has a single most preferred policy along this dimension and that the utility derived from other policy alternatives declines symmetrically as they move further away from the ideal point.⁹ It is also assumed that each player has complete information about the preferences and strategies of the other players. In this model, the executive (E) moves first, proposing a new law by means of a decree. The legislature in turn consists of a chamber of deputies (D) and a senate (S), which have the power to accept or veto the decree (with no amendments) before a time limit, but only if they do it jointly. R is the reversionary

9. In technical terms, it is assumed that preferences are single peaked and symmetric. See Hinich and Munger (1997, pp. 21-49).

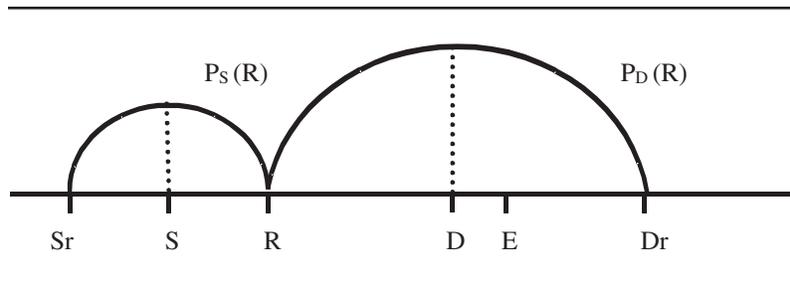


Figure 1. Disagreement about the direction of legislative change.

outcome or the state of the world that would obtain if the proposal were not passed.

Let us start with a distribution of preferences in which some of the main actors disagree about the direction of legislative change. In this model, represented in Figure 1, the ideal policy of the executive is located within the set of policies that the majority of the chamber of deputies prefers to the reversionary outcome. However, one of the players with veto power over legislation, in this case the majority in the senate, would prefer the reversionary policy to any policy that is acceptable to the other players.¹⁰ In other words, the policy preferences of the executive and the majority of deputies on one hand and those of the majority of the senate on the other hand are strictly opposite. This may reflect the fact that the executive's party controls the chamber of deputies but not the senate, whose majority is dominated by opposition parties. How can decrees help the government break the potential stalemate involved in this situation?

Contrary to the usual assumption that decree powers provide an executive with a powerful instrument to break a deadlock situation, an analysis of the rules regulating the approval of decrees shows that this is not always the case. If the rule for legislative consent were that the decree needs an affirmative vote of both chambers to become permanent law, no decree would stand at E because only the majority of the chamber of deputies has an incentive to acquiesce in this situation. The decree, in other words, would be insufficient to induce a legislative change in the direction desired by the government. It is only under the rule of tacit approval that the executive could use the decree to enact policy at E, knowing that deputies would have no interest in joining senators to reject the new policy. Because the agreement of both S and D is

10. Every time I refer to legislative majorities, I assume that they are formed around the preferences of the party that includes the median legislator in the chamber.

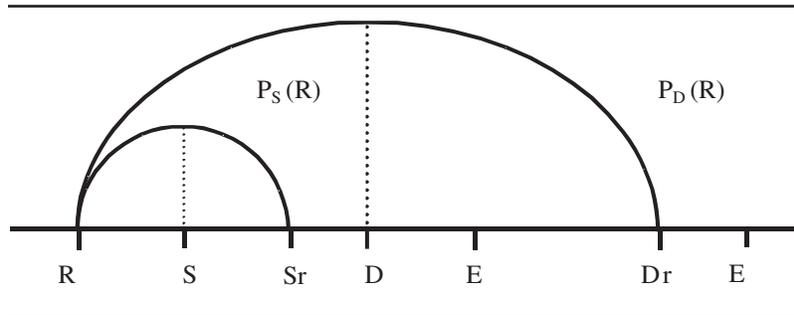


Figure 2. Disagreement about the extent of legislative change.

required to pass a repeal law, there would be no rejection, and the executive would obtain his or her most preferred outcome.

Suppose now a different distribution of preferences, represented in Figure 2, in which all policy makers agree on changing the status quo in the same direction but disagree on the extent of the change. Similar to the previous case, the ideal policy of the executive, E , is located within the preferred set of policies of the legislative majority in the chamber of deputies but outside the set of policies the legislative majority in the senate prefers to the reversionary outcome. Under this configuration of preferences, however, no potential stalemate is involved, and the conflict is restricted to how moderate or radical the legislative change would be.

The equilibrium outcomes are similar to those of the previous model. Under the rule of explicit approval, no decree would stand at E , because only the legislative majority in the chamber of deputies has an incentive to acquiesce. In this situation, however, the executive can obtain the approval of both chambers by locating the policy enacted by the decree at a point at which a majority of senators are indifferent between accepting the executive's proposal or rejecting it, in this case S_r . Just as in the previous model, only the rule of tacit approval would allow the executive to enact policy at his or her ideal point (E), because deputies would have no incentive in joining senators to reject the new policy.

How would outcomes change if the executive wants a more radical move away from the status quo, say at E' ? Unlike in the previous examples, the ideal policy of the executive now stands outside the set of policies that both chambers prefer to the reversionary outcome, probably reflecting the fact that a party or parties different from the executive's control the legislative majority in both chambers. Under the rule of explicit approval, no decree at

point E' would stand, and, reasoning by backward induction, the best move for the executive is to enact policy, as in the previous example, at point Sr. Under the rule of tacit approval, the decree would not stand at E' either, but in this case, the executive could choose a policy much closer to his or her preferences, say at Dr, at which deputies are indifferent between accepting or rejecting the executive's proposal.

In a situation in which the preferences of the executive stand outside the range of policies that legislators prefer to the reversionary outcome, it is crucial to consider the interaction between the rule of approval of decrees and the strength of the executive's veto. Say that E' is again the ideal policy of the executive, and he or she has a veto that legislators from opposition parties do not have the votes to override (even if they gather a majority in both chambers). Under the rule of explicit approval, this veto is of no use: The legislative majority of one or both chambers can neutralize it by simply taking no action or by rejecting the decree by means of a resolution not subject to an executive veto. Under the same conditions but using the rule of tacit approval, the executive may be able to enact policy at E'. Because the legislature can reject the decree only by means of a new law, the executive would veto it, and policy would stand at his or her ideal point.

Note that these models were based on the assumption that the assembly can only accept or reject the decree without introducing amendments before the expiration of the time limit. If amendments were allowed (as it is the case in all contemporary democratic constitutions with decree powers), legislators would have more capacity to control executive initiatives than in the previous examples.¹¹ A legislative majority, for instance, could counteract by offering the executive an option between a modified version of the decree (say, at point Sr) or the reversionary outcome. In this case, the executive could only impose his ideal policy—or something close to it—by means of a line-item veto that those who oppose the decree in the legislature do not have the votes to override. But even in this case, if the decree is subject to the rule of explicit approval, legislators could avoid the veto by simply not acting. In this way, the executive might be forced to issue a new decree including the modifications that legislators would require to accept the proposal.

The institutional implications of this spatial analysis are quite important. In the first place, it shows that CDA effectively provides the executive with a first-mover advantage that he can use to manipulate the agenda by anticipating the reactions of legislators. This advantage, however, can rarely be used to pass legislation that is outside the set of policies that a legislative majority

11. Only the Brazilian constitution of 1967, enacted by a military dictatorship, incorporated decree powers subject to both closed rule and tacit approval.

prefers to the reversion point. In fact, the only situation in which the executive might literally impose his preferences against an opposing legislative majority may occur when (a) the decree stands under the rule of tacit approval and (b) the executive has a veto that an opposing legislative majority is unable to override. When these conditions are met, we may indeed see that CDA could give executives a significant influence over policy, even if their parties hold only a minority of seats in the legislature.

The second important implication of the model is that the relative capacity of the executive to use decrees to control the agenda is a function not only of the rules for approval but also of the structure of the legislature and the partisan interests represented in it. When the legislature is bicameral and each chamber represents different preferences regarding the direction or the extension of legislative change, the ability of legislators to coordinate their action to approve or reject a decree is greatly diminished. However, the power of the executive as an agenda setter in these circumstances is considerably weaker under the rule of explicit approval than under the rule of tacit approval. Whenever a decree needs the affirmative vote of the legislature to become new law and the legislature is bicameral, the executive would need partisan support in both chambers to let the decree stand. If, on the contrary, a decree becomes new law in the absence of opposition, the executive would need partisan support in only one chamber to sustain the decree.¹²

Finally, although the strength and nature of the veto power of an executive matters to protect a decree from the possible reversal or modification of an opposing majority in the legislature, its importance might vary according to the rule of approval. If an opposition party or coalition has the votes to reject a decree but not to override a veto, an executive can always threaten to use it to maintain the new policy. However, if the decree stands under the rule of explicit approval, the veto is of no use because legislative opposition in only one chamber can deprive the executive of the opportunity to use it. Legislators cannot use this strategy under the rule of tacit approval, because they need to pass a new law to reject or amend the decree that is in turn subject to a presidential veto.

The cases of Brazil and Argentina present an optimal degree of variation to understand the working of CDA under different institutional configurations. Both Brazil and Argentina have incorporated this instrument in constitutions characterized by extensive separation-of-powers schemes that include not only a division between executive and legislature but also bicameralism. At the same time, both countries provide for electoral mecha-

12. In other words, only under the rule of explicit approval, the power of the executive as an agenda setter diminishes with the addition of more veto players in the legislature.

nisms under which a single, unified party would rarely control those separated powers.¹³ Each constitution, however, provides for different rules to regulate the use of decrees, creates different thresholds to override a presidential veto, and is meant to work under party structures and forms of party organization that have different impacts on the representation and support of the executives' parties in the legislatures. As I will show, these variations have had an enormous impact on the ability of Brazilian and Argentinian executives to promote policy change through decrees and on the capacity of legislators to share or control executive initiatives.

CDA IN BRAZIL: EXPLICIT APPROVAL, LOW PARTISAN POWERS, AND WEAK VETO

The current form of decree authority in Brazil was created by the constitution of 1988, which in contrast to the regulation of CDA under the 1967 constitution removed restrictions on amendments by Congress and substituted the rule of tacit approval by the rule of explicit approval.¹⁴ According to article 62 of the 1988 constitution, in cases of "relevance" and "urgency," the president may issue "provisional measures" (*medidas provisórias*, or MPs) with the force of law, which must be submitted immediately to congress. In its original version (valid for the whole period considered in this article) this article established that if decrees were not approved within 30 days, they would lose efficacy from the day they were issued. Since September 2001, this time limit has been extended to 60 days, subject to a one-time renewal.

Compared with the period from 1946 to 1964, the constitutional change of 1988 had a deep impact on the legislative process in Brazil. The new constitution strengthened the lawmaking powers of Congress by lowering the veto override (for both a total and partial veto) from two thirds to an absolute majority of a joint session of congress. At the same time, however, it reinforced the proactive legislative powers of the executive. The constitution of 1988 provided the president not only with the authority to give priority to government bills (article 64) but also, and more crucially, with the capacity to initiate new policy by decrees (article 62). As a result of these powers, presidents have increased their participation in lawmaking, particularly in the area

13. Using the terms of Gary Cox and Mathew McCubbins (2001), Brazil and Argentina combine a high level of separation of powers with a high level of separation of purpose.

14. The first constitution in Brazil that incorporated legislative decrees was the authoritarian constitution of 1937. They were eliminated from the constitution of 1946 and reintroduced by the military in 1967.

Table 1
 Medidas Provisórias (MPs) in Brazil, 1989 to 2000

| MPs | Sarney (Jan. 1989– Mar. 1990) | Collor (Mar. 1990– Oct. 1992) | Franco (Oct. 1992– Dec. 1994) | Cardoso, First Term (Jan. 1995– Dec. 1998) | Cardoso, Second Term (Jan. 1999– Dec. 2000) | Total (1989– 2000) |
|--------------------------------|-------------------------------------|-------------------------------------|-------------------------------------|---|--|-----------------------------|
| Total per period | 133 | 164 | 506 | 2,612 | 2,121 | 5,536 |
| Original | 110 | 89 | 142 | 160 | 70 | 571 |
| Reissued | 23 | 75 | 364 | 2,452 | 2,051 | 4,965 (90%) ^a |
| Reissued with modifications | 2 | 22 | 50 | 454 | 222 | 750 (15%) |
| Expired ^b | 5 | 5 | 15 | 3 | 2 | 30 (5%) ^c |
| Rejected | 9 | 11 | — | 1 | — | 21 (4%) ^c |
| Made into laws | 79 | 69 | 74 | 101 | 55 | 378 (66%) ^c |
| Amended | 40 | 47 | 28 | 36 | 5 | 156 (41%) |
| Vetoes | 8 | 19 | 7 | 13 | 2 | 49 (13%) |

Source: Based on Casa Civil da Presidência da República (<http://www.planalto.gov.br>), Amorim Neto and Tafner (2002, p. 10), and Reich (2002, p. 13).

a. Percentage calculated from the total number (original plus reissued) of decrees.

b. MPs that were not reissued after the expiration of the deadline for approval.

c. Percentage calculated from the original decrees.

of economic policy, from 43% in the period from 1946 to 1964 to 86% between 1989 and 1997 (Figueiredo & Limongi, 2000).

In spite of this observation, one needs to look more closely at legislation by decree in Brazil to compare the impact of CDA since 1988 not only with previous periods in this country but also with other countries that incorporate this instrument under different institutional variables. Table 1 shows the startling number of MPs issued by Brazilian presidents from January 1989 to December 2000: 5,536. However, only 571 (10%) correspond to original MPs. The rest (90%) were decrees that were reissued after the 30-day period initially established for congressional consideration expired.

According to the spatial model presented in this article, when decree authority is subject to the rule of explicit approval, as in Brazil, one should expect a relatively weak capacity of the president to make his decrees stand as new law, unless he has strong partisan support in the legislature. This asser-

tion, however, is challenged by the practice of decree reiteration, which was admitted in Brazil until amendment 32/2001 prohibited reissuing an MP whose term for approval has expired.¹⁵ If the president had an unlimited capacity to reissue a decree after the deadline for approval passed, then he may have had a strong agenda power, even if his party lacked a majority of seats in the legislature. Taking this perspective, authors such as Figueiredo and Limongi (1997, p. 141) argue that the reiteration of decrees *de facto* transformed the rule of explicit approval into one of tacit approval under which presidents could legislate without majority support by simply obstructing a vote on an MP.

This interpretation is only partially correct. The ability to reissue decrees certainly expanded the options available to the president because legislative inaction after the continuous reiteration of a decree became then (contrary to the logic of article 62) a form of implicit congressional approval. But it is not accurate to conclude from this that the regular reiteration of decrees was a strategy that presidents in Brazil could impose without sufficient legislative support. In fact, as will be demonstrated, the growing reiteration of decrees in this country since 1990 is impossible to understand without taking into account the acquiescence of Congress to this practice.

In the first place, although President Sarney initiated the practice by reissuing MP 29/89, a special congressional committee accepted its constitutional validity in March 1989. In May of that year, Congress approved Resolution 1 to regulate the review process of MPs. Being silent on the issue, it implicitly ratified the previous decision allowing the president to reissue MPs. However, the same resolution also established a mechanism for the approval of decrees that (consistent with the logic of article 62) would make difficult their reiteration by the sole decision of the executive.

According to Resolution 1/89 (still valid in this respect), decrees are subject to the two-stage review of a joint committee.¹⁶ In the first stage, the committee can recommend the admission or rejection of an MP according to whether it fulfills the requirements of relevance and urgency. If the report recommends rejection, a floor vote by simple majority is needed to confirm the decision within 2 days. And in case of rejection at this stage, the president is forced to accept the congressional decision: He can neither veto it nor appeal to the courts.

15. See the text of the amendment at <http://www.planalto.gov.br>.

16. It should be noted that congress has increasingly relied on an informal review process in which the mixed committee rarely meets as such. This practice, however, does not change the logic of the process in terms of the ability of legislators to control executive initiatives by means of rejection or amendment.

In the second stage, the committee may recommend the approval of the MP as it was originally issued, the approval of an amended version by means of a conversion bill, or its rejection. If the committee recommends the approval of the MP with amendments, a conversion bill must be passed by a floor vote, and the president is able to veto the bill by means of a (usually partial) veto. But should the committee vote for rejection, the decree immediately loses legal force, and the president can neither veto the decision nor (after a ruling of the Supreme Court on this matter on June 1990) reissue the decree.¹⁷

In sum, legislators in Brazil can reject an MP at any time without facing a presidential veto or amend an MP by gathering a veto-proof majority in both chambers. Under this process, presidents may have attempted to inundate Congress with MPs legislators did not have the time to review or even resort to obstructionist tactics to prevent a congressional vote that was expected to reject or substantially amend a decree. But it is unlikely that even the most resolute president could continuously use this strategy to impose policies far off the preferences of the median legislator in Congress.

Brazilian legislators did not reject decrees very often, as indicated in Table 1.¹⁸ But they could and did resort to this alternative when it was necessary to deter a confrontational president. Such was the case with President Collor, who almost stopped reissuing decrees after having 10 MPs rejected between mid-1990 and early 1991.¹⁹ At the same time, Congress could and frequently did control executive initiatives by approving MPs with amendments. Why, then, would legislators sometimes prefer the reiteration of decrees to explicit votes on them? There are several reasons.

The first reason was to avoid the political responsibility of approving certain policies that hurt important social interests but of whose success legislators were uncertain *ex ante*. According to Nelson Jobim (2000), a former legislator and firsthand witness of the creation and early implementation of MPs, this was one of the main motivations for not even considering (at least not initially) socially unpopular economic policies, such as those curbing wage increases or cutting public spending usually incorporated in stabilization plans. In his words, "since the failure of Collor's plan (late 1990s), congress only converted economic measures into law once their success was

17. In the informal review process, the acceptance or rejection is voted separately in each chamber, and the rejection of only one chamber is sufficient to produce the fall of the MP.

18. This was in part because they had to then regulate the legal relations affected while the decree was in force.

19. In contrast to the 72 MPs reissued in 1990, Collor resorted to this practice only three times from 1991 to 1992. In addition to rejections, Collor was also restrained by a proposal in Congress intended to prohibit the unlimited reissuing of decrees. See note 24.

guaranteed” (pp. 4-5). Evidence of this strategy is the dramatic increase in the number of reissued MPs after Collor, most of them part of stabilization plans implemented during the presidencies of Franco and Cardoso.²⁰

A second reason to let the president reissue decrees was that legislators disagreed with parts of an MP but refused to vote on it as a way to induce the executive to introduce modifications in subsequent enactments of the measure. Nelson Jobim (2000) also provides evidence of this type of legislative behavior, stating that on different occasions, “congress received the provisional measure, convoked the joint committee to initiate the review process, and the parliamentary majority asked the executive to reissue the MP *with alterations* already established in a conversion bill” (p. 5).

In fact, this is how the practice of decree reiteration started: President Sarney reissued MP 29/89 (as MP 39) because the legislative majority did not support the extinction of the Ministry of Agrarian Reform mandated by the original measure. As a concession, the second decree created a special secretary of agrarian reform within the Ministry of Agriculture, and it was finally approved (Figueiredo & Limongi, 1999, p. 8).

Legislators supported this practice under different circumstances. When executive-legislative relations were conflictive, legislators forced the president to reissue a decree with alterations by threatening with rejection or by exploiting the president’s desire to have a particular MP approved as a regular law (as frequently occurred with privatization programs). This was the case during Collor’s presidency, when as shown in Table 1, 22 of the 75 (29%) reissued decrees included modifications to the original text. In consensual coalition governments, however, reissuing decrees with alterations functioned as a cooperative strategy to adjust (ex post) the preferences of the president with those of his coalition partners in congress. Amorim Neto and Tafner (2002) have demonstrated quite convincingly that this is the way in which the practice of reissuing decrees with alterations worked during the first and second presidencies of Cardoso.

A final, perhaps obvious, reason why legislators preferred the continuous reiteration of decrees over explicit decisions on them was to let the president regulate matters of no or scarce interest to them. This happened with highly technical issues legislators had neither the expertise nor the will to consider or with specific administrative matters that they saw as part of the executive’s domain (Amorim Neto & Tafner, 2002; Reich, 2002). Legislative inaction worked here as a time-saving strategy.

20. In this sense, it should be noted that central measures of Cardoso’s 1994 stabilization plan, such as the MPs creating the new currency (the real), were approved 1 year after being constantly reissued, precisely when both the general public and the political class agreed on their resounding success.

In other words, although reissued decrees may have sometimes derived from acts of presidential imposition, more often than not, the practice reflected legislative preferences. And this is the ultimate difference between decrees reissued under the rule of explicit approval and decrees subject to the rule of tacit approval. Although congressional tolerance to the continuous reiteration of an MP worked in Brazil as a form of implicit consent, it was under the control of legislators to decide when they wanted to express approval in this manner. Legislators do not have this choice under the rule of tacit approval.

Along with decree reiteration, another important feature of policy making by decree in Brazil has been the amendment process. Table 1 shows that although 378 (64.5%) of all original MPs were made into law, 156 of them (41%) were approved with amendments. Not all conversion bills, of course, survived presidential vetoes. But most (87%) did. Moreover, according to data provided by Reich (2002, p. 20), a large percentage of the conversion bills that escaped presidential vetoes were located in politically sensitive areas, such as transfers of funds between the central government and subnational governments (75%), monetary conversions (66%), and the indexation of prices and wages (55.5%).

This leads to the question of how the use of MPs has been related to the composition of legislative majorities. Brazilian presidents need majority support in each chamber of a bicameral Congress to pass ordinary legislation, convert their MPs into laws, and sustain vetoes. They have had a difficult time, however, obtaining this level of legislative support. Table 2 shows that since the beginning of the democratic transition, the president's party has never had an independent majority in either chamber.

This is caused by an electoral system that encourages the representation of different party interests in separate branches of government: nonconcurrent electoral cycles (until 1994), an upper chamber with staggered terms, a majority runoff election for president, and a system of proportional representation for the election of deputies that combines features such as open lists, high district magnitudes, and a low threshold of entry.²¹ As a result of these rules, between 1989 and 1999, the effective number of legislative parties fluctuated between 5.5 and 9.4 (Amorim Neto, 2002, p. 59).

The percentage of seats of the president's party in Congress is, of course, only a rough indicator of the real extent of legislative support an executive may have. Even minority presidents can and do build multiparty coalitions in Congress to legislate, as has been the case in Brazil since 1989. Only Collor

21. For a list of the different factors that affect the number of parties and their levels of internal discipline and cohesion, see Mainwaring and Shugart (1997).

Table 2
Percentage of Seats of President's Party in Congress

| President | Chamber of Deputies | Senate |
|-----------------------------|---------------------|-----------------|
| Sarney (PFL) ^a | 1986-1990: 24.1 | 1987-1990: 22.6 |
| Collor (PRN) | 1990-1992: 7.9 | 1991-1992: 5.8 |
| Franco ^b | NA | NA |
| Cardoso, first term (PSDB) | 1994-1998: 12.1 | 1994-1998: 13.6 |
| Cardoso, second term (PSDB) | 1998-2002: 19.3 | 1998-2002: 19.7 |

Source: Political Database of the Americas.

Note: PFL = Party of the Liberal Front; PRN = Party of National Reconstruction; NA = not applicable; PSDB = Brazilian Social-Democratic Party.

a. Although part of a ticket supported by the Party of the Brazilian Democratic Movement, Sarney belonged to the PFL.

b. Franco became president after Collor's impeachment in 1992. He relied on an ad hoc coalition and was not identified with a particular party.

lost a majority in both chambers in 1992, and Franco lost his majority in the chamber of deputies between August 1993 and December 1994.

The crucial problem, however, is the ability not just to form coalitions but to obtain from them reliable sources of support. According to recent studies, although electoral rules in Brazil promote uncohesive parties, the centralized control that congressional party leaders have over voting procedures and access to patronage allow them to prevent acts of indiscipline. Following this argument, Figueiredo and Limongi (2000) indicate that between 1988 and 1997, presidents won the large majority of roll-call votes.

But this is a controversial conclusion. As Ames (2001, pp. 188-204) points out, roll-call votes reflect neither the cases of presidential proposals that never reach floor votes because of legislative opposition nor the costs in terms of time and material resources implied in obtaining majority support. Moreover, even accepting roll-call votes as adequate measures of party discipline, other studies show a significant variation in the level of support that Brazilian presidents obtained from each of the major partners of the presidential coalitions. Amorim Neto (2002), for instance, finds that relatively high levels of party discipline (higher than, say, 70%) among the main partners of the presidential coalition correspond only to the presidencies of Cardoso.

A comparison of policy making by decree under Sarney and Collor on one hand and under Cardoso on the other is illustrative of the variance in the partisan support that each president obtained from his government coalition. Having minority representation in Congress, a crucial challenge for any Brazilian president has been to build a consensual legislative agenda with the median

party in congress, a role that since the beginning of the transition was occupied by the Party of the Brazilian Democratic Movement (PMDB).²² But although the PMDB was regularly part of every presidential coalition (except for Collor's since October 1990), the relations between this party and the president's party were not always cooperative in crucial issues of economic policy.

The stabilization and, above all, the market-oriented reform plans of Sarney and Collor suffered several modifications due to the opposition of majorities within the PMDB whose preferences on economic policy were generally close to the status quo of state-led economics (Mainwaring, 1999). In January 1989, in a context of growing inflation and fiscal crisis, Sarney issued the Summer Plan, a package of MPs implementing a new currency and some measures of administrative reform and privatization. Although the creation of a new currency was approved, the plan, consisting of 17 MPs, was significantly altered during the process. The 2 MPs dealing with the dissolution and privatization of state enterprises were rejected. From the rest of the decrees dealing with fiscal adjustment and public sector reform, 1 was re-edited with alterations to satisfy legislators demands, 1 abrogated at request of legislators, and 2 issued to modify previous MPs, also required by legislators.²³ At the end of his period, although 79 (72%) of Sarney's original MPs were approved, only 39 (49%) of those survived congressional amendments.

Collor's presidency is even more representative of the costs of policy making by decree without consistent legislative support. With the failure of Sarney's stabilization plans, Brazil entered a hyperinflationary phase. As opposed to his predecessor, Collor intended to use his decree power not only to curb inflation but also to implement an ambitious plan of structural change, including an extensive scheme for privatizations, fiscal reform, economic deregulation, and public administration reform. Given the depth of the economic crisis, Collor managed to secure initial support from the PMDB and other parties to control inflation. However, as initial stabilization measures (including a controversial freeze on bank accounts) failed to produce results, by late 1990, political support for structural change had eroded sharply. The PMDB abandoned the presidential coalition and became an opposition force in Congress.²⁴ From that moment until his impeachment in

22. By *median party*, I mean the party whose location in the policy space is such that its proposals are able to gather majority support in Congress, even if the party does not have a majority status by itself. See Colomer and Negretto (in press).

23. On this process, see Figueiredo and Limongi (1999).

24. In early 1991, the PMDB sponsored (although it ultimately did not pass) the "Jobim law," which intended to limit to one time only the reiteration of MPs not explicitly approved by Congress.

1992, Collor found article 62 of little use to accomplish his initial agenda. After having 11 of 89 (12%) MPs rejected and 47 of 69 (68%) MPs amended by Congress, he decided to give up the strategy of dictating policy by decree.²⁵

Although complex economic factors probably contributed to the successive failure of anti-inflationary plans in Brazil, it is very likely that the rules regulating the use decrees and the absence of a unified majority supporting the president played an important role in making Brazil one of the latest in initiating and one of the slowest in implementing structural economic reforms in Latin America.²⁶ That the policy choice of the legislative majority was not initially favorable to a drastic departure from state-led to market-led economics is evident from the different restrictions on reform Congress included in the constitution approved in 1988. This constitution discriminated against the participation of foreign companies in different economic activities, established job-for-life security for public employees, and created a state monopoly in such attractive areas for foreign investment as oil and telecommunications. Both Collor and Franco tried to gather congressional support to reform these provisions but failed.

Cardoso's first and second presidencies show an important contrast with those of his predecessors. He obtained solid congressional backing not only for measures of stabilization and fiscal adjustment but also for constitutional amendments in 1995, 1996, and 1997 that made possible a relatively far-reaching program of structural reforms. This program, implemented by both ordinary bills and MPs, included privatizations in the areas of telecommunications, electricity, banking, and transportation as well as important advances in social security and civil service reform (De Souza, 1999).

The main cause of this success is that unlike Sarney or Collor, Cardoso was able to construct a more solid and stable presidential coalition thanks to the approximation between the policy preferences of his party, the Brazilian Social-Democratic Party (PSDB), and the PMDB. By the time of Cardoso's election, both the PSDB (center-left) and the PMDB (center) had abandoned their traditional positions against the basic tenets of market economics and accepted a "neoliberal" program of reform (Mainwaring, 1999). The shift was induced by the popularity gained by Cardoso's economic plan toward the end of Franco's presidency, while Cardoso was economic minister.

In terms of policy making by decree, one can note from Table 1 that although only one of Cardoso's MPs was rejected between 1995 and 2000, most were approved with the lowest percentage (26%) of amendments since

25. Only 13 MPs on relatively uncontroversial issues were issued between 1991 and 1992, in contrast to the 76 MPs implemented in 1990.

26. On an explanation and comparison of the different timing and degrees of implementation of economic reforms in Latin America, see Schiavon (2000).

1989. At the same time, he was the president with the largest number of reissued MPs. As a whole, it seems clear that Congress gave Cardoso ample room to legislate by decree, including the possibility of reissuing MPs without limits. But it is unlikely to see again this form of policy making in the future, even for presidents as able as Cardoso to form stable coalition governments.

By September 2001, after years of criticisms coming from the legal community and the general public about the abuse of MPs, Congress approved a constitutional amendment to restrict the practice of reissuing decrees. Although the time limit for approval has been extended from 30 to 60 days, subject to a one-time renewal, the president is now legally unable to reissue an MP whose term has expired within the same legislative session. This means that after the amendment, somewhat restoring the original spirit of article 62, neither are presidents able to legislate without explicit majority support in Congress nor can legislative majorities avoid direct responsibility in policy making by means of the unlimited reiteration of decrees.²⁷

CDA IN ARGENTINA: TACIT APPROVAL, HIGH PARTISAN POWERS, AND STRONG VETO

Unlike the case of Brazil, the initial use of decrees of legislative content in Argentina was a paraconstitutional practice: They were neither authorized by the existing constitution nor based on congressional delegation. Decrees of legislative content, known in Argentina as “need-and-urgency” decrees (NUDs) were de facto introduced by president Alfonsín of the Radical Party (UCR) a few years after the inauguration of the democratic transition in 1983.²⁸ Only in 1990, after the succession of Alfonsín by Menem of the Partido Justicialista (PJ), were NUDs recognized by the Supreme Court as constitutionally valid instruments of legislation.

In December 1990, on the occasion of deciding the constitutionality of decree 36/90, which created a forced public loan system, the Supreme Court declared the validity of NUDs subject to two conditions: (a) the existence of a “serious social danger” that makes necessary the adoption of rapid measures

27. After Amendment 32, Cardoso issued 101 MPs until the end of his term (December 2002), whereas Lula issued 30 from January to October 2003. In both cases, the large majority of MPs were converted into laws (83 for Cardoso and 23 for Lula). No MP was reissued. Data from Casa Civil da Presidencia da República.

28. The first decree of this kind was the one that launched the so-called Austral plan in 1985, a stabilization package aimed at bringing down inflation. For the use of decrees of legislative content before 1983, see Lugones, Garay, Dugo, and Corcuera (1992).

and (b) that Congress “does not adopt decisions different from the decree on the involved issues of economic policy.”²⁹ This interpretation was clearly beneficial to the president. The social danger requirement was not an important limitation because it is up to the president to determine whether a real emergency exists and what measures are the most appropriate to solve it.³⁰ Moreover, the Supreme Court held that if Congress wanted to reject a decree, it had to pass a new law abrogating it: Mere inaction would implicitly ratify the decree as a valid law.

Because according to the court, Congress could oppose an NUD only by means of a new law, the latter is subject to a presidential veto. This created a crucial strategic advantage for the president in Argentina, who has a veto that requires a two-thirds majority in each chamber to be overridden. In addition, although not initially part of the formal constitution, since the 1960s, the Argentine Supreme Court had considered valid the use of line-item vetoes by the president, subject to the same override requirement (Gelli, 1994).³¹ This means that if legislators wanted to repeal a decree or approve it with amendments, the president was constitutionally empowered to oppose these legislative decisions and sustain the decree in its original form with the support of only a minority of legislators.

The formal incorporation of CDA in the constitution did not take place until the constitutional reform of 1994. According to article 99.3 of the new constitution, “only when exceptional circumstances make it impossible to follow the ordinary lawmaking process established by this constitution, can the executive issue need and urgency decrees insofar as they do not regulate penal, fiscal, electoral or political party matters.” As for the rules of approval, the constitution established that the chief of the cabinet must submit a NUD within 10 days to a permanent bicameral committee, which must send its opinion to the floor for a final decision within another 10 days.³² No restrictions on amendments were imposed. It is not clear, however, what happens if Congress fails to act.

During the negotiations that led to the reform of 1994, whereas negotiators from the UCR demanded the rule of explicit approval, negotiators from the PJ favored the rule of tacit approval (Negretto, 1999). As a result of this lack of agreement between the two main parties, the constituent convention left the issue to be resolved by a future law of Congress. But after the reform

29. See case “Peralta” in *El Derecho*, 1991, Volume 141, pages 519 to 548.

30. The Argentine Supreme Court has traditionally considered these matters as “political questions,” beyond the jurisdiction of judges. See Negretto (1994, pp. 120-133).

31. The line-item veto was finally included in the constitution after the reform of 1994.

32. The chief of the cabinet performs the role of a minister coordinator in the constitution of 1994.

was enacted, this law was never passed, because of the opposition of legislative forces supportive of both president Menem in his second term (1995 to 1999) and President De la Rúa (1999 to 2001).³³ The consequence is that as of this writing (October 2003), the rule of tacit approval established by the Supreme Court in 1990 still today regulates the legal validity of decrees in Argentina.

Note, then, the important contrast between this regulation of CDA and that established in Brazil. Whereas in Brazil legislative majorities are able to reject a decree by a decision that is not subject to a presidential veto, in Argentina, Congress can oppose a decree only by means of a new law subject to a package veto that the president can sustain with the support of only one third of legislators in either the Senate or the Chamber of Deputies. In addition, although the Brazilian president can use a partial veto to oppose the amendments that a conversion bill introduced to a decree, he can sustain it only with the support of a majority in both chambers. In the same situation, the Argentinian president needs, again, only minority support to get rid of the amendments and impose his preferred policy.

Similar to what happened in Brazil, the use of decrees in Argentina increased the average level of presidential initiative in lawmaking, particularly in economic policies related to stabilization plans and market reforms. After the introduction of NUDs, Argentine presidents went from an average of 40% to a level of legislative participation of 53% for Alfonsín, 58% for Menem in the first presidency, and 53% for Menem in the second presidency.³⁴ These percentages, however, are still low compared with those of Brazil. The main reason for this difference is that compared with Brazil, fewer decrees have been issued in Argentina in a longer period of time. Table 3 indicates that even excluding the phenomenon of decree reiteration, presidents in Brazil issued almost as twice as many decrees from 1989 to 2000 than Argentine presidents did from 1983 to 2001.

The second, most important, difference is that although relatively few decrees have been rejected in both countries, Argentina presents a higher number of decrees that became permanent laws according to the initial proposals of the president. To see this, it is sufficient to realize that in Argentina, both legislative inaction and ratification, which represent together 92% of the cases, implied the approval of decrees (in one case implicit and in the other explicit) without amendments. Only 14 of 315 NUDs (4.4%) were modified

33. See *La Nación*, May 10, 2000.

34. Percentages were calculated by adding NUDs to the total number of laws approved in each period that were initiated by the executive. Data were provided by Dirección de Información Parlamentaria, Cámara de Diputados del Congreso de la Nación. For the level of participation of Argentine presidents in legislative initiatives before 1983, see Goretti and Mustapic (1993).

Table 3
Need-and-Urgency Decrees (NUDs) in Argentina, 1983-2001

| | Alfonsín (1983– 1989) | Menem, First Term (1989– 1995) | Menem, Second Term (1995– 1999) | De la Rúa (Dec. 1999– Dec. 2001) | Total (1983– 2001) |
|----------------------------------|-----------------------------|---|--|--|--------------------------|
| NUDs | | | | | |
| Total per president ^a | 11 | 162 | 93 | 49 | 315 |
| Ratified | 4 | 34 | 2 | 1 | 41 (13%) |
| Modified | 1 | 10 | 1 | 2 | 14 (4.4%) |
| Abrogated | 1 | 3 | 4 | 3 | 11 (3.5%) |
| Vetoes ^b | — | 6 | 2 | 1 | 9 (36%) |
| Inaction | 5 | 115 | 86 | 43 | 249 (79%) |

Source: Based on information provided by Dirección de Información Parlamentaria, Cámara de Diputados, Congreso de la Nación Argentina.

a. Except for the period from 1983 to 1989, when the recently created category of NUDs was not regularly used, these numbers reflect only those decrees explicitly recognized by the executive as NUDs. Other authors (Ferreira Rubio & Goretti 1996, 1998a, 1998b) include a significant number of decrees that the executive did not recognize as NUDs but that the authors classify as such because of their legal content. (An important number of decrees not explicitly recognized as NUDs may have invaded exclusive prerogatives of the legislature. However, the legal status of those decrees is controversial. Evidence that these decrees are controversial is that the executive did not have a valid reason, at least not until 1994, to hide their character as NUDs, if they were thought to belong to this category. Given the ample constitutional recognition of NUDs by the Supreme Court in 1990, decrees were more protected from being challenged on legal grounds if they were explicitly issued as NUDs than if they were issued as regular decrees invading legislative jurisdiction. For the purposes of counting the total number of NUDs, it is therefore safer to include only those that the actors involved recognized as such.)

b. The number of vetoes applies to decrees either modified or abrogated by Congress.

by Congress, and not all these amendments survived presidential vetoes. If one takes into account the phenomenon of decrees that have been reissued with alterations in the original or the important number of decrees that have been approved with amendments in Brazil, it seems clear that Argentinian presidents have had a stronger capacity than their Brazilian counterparts to make their policy preferences prevail by means of CDA.

The dynamics of economic reform in both countries may confirm this assertion. Alfonsín was even less committed than Sarney to market reform and used his decree powers to implement a few moderate austerity measures. But a comparison between Collor and Menem in his first presidency is appropriate. In a context of hyperinflation and fiscal crisis, both Collor and Menem aimed at implementing radical stabilization measures and market-oriented structural reforms. In addition, as noted by President Collor and Menem's economic minister, Domingo Cavallo, emergency decrees were

crucial instruments to formulate many of these policies.³⁵ Nevertheless, whereas Menem achieved most of his objectives in a relatively short period of time, Collor did not (Iazetta, 1997).

The reason for this success is that Menem enjoyed not only a broad delegation of legislative powers to proceed to privatizations and public sector reforms but also the passive support of Congress to sustain his decrees in several areas of nondelegated powers, such as tax reform, labor regulations, wage policy, public debt, and trade liberalization, among others (Ferreira Rubio & Goretti, 1998b).³⁶ Collor, on the contrary, relied mainly on CDA and faced significant congressional opposition to have his decrees approved as initially proposed in most of these areas of structural reform.

This contrast shows that apart from the particular design of CDA in Argentina, the relative success of decree legislation in this country should be found in the extent of partisan support of the executive in the legislature. Just as in the case of Brazil, constitutional and electoral rules in Argentina make unified government a very unlikely event. Mainly because of a bicameral system with nonconcurrent electoral cycles and staggered elections for both deputies and senators, only between 1995 and 1997, since the beginning of the transition, did the party of the president control a majority in both chambers of Congress. However, both a system of indirect elections by effective plurality and (since 1994) by qualified plurality for president along with electoral rules for the election of deputies that combine proportional representation with closed lists and moderate district magnitudes have contained the level of party fragmentation in Argentina.

Unlike in Brazil, the effective number parties in Argentina oscillated between a minimum of 2.3 and a maximum of 2.7 in the Senate and a minimum of 2.2 and a maximum of 3.3 in the Chamber of Deputies for the period from 1983 to 1999 (Molinelli, Palanza, & Sin, 1999, pp. 305-306). The main effect of this party system is to reduce the chances of having a minority president in both chambers.

Table 4 shows that the president's party always had either a majority or a large plurality in at least one chamber. In the Chamber of Deputies, in particular, Argentine presidents had since 1983 a level of representation between 45% and 51%. This is exactly the level of partisan support that presidents in

35. See the statements of both actors cited by Power (1998, p. 216) and Ferreira Rubio and Goretti (1998b, p. 36).

36. Two laws of economic reform were passed in 1989 by Congress with the support of the opposition: the Administrative Emergency Act and the Economic Emergency Act. Both laws delegated broad legislative powers to the executive in the area of privatization and public sector reform but under temporal limits that in different matters required the necessary intervention of Congress for renewal.

Table 4
Percentage of Seats of President's Party in Congress

| President | Chamber of Deputies | Senate |
|--------------------|---------------------|-----------------|
| Alfonsín | 1983-1985: 50.8 | 1983-1986: 39.1 |
| | 1985-1987: 51.6 | 1986-1989: 39.1 |
| | 1987-1989: 45.4 | |
| Menem, first term | 1989-1991: 47.2 | 1989-1992: 56.3 |
| | 1991-1993: 45.1 | 1992-1995: 62.5 |
| | 1993-1995: 49.4 | |
| Menem, second term | 1995-1997: 51.0 | 1995-2001: 55.1 |
| | 1997-1999: 46.3 | |
| De la Rúa | 1999-2001: 48.2 | 1999-2001: 29.1 |

Source: Molinelli, Palanza, and Sin (1999).

Argentina need, because the absence of opposition in at least one chamber is sufficient to sustain a decree. Moreover, even in the rare event that opposition forces were able to gather a majority in both chambers, the president's party always had more than the necessary number of votes to sustain a veto and protect the decree from a modification or abrogation by Congress.³⁷

Also crucial for the legislative support of presidents in Argentina is the traditional level of party discipline in the country. Because of the existence of closed party lists and the ability of congressional party leaders to distribute a wide range of material and political resources in the legislature, parties in Argentina are highly disciplined, much more so than in Brazil. In a study of 218 roll-call votes taken in the Chamber of Deputies between 1989 and 1997, Jones (2002) shows that the mean and median levels of relative party discipline for both the PJ and the UCR were always above 94%.

Given the significant representation of the president's party in Congress and the high level of party discipline in Argentina, it is not surprising to find that legislators rarely voted on NUDs. They did so for various reasons. One was to support the executive without taking direct responsibility for policies that may hurt the interests of their constituencies.³⁸ Another was to delegate

37. In this respect, it should be noted that 2 of the 3 NUDs rejected and 4 of the 10 NUDs modified by Congress between 1989 and 1995 suffered presidential vetoes that allowed the president to sustain the decrees in their original forms (Dirección de Información Parlamentaria, Cámara de Diputados de la Nación).

38. Deputy Humberto Roggero (of the PJ) illustrated well this motivation when on the occasion of a decree privatizing airports, he stated, "We cannot ratify such a controversial decree in less than one month before the elections, because it is we who have to face the people who vote for us." See *La Nación*, February 1, 1997.

authority to the president in areas in which legislators were indifferent or had no particular interest in the outcome. A third reason, perhaps the most important, was to avoid an open conflict with the president on policy issues on which legislators did not fully agree with his position. This has been the particularly the case since the first presidency of Menem.

Menem's radical market reforms never quite had the active support of a majority within the PJ. The party was traditionally associated with a statist model of economic management, and many of its constituencies were located among groups (such as workers and public employees) who would be hurt by the new policies. In fact, several indicators confirm that in spite of strong discipline, the PJ was relatively uncohesive on the issue of economic reform. As Mustapic (2002) points out, almost 30% of the vetoes used by Menem during his first presidency were partial vetoes to laws initiated by the executive but amended in Congress with the participation of legislators of the PJ. Many of these vetoes involved laws implementing important economic reforms in the area of privatization.

In this context of intraparty conflict, it is clear why legislators regularly chose inaction in the case of NUDs: Although explicit support could affect the interests of their followers, explicit rejection could jeopardize their own political positions within a disciplined party. This may also explain the paradox of why Menem issued so many NUDs in spite of the seemingly high level of partisan support during his first presidency and in the first half of his second presidency. In the absence of a unified position within the party, Menem decided to avoid ordinary legislative procedures and rely on a "negative" form of party discipline to sustain policy making by decree. To maintain a decree, the president needed only to ask his partisans in Congress to abstain from repealing it.

Menem did not always resort to NUDs to neutralize opposition from his own party. In sensitive areas, such as privatization, the president regularly relied either on delegation or on normal legislation (Llanos, 1998, pp. 764-765). Something similar occurred in the area of labor reform, where the president faced strong opposition from labor unions and their representatives in Congress, all of them members of the PJ (Etchemendy & Palermo, 1998).³⁹ If one contrasts this strategy with other areas of reform, such as taxes and fiscal matters, for which NUDs were regularly used, one can conclude that the president made selective use of these instruments, avoiding them when active opposition from his party or organized interests was likely to arise.⁴⁰

39. The only decree in the area of labor was one regulating strikes. See Etchemendy and Palermo (1998).

40. On the different factors explaining the option between introducing regular bills and changing the status quo by means of decrees, see Magar (2001).

Nevertheless, even when Menem preferred to regulate certain issues by regular laws, he did not hesitate to impose his will on Congress in cases in which his own party withdrew its support. Such was the case of the privatization of airports in 1997, during Menem's second presidency.⁴¹ Although Menem initially wanted to implement this project by statute and explicitly asked his party to approve the bill he sent to Congress, in the end, privatization was made by decree in the absence of explicit support from the PJ.⁴²

The experience of policy making by decree under Menem's successor, De la Rúa (of the UCR-FREPASO), showed that this capacity to control (and eventually impose) the legislative agenda was not related to Menem's decisionist style or to his reformist zeal. Rather, it was structurally induced by the design of CDA and the institutional context in Argentina.

In the midst of a deep economic recession, De la Rúa governed with a very unstable and uncohesive center-left coalition, which had a plurality only in the Chamber of Deputies. The PJ in turn controlled a majority in the Senate and was then decided to oppose unpopular economic policies. In spite of these unfavorable conditions, De la Rúa was able to implement by decree drastic measures of fiscal adjustment and second-generation market reforms not completed under Menem.

From December 1999 to December 2001, De la Rúa issued 49 NUDs, of which only 2 were modified and 3 abrogated. This means that almost 90% of his decrees were sustained in their original forms, including highly controversial measures such as a harsh reduction of salaries in the public sector (May 2000) and a reform to the social security and retirement system in the public sector (December 2000) that even Menem failed to implement because of insufficient support from his party. Both decrees were literally imposed, bypassing solid opposition from the PJ in the Senate and in the Chamber of Deputies, and even from different legislators of the UCR and the FREPASO, who in the end decided to support the president to maintain the coalition.⁴³ It is difficult to imagine a Brazilian president having this capacity to legislate by decree under similar constraints.

41. Something similar occurred in 1996 with the privatization of the public mail service, although this time, the president hid the imposition by invoking the supposed authorization of the law of state reform.

42. See *La Nación*, December 19, 1997.

43. In the case of the reduction of salaries in the public sector, the Senate approved a law abrogating the decree that was later rejected in the Chamber of Deputies with the support of De la Rúa's coalition and the vote of minor center-right parties. See *La Nación*, June 30, 2000.

CONCLUSIONS

Presidential regimes have often been described in the comparative literature along the lines of the U.S. model, in which legislators control the agenda by proposing policy changes that the executive has the power to accept or reject. This picture does not represent the lawmaking process of several presidential regimes where presidents have the power to initiate policy changes by means of decrees. In these cases, it is the executive who acts as an agenda setter and the legislature as a veto player. However, the extent to which executives may effectively use decrees to manipulate the legislative agenda and obtain an agreement as close as possible to their initial preferences is subject to variations.

I have shown that the capacity of an executive to act as an agenda setter varies according to the interaction between three institutional variables: the rule of the approval of decrees, the level of partisan support of the president's party, and the strength of the presidential veto. The dynamics of policy making by decree in Brazil and Argentina support this point. With more demanding requirements for the approval of decrees, lower levels of representation in Congress, and a weaker veto, Brazilian presidents have been less successful than their Argentinean counterparts in transforming urgency decrees into permanent laws according to their preferences.

The preceding study of the effects of CDA in Brazil and Argentina provides an excellent opportunity to offer some reflections on constitutional design. Whether from a normative or a positive point of view, CDA does not seem to be a good choice to improve the quality or the performance of a democratic regime. Once created, decrees of legislative content can be used beyond the conditions for which they were initially incorporated in the constitution. More concretely, from being instruments to be used in cases of real need and urgency, they may become, as they became in Brazil and Argentina, instruments of regular government. The great risk of enshrining these powers in the constitution is, then, that any policy that the government finds important, not only those that put at risk the survival of democracy or the economic system, could be passed by decree. In this manner, decree powers weaken mechanisms of horizontal and vertical accountability, affect the legitimacy of lawmaking in a democratic regime, and undermine the trust of citizens and economic agents on the stability of government decisions.

Moreover, this loss in legitimacy is not necessarily compensated by a more effective system of lawmaking. The formal authority of the executive to initiate policy by decree has often been created to make the decision-making process of a presidential regime more decisive in the presence of multiple veto players in the legislature. However, as the comparison between Argen-

tina and Brazil shows, it not clear that this result is always achieved regardless of other institutional variables.

Ideally, constitutional designers could avoid the incorporation of decree authority to meet crisis situations if potential conflicts of interest between presidents and assemblies are prevented beforehand or if mechanisms of interbranch cooperation are adopted to induce an agreement when conflicts arise. The first option implies providing executives with a more solid base of partisan support by means of concurrent elections and party list electoral systems that reduce the level of party pluralism and enhance party discipline and cohesion. The second option implies promoting collaboration among branches by measures such as investing the executive with moderate agenda powers, lowering the requirements of veto override in the legislature, and eliminating second chambers or reducing their powers to oppose legislative change. Unfortunately, either alternative may go against the interests of presidents who want to play more active roles in deciding national policies and legislators who would rather preserve the power to oppose than to promote those policies.

REFERENCES

- Ames, Barry. (2001). *The deadlock of democracy in Brazil*. Ann Arbor: Michigan University Press.
- Amorim Neto, Octavio. (2002). Presidential cabinets, electoral cycles, and coalition discipline in Brazil. In Scott Morgenstern & Benito Nacif (Eds.), *Legislative politics in Latin America* (pp. 48-78). New York: Cambridge University Press.
- Amorim Neto, Octavio, & Tafner, Paulo. (2002). Governos de coalizao e mecanismos de alarme e incendio no controle legislativo das medidas provisórias. *Dados*, 45(1), 5-38.
- Carey, John, & Shugart, Matthew. (Eds.). (1998). *Executive decree authority*. New York: Cambridge University Press.
- Colomer, Josep, & Negretto, Gabriel. (in press). Can presidentialism work like parliamentarism? *Government and Opposition*.
- Cox, Gary W., & McCubbins, Matthew. (2001). The institutional determinants of policy outcomes. In Stephan Haggard & Matthew McCubbins (Eds.), *Presidents, parliaments, and policy* (pp. 21-63). New York: Cambridge University Press.
- De Souza, Amaury. (1999). Cardoso and the struggle for reform in Brazil. *Journal of Democracy*, 3, 49-63.
- Eaton, Kent. (2000). Parliamentarism versus presidentialism in the policy arena. *Comparative Politics*, 32(3), 355-373.
- Etchemendy, Sebastián, & Palermo, Vicente. (1998). Conflicto y concertación. Gobierno, Congreso y organizaciones de interés en la reforma global del primer gobierno de Menem (1989-1995). *Desarrollo Económico*, 37(148), 559-590.
- Ferreira Rubio, Delia, & Goretti, Mateo. (1996). Cuando el presidente gobierna solo. Menem y los decretos de necesidad y urgencia hasta la reforma constitucional (Julio 1989-Agosto 1994). *Desarrollo Económico*, 36(141), 443-474.

- Ferreira Rubio, Delia, & Goretti, Mateo. (1998a, September). *Menem's decretazo (1989-1998)*. Paper presented at the meeting of the Latin American Studies Association, Chicago.
- Ferreira Rubio, Delia, & Goretti, Mateo. (1998b). When the president governs alone: The decretazo in Argentina. In John Carey & Matthew Shugart (Eds.), *Executive decree authority* (pp. 33-61). New York: Cambridge University Press.
- Figueiredo, Argelina, & Limongi, Fernando. (1997). O Congresso e as medidas provisórias: Abicacao or delegacao. *Novos Estudos*, 47, 127-154.
- Figueiredo, Argelina, & Limongi, Fernando. (1999). *Medidas provisórias e o papel do Congresso na aprovacao dos planos vero e Collor*. Unpublished manuscript.
- Figueiredo, Argelina, & Limongi, Fernando. (2000). Presidential power, legislative organization and party behavior in the legislature. *Comparative Politics*, 32, 151-170.
- Gelli, María Angélica. (1992). Implicancias jurídicas y políticas de la promulgación parcial de las leyes. *La Ley*, 1992-E, 533-548.
- Goretti, Matteo, & Mustapic, Ana M. (1993). *El Congreso de la transición democrática (1983-1989)*. Buenos Aires, Argentina: Instituto Torcuato Di Tella.
- Haggard, Stephan, & Kaufman, Robert. (1995). *The political economy of democratic transitions*. Princeton, NJ: Princeton University Press.
- Hinich, Melvin, & Munger, Michael. (1997). *Analytical politics*. Cambridge, UK: Cambridge University Press.
- Huber, John. (1996). *Rationalizing Parliament: Legislative institutions and party politics in France*. New York: Cambridge University Press.
- Iazetta, Osvaldo M. (1997). Capacidades técnicas y de gobierno en las privatizaciones de Menem y Collor de Mello. *Desarrollo Económico*, 37(146), 263-283.
- Jobim, Nelson. (2000). Camara dos Deputados, audiencia pública 0219/00.
- Jones, Mark P. (2002). Explaining the high level of party discipline in the Argentine Congress. In Scott Morgenstern & Benito Nacif (Eds.), *Legislative politics in Latin America* (pp. 147-184). New York: Cambridge University Press.
- Llanos, Mariana. (1998). El presidente, el Congreso y la política de privatizaciones en la Argentina (1989-1997). *Desarrollo Económico*, 38(151), 743-770.
- Lugones, N., Garay, A., Dugo, S., & Corcuera, S. (1992). *Leyes de emergencia. Decretos de necesidad y urgencia*. Buenos Aires, Argentina: La Ley.
- Magar, Eric. (2001, August-September). *Polarization and usurpation of authority or bargaining and concessions? Decrees and statutes in Argentina, 1983-1994*. Paper presented at the annual meeting of the American Political Science Association, San Francisco.
- Mainwaring, Scott. (1999). *Rethinking party systems in the third wave of democratization: The case of Brazil*. Stanford, CA: Stanford University Press.
- Mainwaring, Scott, & Shugart, Matthew. (Eds.). (1997). *Presidentialism and democracy in Latin America*. Cambridge, UK: Cambridge University Press.
- Molinelli, Guillermo N., Palanza, Valeria, & Sin, Gisela. (1999). *Congreso, presidencia y justicia en Argentina*. Buenos Aires, Argentina: CEDI.
- Mustapic, Ana María. (2002). Oscillating relations: President and Congress in Argentina. In Scott Morgenstern & Benito Nacif (Eds.), *Legislative politics in Latin America* (pp. 23-47). New York: Cambridge University Press.
- Negretto, Gabriel. (1994). *El problema de la emergencia en el sistema constitucional*. Buenos Aires, Argentina: Abaco de Rodolfo Depalma.
- Negretto, Gabriel. (1999). Constitution-making and institutional design. The transformation of presidentialism in Argentina. *Archives Européennes de Sociologie*, 40(2), 193-233.
- O'Donnell, Guillermo. (1994). Delegative democracy. *Journal of Democracy*, 5(1), 55-69.

- Power, Timothy J. (1998). The pen is mightier than the Congress: Presidential decree power in Brazil. In John Carey & Matthew Shugart (Eds.), *Executive decree authority* (pp. 197-230). New York: Cambridge University Press.
- Przeworski, Adam. (1991). *Democracy and the market*. Cambridge, UK: Cambridge University Press.
- Reich, Gary. (2002). Executive decree authority in Brazil: How reactive legislators influence policy. *Legislative Studies Quarterly*, 27(1), 5-31.
- Schiavon, Jorge. (2000). *A theoretical and statistical assessment of the structural reform in Latin America* (Working Paper 48). Mexico City, Mexico: Centro de Investigación y Docencia Económicas.
- Shugart, Matthew. (1998). The inverse relation between party strength and executive strength: A theory of politicians' constitutional choices. *British Journal of Political Science*, 28, 1-29.
- Shugart, Matthew S., & Carey, John M. (1992). *Presidents and assemblies: Constitutional design and electoral dynamics*. Cambridge, UK: Cambridge University Press.
- Tsebelis, George. (1995). Decision making in political systems: Veto Players in presidentialism, parliamentarism, multicameralism and multipartism. *British Journal of Political Science*, 25, 289-325.
- Tsebelis, George. (2002). *Veto players: How political institutions work*. Princeton, NJ: Princeton University Press.

Gabriel L. Negretto is an assistant professor of political science and a full-time researcher at the Centro de Investigación y Docencia Económicas in Mexico City. His research interests are constitution making, institutional design, comparative constitutionalism, and Latin American politics. He is currently working on a study of constitutional change in Latin America from 1979 to the present and a study on minority presidents and types of governments in Latin America.