Scientific Research Publishing

Beijing Law Review, 2024, 15, 1205-1226
https://www.scirp.org/journal/blr
ISSN Online: 2159-4635
ISSN Print: 2159-4627

The Politics of Legal Interpretation by the Subnational Parliament: A Case Study of the "Principle" *in Dubio Pro Legislatore* in Brazilian Constitutional Hermeneutics

Marcelo Raimundo da Silva

Faculty of Law, Universidade do Estado do Amapá, Macapá, Brazil
Email: raimundo.silva@ueap.edu.br

How to cite this paper: Raimundo da Silva, M. (2024). The Politics of Legal Interpretation by the Subnational Parliament: A Case Study of the "Principle" *in Dubio Pro Legislatore* in Brazilian Constitutional Hermeneutics. *Beijing Law Review, 15,* 1205-1226.
https://doi.org/10.4236/blr.2024.153073

Received: July 26, 2024
Accepted: September 15, 2024
Published: September 18, 2024

Abstract

In Brazil, the field of legislative studies has developed over the past few decades, particularly within political science. Specifically, in the realm of law, investigations into the political dynamics of institutions, such as the legislative branch, especially concerning public policy formulation, are still relatively recent. Considering this scenario, this article presents the results of an investigation into the politics of normative interpretation by state legislatures, focusing on the "principle" of *in dubio pro legislatore*. Utilizing the theoretical frameworks of constitutional hermeneutics and comparative constitutional law, and following an extensive literature review of *in dubio pro legislatore*, we developed a case study analyzing the databases of 27 legislative bodies. The results showed scant use of *in dubio pro legislatore* by subnational parliaments, prompting a discussion on the theoretical potential of this legal principle to enhance (counter) legislative activism in response to judicial maximalism. The article is organized as follows: Section 1 introduces the discussion within the current Brazilian context. Section 2 delves into the adopted theoretical framework, emphasizing the debates around proceduralism versus substantialism and non-interpretivism versus interpretivism within constitutional hermeneutics. Section 3 provides the initial context for constructing the concept of *in dubio pro legislatore*, detailing its main theorists and authors on the basis of comparative constitutional law studies and Brazilian theorization developed in the past decade. Section 4 specifies the methodological procedures employed. Section 5 presents the results. Section 6 discusses the results in light of the theoretical framework and contemporary constitutional hermeneutics. Section 7 concludes this article.

Keywords

Constitutional Hermeneutics, Legal Interpretation, In Dubio Pro Legislatore, Subnational Parliament, Brazilian Constitutional Law

1. Introduction

In contemporary legal science, "hermeneutics" and "interpretation" exemplify the relationship between principles and applications. While legal hermeneutics is theoretical, aiming to establish principles, methods, and overall epistemic orientation, legal interpretation is a practical activity that applies hermeneutical guidelines to elucidate the meaning of a legal text (Barak, 2005; Bastos, 2014; Grau, 2014; Alexander and Sherwin, 2021; Nader, 2023). Thus, constitutional hermeneutics studies systematize the criteria applicable to the interpretation of constitutional norms concerning a concrete case.

Some Brazilian constitutional law theorists, such as Fonteles (2014), identify a broad research agenda within constitutional hermeneutics, including the discussion of norms (i.e., principles and rules) in light of philosophical debates such as "interpretivism" versus "non-interpretivism" and "proceduralism" versus "substantialism."

Building on this introduction and given the need to understand political disputes in legal interpretation within the current Brazilian legislative process, the existence of a precept or even a "principle" of *in dubio pro legislatore* has been postulated. According to this "principle," when there is legal uncertainty about a concrete law in the judicial review of constitutionality, the benefit of the doubt favors the law itself, and the original "legislative" meaning of the respective norm ultimately prevails (Ferreres Comella, 1997; Lora Deltoro, 2000; Horn, 2002, 2012; García Amado, 2007).

In this context, two questions arise: Has this "principle" truly been a rule of constitutional hermeneutics in Brazil? If so, which actors in the constitutional review decision-making process utilize *in dubio pro legislatore*?

To begin examining these issues, we present the results of a case study on the application—or lack thereof—of *in dubio pro legislatore* by state legislative bodies within the context of the Brazilian constitutional process.

Importantly, in Brazil, constitutional review can occur at two stages: 1) the "preventive" or "preliminary" stage, which happens before the normative act is perfected, as exemplified by the activities of the constitutional and justice committees in the federal (House of Representatives and Federal Senate), state (Legislative Assemblies), district (Legislative Chamber of the Federal District), and municipal legislative houses (City Councils); and 2) the "repressive" or "successive" stage, which occurs after a law is passed or goes into effect, under the responsibility of the higher courts.

In Brazilian federalism, the states have less extensive legislative powers than

the Federal Union and municipalities. For this reason, the states possess "residual" or "remaining" legislative powers, in addition to a few exclusive powers, in matters such as the exploitation of local piped gas services, the establishment of metropolitan regions, along with issues of manifest "state interest" (Gonet Branco and Mendes, 2023).

The governors are the highest executive authorities, and the legislative assembly is the core of legislative power. It is within state legislative houses that the constitutionality of drafts is preventively analyzed by the respective constitutional and justice committees. Once such a proposal becomes state law or statute, its (un)constitutionality can be judicially reviewed: 1) by the respective state court of justice, if the law allegedly violates the State Constitution; and 2) by the Supreme Federal Court, if the law allegedly violates the Federal Constitution[1] (Cavalcante Filho, 2022).

Thus, the following hypothesis was developed: The use of *in dubio pro legislatore* by subnational parliaments is associated with the adoption of "non-interpretivist" and "proceduralist" perspectives on legal interpretation in the preventive constitutional review, as a strategy of state legislative counter-activism in response to judicial activism.

2. Theoretical Background

We drew upon Gadamer's (1999) hermeneutic perspective, which posits that legal interpretation occurs in a single, monophase discursive operation when faced with a concrete case.

According to Fonteles (2014), contemporary Brazilian theorization on constitutional hermeneutics reflects insights from American constitutional theory, notably the debate between "interpretivism" and "non-interpretivism."

On the one hand, interpretivists assert that constitutional interpretation should aim to uncover the original meaning of the Constitution, whether on the basis of its actual text ("original public meaning") or the original intent of the legislators. On the other hand, non-interpretivists maintain that the constitutional text is a living document, implying that the Constitution can and should adapt to the demands of each generation according to its historical context.

As a counterpoint to interpretivism, non-interpretivists view the Constitution as a living organism that can be modified in response to values and principles emerging from society. This is exemplified by the phenomenon of "constitutional mutation," which signifies a new normative interpretation resulting from a semantic-material alteration of the constitutional text without formal syntactic modification (Gonet Branco and Mendes, 2023).

In other words, non-interpretivism holds that constitutional interpretation should be broad, encompassing rules and principles that are not self-evident in the constitutional text.

[1]For more details on the Brazilian system of judicial review of legislation, see Silva (2019: pp. 68-106, 200-210).

Contemporary constitutional theory (Sarmento and Souza Neto, 2024) distinguishes between "proceduralist" and "substantialist" approaches, either to examine the importance of the Constitution in a given political society or to investigate the actual scope of constitutional jurisdiction.

In Brazil, the substantialism-proceduralism dichotomy was developed primarily during the redemocratization process that took place in the 1980s and 1990s. In fact, inspired by postwar constitutional debates in Western Europe regarding the strategic role of constitutional justice during a period of institutional reconstruction, as well as by U.S. legal theory on constitutional justice, two analytical perspectives were then developed: 1) "proceduralism," exemplified by Álvaro Ricardo de Souza Cruz, Marcelo Campos Gallupo, Bernardo Gonçalves Fernandes, among others; and 2) "substantialism," exemplified by Paulo Bonavides, Celso Antonio Bandeira de Melo, Eros Roberto Grau, Fábio Konder Comparato, Ingo Wolfgang Sarlet, and Lênio Luiz Streck, among others (Streck, 2002; Binenbojm, 2014; Sarmento and Souza Neto, 2024).

In summary, while proceduralists adopt a "procedural" rather than "metaphysical" justification of fundamental rights, emphasizing the importance of democratic procedures and citizen participation in a democratic state of law, substantialists argue that the Constitution establishes the conditions for political and state action based on the premise that the constitutional text is the ultimate realization of the social contract. So, from a substantialist perspective, the judiciary must assume the role of an interpreter who implements the substantial general will—occasionally against majoritarian decisions or even against other branches of government—to realize constitutional values and rights through judicial action.

That said, in contrast to substantialism, the proceduralist approach supports a more restrained and modest constitutional jurisdiction, emphasizing democratic principles and the representative system rather than judges. Ultimately, the Constitution becomes an institutional means to define the rules of the democratic political game.

Proceduralists argue that decisions made within the parliamentary sphere often limit aggressive and illegitimate actions by the constitutional court. Consequently, the constitutional text should be modified or interpreted only in response to choices made by elected legislators, implying a pluralization of the repressive control of constitutionality in favor of a participatory form of judicial review (Ely, 2001).

As Sarmento and Souza Neto (2024) illustrate, although Brazilian proceduralists are largely inspired by Habermasian proceduralism, we adopted the proceduralist conception developed by John Hart Ely.

Reflecting on the countermajoritarian difficulty in the context of American constitutional jurisdiction, Ely argues that the normative goal of the constitutional text should be procedural or instrumental, as the application or interpretation of the Constitution essentially depends on the decisions of political ma-

jorities formed at each historical moment. Hence, judges should not act politically as holders or guardians of fundamental rights. Instead, for the sake of checks and balances, judges should exhibit judicial self-restraint when interpreting the Constitution.

As such, judges should consider declaring a norm invalid only when it is clearly contrary to the constitutional order of the respective era, recognizing that elected political agents are primarily responsible for society's substantive decisions.

Therefore, according to Ely, with the exception of possible judicial intervention to address fundamental issues concerning the functioning of the democratic regime itself—such as maintaining channels of political participation and protecting stigmatized minorities—the ordinary legislator serves as the central actor in constitutional jurisdiction.

Similarly, we adopted Cass Sunstein's (1999) reasoning on "judicial minimalism." As indicated by Sunstein, judges should modestly exercise judicial constitutional review on the basis of "incompletely theorized agreements," wherein major political controversies, for example, should be resolved within the appropriate legislative bodies, thereby avoiding backlash.

In line with Ely's propositions, Sunstein's minimalist conception allows constitutional jurisdiction to be subject to scrutiny in the broader public sphere, thus enabling democratic experimentalism.

Importantly, neither Ely nor Sunstein innovated the discussion on a minimalist and restrained constitutional jurisdiction. In fact, it is well known that such reflections originated from James Bradley Thayer (1893), whose main arguments, as summarized by Dimoulis and Lunardi (2011: p. 463), are as follows: 1) state constitutions in the U.S. do not grant judges the power to control the constitutionality of state laws. This power is implicitly deduced ("the literal argument"); 2) judges can only oversee constitutionality to resolve a concrete case and not to annul laws. This power belongs solely to the legislature to avoid violating the separation of powers ("the argument of the limited competence of the Judiciary"); 3) the interpretation of the Constitution cannot be literal or academic; it must be political. In other words, since constitutional norms are vague, there are various possibilities for reasonable interpretation, and it is not the Judiciary's job to establish the true meaning of the Constitution. Only the Legislature, elected by the people, can choose the most convenient interpretation according to the Nation's interest by enacting the laws it deems prudent or reasonable ("the argument of the constitutional indeterminacy of interpretative openness"); and 4) judicial review of constitutionality is, however, indispensable. Otherwise, there would be no guarantee that the legislator would effectively comply with the Constitution. However, the Judiciary can void legislation and declare unconstitutionality only if it is evident or unquestionable, beyond any doubt ("the argument of deference or respect for the Legislature").

Brazilian constitutional theory predominantly adopts substantialist concep-

tions regarding constitutional jurisdiction. Hence, we can assert that the Brazilian Supreme Court does not seem to adhere to minimalist positions, even in recent periods. As constitutionalists Sarmento and Souza Neto (2024: p. 226) elucidate: "The Supreme Federal Court has not been characterized by minimalism. On the contrary, decisions rendered by the Court frequently resort to broad theorization or excessively comprehensive constructions, often unnecessary for the resolution of the case."

Having this in mind, it is worth indicating some proposals in favor of judicial restraint brought forth by the literature. One example would be the adoption of judicial behaviors that favor both "narrow" and "shallow" decisions, so that the judiciary power should pronounce only what is necessary to resolve the case, without exhaustive argumentation, thereby avoiding engagement in major philosophical or ontological controversies (Sunstein, 1999).

Another example would be the social and institutional strengthening of existing legislative procedures to resolve substantial social disputes and conflicts also within the democratic-parliamentary sphere (Waldron, 2006). A final example would be the exercise of "epistemological constraints," whereby the mistakes or logical inconsistencies of judicial decisions are critically examined by legal scholars (Streck, 2012).

3. Brief Theoretical Contextualization of *in Dubio Pro Legislatore* from the Perspective of Comparative Constitutional Law

Constitutional hermeneutics has specificities that distinguish it from other fields of law, prompting theorists in this branch to advocate for a unique and specific catalog of interpretive principles.

With respect to the decision-making process of legislative (preventive) and judicial (repressive) constitutional review, the existence of legal principles advocating for judicial self-restraint and minimalism in deference to the legislature is not new in contemporary constitutional theory.

As mentioned above, American constitutional theory, particularly Thayer's doctrine, has influenced scholars of judicial constitutional review, who advocate for a balanced separation of powers to avoid judicial supremacy as the sole rule.

According to Tommasini (2018: p. 18, footnote no. 12), the earliest systematic reference to the general theme of constitutional hermeneutics associated with the Thayerian tradition was the Spanish scholar Victor Ferreres Comella (1997). Comella connected Thayer's traditional doctrine with more recent theorization on the presumption of constitutionality, focusing on a second theme also investigated by Thayer but overlooked by current scholars: the burden of proof that falls on the actor, alleging the unconstitutionality of a norm (ibid., p. 144).

This Thayerian-inspired discussion forms the precise starting point for the theoretical construction of *in dubio pro legislatore*, on the basis of the idea that there is a direct connection between the evidentiary parameters of the presump-

tion of constitutionality in favor of the legislator and those evidentiary standards in criminal law related to the presumption of innocence.

As Ferreres Comella (1997: p. 135) explains, "the connection that Thayer establishes between the constitutionality test he suggests and the various evidentiary tests that govern criminal and civil proceedings is clear (…). It must be noted that Thayer was an acclaimed professor of Evidence (theory of proof), mentor to such significant authors in this field as John Henry Wigmore. It was Thayer who wrote the great Treatise on Evidence in Common Law, and it was also he who provided the first major theoretical treatment of presumptions in the American context."

This is why it is plausible to transplant—innovatively proposed by Ferreres Comella—the debate initiated by Thayer about legal presumptions and their respective evidentiary standards to the constitutional field in the sense of *in dubio pro legislatore* (Tommasini, 2018: p. 49).

Consequently, analogous to *in dubio pro reo* in criminal proceedings, in judicial constitutional review, justices might void legislation if—and only if—there is no discussible doubt regarding its constitutional validity. This gives rise to the justifiable possibility of employing the formula or axiom "guilty beyond a reasonable doubt."

Without referring to Ferreres Comella's innovative study, in the broader context of Latin American constitutional theory, the Spanish jurist García Amado is considered a key author in conceptualizing the "principle" of *in dubio pro legislatore* to justify, from the perspective of positivist constitutionalism, a maxim or procept advocating for judicial self-restraint. This stands in opposition to neoconstitutionalists, who would in practice support a principle of *in dubio pro iudice*, meaning that doubt would favor the judge's decision when interpreting the Constitution, especially in cases of semantic indeterminacy of the constitutional text (Bernal Pulido, 2006: p. 5).

In these terms, Bernal Pulido identifies García Amado as a referential example of the positivist critique against Hispanic neoconstitutionalist thought, represented, conversely, by the doctrine of Prieto Sanchís. In this debate, neoconstitutionalism advocates for "maximal judicial review" in favor of *in dubio pro iudice*, whereas traditional constitutionalism is grounded in "minimal judicial review" in defense of *in dubio pro legislatore*, particularly in cases of interpretative "penumbra zones" within the constitutional text.

Examining Hispanic doctrine, another author who addressed *in dubio pro legislatore* was Hans-Rudolf Horn (2002). Citing Ferreres Comella's study explicitly, Horn realized that *in dubio pro legislatore* was indeed a principle created from an analogy with *in dubio pro reo*. Additionally, Horn suggested that *in dubio pro legislatore*, was conceptually situated within the normative scope of the principle of the presumption of constitutionality.

In the early 2000s, within the context of Spanish constitutional law, Pablo de Lora Deltoro also addressed *in dubio pro legislatore*. Inspired by both Hispanic

doctrine (Ferreres Comella, 1997) and American doctrine (Thayer, 1893; Perry, 1993; West, 1993; White, 1993; Sunstein, 1999), Lora Deltoro advocated for the adoption of a more restrictive or "strong" concept of the principle of presumption of constitutionality of laws by constitutional theory. In this sense, his thesis was as follows: In a democracy, constitutional courts can invalidate a democratically approved norm only when there is a consensual—and not merely majoritarian—decision in favor of normative-constitutional invalidity.

Lora Deltoro also argues that the theoretical defense of *dubio pro legislatore* presupposes that the burden of proof lies with the party alleging the invalidity of the norm. Thus, the application of this precept is always *ex post*, as the initial rule is normative validity/constitutionality, not just its presumption. In other words, again analogous to *in dubio pro reo*, on the basis of the Thayerian theorization proposed by Ferreres Comella, the constitutionality of a norm should be the rule, hence its *iuris tantum* presumption, since the norm is created as "valid" in the national legal order.

As such, starting from Thayer, Lora Deltoro concludes that there is potential for the use of *in dubio pro legislatore* via analogy with *in dubio pro reo* in contemporary constitutional hermeneutics; this can help prevent inquisitorial judicial behavior in matters of judicial constitutional review.

Thus, Lora Deltoro emphasizes that the adoption of *in dubio pro legislatore* may allow constitutional courts to adhere to self-contained and self-restricted positions, bearing the burden of proof to demonstrate the procedural-constitutional "guilt" of a potentially invalid norm. Put differently, in this hermeneutic procedure, courts must prove that a norm is indeed invalid within the constitutional system, without acting as judicial legislators in place of the democratically elected parliament.

Between 2010 and 2020, theorization on *in dubio pro legislatore* was developed through case studies. One example is the preliminary investigation conducted by Cisneros Vivar (2016), seeking to understand the use of *in dubio pro legislatore* by the Constitutional Court of Guatemala in the context of the reform of the amparo procedure during Guatemala's re-democratization. To this end, Cisneros Vivar proposed that the court acted as a "co-legislative body," competing with actual legislative power.

Cisneros Vivar proposes categorizing the subprinciples of *in dubio pro legislatore* to classify constitutional jurisdiction according to the following classification: 1) "Principle of *in dubio pro legislatore de facto*": when only the legislative power can legislate, without the "co-legislator" role of a constitutional court; 2) "Principle of *in dubio pro legislatore* by abuse of function": when a constitutional court exercises a legislative function and uses *in dubio pro legislatore* to hermeneutically justify usurping the typical legislative function of the parliament; 3) "Principle of *in dubio pro legislatore* by legal silence": when a constitutional court illegitimately exercises a legislative function and uses *in dubio pro legislatore* to justify a decision not provided for in the constitutional text; 4) "Principle

of *in dubio pro legislatore* by deficiency of applicable law": when a constitutional court illegitimately exercises a legislative function and uses *in dubio pro legislatore* to justify a legislative decision not provided for in the infra-constitutional legal text.

A second example between 2010 and 2020 is the jurisprudential case study by Echeverri Quintana (2016) on the uses of the *in dubio pro legislatore* by the Colombian Constitutional Court. Thus, to analyze Colombian judicial decisions where this principle or legal rule was applied and not merely a precept or axiom, between 2007 and 2014, Echeverri Quintana (2016: p. 67) conceived this principle on the basis of a "procedural-formalist" conceptualization: "in case of reasonable doubt about the occurrence of a procedural defect, the doubt must be resolved in favor of the majority decision adopted by a deliberative body, specifically the Congress of the Republic."

A third and final example of a case study is that of Gómez Villavicencio (2022) in seeking to understand judicial constitutional review in Ecuador from the perspective of legal philosophy.

On the basis of jurisprudence of the Ecuadorian Constitutional Court, Gómez Villavicencio (2022: p. 137) proposed the following concept of *in dubio pro legislatore*: "The democratic legitimacy of the actions of any authority resides in its respect for the law, which is the objectification of the general will. (…) Hence, the need to presume the constitutionality of the law a priori, that doubt should favor the legislator (*in dubio pro legislatore*), that the preservation of the legal provision should be sought, and consequently, its expulsion from the legal system, should be exceptional and of last resort."[2].

Finally, the comparative law literature has indisputably defended *in dubio pro legislatore* as a legal "principle," even when non-neoconstitutionalist theoretical positions are adopted. This also occurs in contrast to the discussion initiated by García Amado, who views it as a "maxim" or "axiom" rather than a proper normative "principle."

Overview of *in Dubio Pro Legislatore* in Contemporary Brazilian Constitutional Theory

From an exhaustive literature review, we found that studies addressing *in dubio pro legislatore* in Brazil are still scarce, with the exception of the following authors identified in our bibliographic review, who touch on the subject, even indirectly or supplementary: Silva (2007), Dimoulis and Lunardi (2011), and

[2]Although not cited by Gómez Villavicencio, in September 2009, Ecuador innovatively codified *in dubio pro legislatore* as an explicit "principle" pertaining to abstract constitutional review, distinguishing it conceptually from the principle of the presumption of constitutionality. This can be found in paragraphs 2 and 3 of Article 76 of the *Ley Orgánica de Garantías Jurisdiccionales y Control Constitucional*, as follows: "Article 76—Principles and General Rules: Abstract constitutional review shall be governed by the general principles of constitutional control provided by the Constitution and constitutional norms, jurisprudence, and doctrine. In particular, it shall be governed by the following principles: (…) 2. Presumption of constitutionality of legal provisions. The constitutionality of legal provisions is presumed. 3. *In dubio pro legislatore*. In case of doubt about the constitutionality of a legal provision, the option will be not to declare its unconstitutionality."

Tommasini (2018).

The first case is Silva's (2007) research on neoconstitutionalism, post-positivism, and democracy in Brazil.

Silva uses the conceptual basis of *in dubio pro legislatore* as proposed by García Amado, which is based on the work of Bernal Pulido (2006). However, Silva differs from García Amado as he understands *in dubio pro legislatore* as necessarily being a "principle" or "rule".

In his words (pp. 3354-3355), "Neoconstitutionalism must adapt to an experimentalist view of democracy, leaving to the democratically elected legislator, as well as to political actors operating in the public sphere, the criticism, thematization, and proposition of new institutional alternatives for problems not decided at the juridical-constitutional level. This should be the rule of preference: *in dubio pro legislatore*, because the democratically elected representative is the most legitimate agent to make decisions within the open space of the constitution, which should be interpreted in a maximalist sense in favor of political debate. According to this view, the democratic legislator is legitimate even to make an occasional wrong decision, as they are politically accountable for it, whereas the Judiciary is not."

Using García Amado as a reference but complementing it with the Thayerian-based American debate, Dimoulis and Lunardi (2011: p. 468) understand the conceptualization of *in dubio pro legislatore* as part of the theoretical discourse on judicial minimalism: "Judges are required to avoid intense and frequent intrusions into the legislator's sphere of freedom. This is the doctrine of judicial self-restraint, strongly present in the United States. A basic criterion is the requirement of clear and evident unconstitutionality, applying the 'rule of the doubtful case.' In case of doubt, the legislator's option prevails, and the judge should refrain from declaring unconstitutionality: *in dubio pro legislatore*."

Tommasini (2018) is the third and final author who addresses *in dubio pro legislatore* supplementary to his exhaustive study on the principle of the presumption of the constitutionality of laws.

On the basis of the jurisprudence of the U.S. Supreme Court as well as constitutional theories on the subject, Tommasini assumes that the modalities of the presumption of constitutionality are "relative legal presumptions" (*iuris tantum*), meaning they are not absolute. According to him, this is because such presumptions are provided for by the constitutional text, and being relative, they can be overcome.

Tommasini aims to build a common concept regarding presumptions of constitutionality for *n* constitutional systems that practice judicial review. Thus, he seeks to advance theoretical debate on the topic, precisely within the scope of the general theory of constitutional law.

For him, there are two senses of the presumption of constitutionality: 1) the sense of the prohibition of non-compliance with a law not declared unconstitutional and 2) the sense of regulating judicial action to establish possible criteria

for declaring (un)constitutionality.

It is precisely in the second sense that Tommasini includes *in dubio pro legislatore* and *in dubio pro libertate* as theoretical-practical possibilities in the field of prescriptions for resolving doubts about (un)constitutionality, with the consequent need to distribute the burden of proof or argumentation between the litigants in the constitutional process in concrete cases.

Innovatively, among studies on Brazilian and comparative constitutional law, and using Ferreres Comella (1997) as the main reference, Tommasini indicates that *in dubio pro legislatore* is in fact a "prescription" that derives from the presumption of constitutionality. Accordingly, the concept could be defined in its very literal sense, in the maxim that "the doubt favors the legislator."

Understanding constitutional jurisdiction as a decision-making process, Tommasini also attempts to make a conceptual distinction with *in dubio pro libertate*, which, in constitutional jurisdiction, would be the opposite of *in dubio pro legislatore*. Thus, in cases where there is no certainty regarding (un)constitutionality, "the doubt may favor the decisional freedom of the judge."

On the basis of this, Tommasini (2018: p. 89) proposes adopting an "epistemological" or objective perspective when analyzing the presumption of constitutionality: "First, it can be a psychological rule directed at the judge, meaning that when in doubt about constitutionality, the judge should decide one way or the other. This study, however, aims to analyze the presumption from an epistemological perspective; that is, the doubt about constitutionality is not a subjective phenomenon (judge X is in doubt) but rather what the arguments allow to conclude objectively (arguments Y lead to indeterminacy). Given this preliminary observation, although they appear to be simple and direct rules, the prescriptions of *in dubio pro legislatore* or *in dubio pro libertate* require specification of what is the doubt about constitutionality and when it occurs. In effect, according to the construction defended here, the 'doubt' about constitutionality corresponds to the impossibility of determining constitutionality (indeterminacy), so it occurs when it is not possible to justify or deny the proposition of constitutionality."

However, as acknowledged by Tommasini, in practice, indeterminacy does not need to be known to reach an "optimal" decision. As a matter of fact, judges empirically behave in the sense of knowing whether the presumption has been overcome or not—not what the final epistemological outcome would be. Thus, he deduces that indeterminacy would be within the realm of possibility (p. 90): "Indeed, if the judge only evaluates whether the presumption has been overcome or not, the *in dubio* rules operate in situations of possible indeterminacy: if the presumption is not overcome, it is possible that the constitutionality of the law is indeterminate, so in these cases the presumption imposes a rule on how the judge should decide. Thus, contrary to what it may seem, the *in dubio* rules are not only necessary when the sets of arguments for constitutionality are equally strong. Even when one set of arguments is much stronger than the other, the *in*

dubio rules can be decisive, depending on the level of certainty required to overcome the presumption."

In summary, the Brazilian literature is theoretically rooted in two lines of research: 1) the Hispanic and Latin American perspective, as in the case of Silva (2007); and 2) a combined perspective, blending Hispanic, Latin American, and American lines, as seen in the works of Dimoulis and Lunardi (2011) and Tommasini (2018), who drew more inspiration from comparative constitutional theory, particularly that developed in the U.S.

In the current landscape, we believe that the research line initiated in Brazil by Tommasini is the most robust today, especially in the context of studies on Brazilian constitutional hermeneutics. This is noteworthy because in general, the referential discourse in Brazil is grounded in the neoconstitutionalist tradition, with a substantialist law-related philosophical orientation, drawing primarily from related German constitutionalist theory.

For this reason, traditionally, current constitutional theory handbooks in Brazil note an identifiable set of principles or norms of constitutional interpretation inspired by German constitutional law.

According to Sarmento and Souza Neto (2024: p. 438), there are essentially two catalogs of constitutional hermeneutic principles used in Brazil. First, the catalog originally proposed by Konrad Hesse (1992: pp. 33-54) includes the following principles: 1) the principle of the unity of the constitution; 2) the principle of practical concordance; 3) the principle of functional correction; 4) the principle of integrative effectiveness; 5) the principle of the normative force of the Constitution; and 6) the principle of interpretation in conformity with the Constitution.

Second, the catalog proposed by Barroso (2020) consists of the following principles: 1) the principle of the supremacy of the Constitution; 2) the principle of the presumption of the constitutionality of laws and acts of the Public Power; 3) the principle of interpretation in conformity with the Constitution; 4) the principle of reasonableness/proportionality; and 5) the principle of effectiveness.

For Barroso, the "principle of the presumption of constitutionality of laws" serves as a rule to control the risks of excessive constitutionalization, i.e., inclusion in the constitutional text of norms from various branches of infra-constitutional law, which would consequently remove certain matters from daily politics and ordinary legislative debate. For this reason, Barroso (2020: p. 374) asserts that "[a]s the Brazilian Constitution already suffers from excessive constitutionalization in its first sense, interpretative constitutionalization should not be extended beyond reasonable limits, under penalty of hindering, by excessive rigidity, the governance of the majority, an important component of the democratic state."

Consequently, judges and courts must accept dogmatic rigor and assume the argumentative burden of applying norms that contain indeterminate legal concepts or principles with fluid content.

To promote judicial self-restraint, Barroso (2020: pp. 375-376) advocates for

two interpretative parameters: 1) preference for the law—in the same sense as *in dubio pro legislatore*—meaning that in the presence of an unequivocal and valid manifestation of the legislator, this manifestation should prevail, and the judge or court should refrain from producing a different solution that seems more convenient. In summary, a preference for the law would concretize, in hermeneutic practice, the principles of the separation of powers, legal certainty, and equality; and 2) preference for the rule—where the constituent or legislator has acted by enacting a valid rule descriptive of the conduct to be followed—should prevail over principles of equal hierarchy that might otherwise apply to the matter when there is a conflict between principles of equal hierarchy concerning the same issue.

More recently, a third catalog of principles was proposed by Sarmento and Souza Neto (2024: p. 438), which includes the following: 1) the principle of the unity of the Constitution; 2) the principle of the normative force of the Constitution; 3) the principle of functional correction; 4) the principle of public reasons; 5) the principle of ethical cosmopolitanism; 6) the principle of interpretation in conformity with the Constitution; 7) the principle of the "graduated" presumption of constitutionality of normative acts; 8) the principle of proportionality; 9) the principle of reasonableness; and 10) the principle of balancing interests.

Based on the studies of Barroso, Sarmento and Souza Neto (2024: p. 460) indicate that *in dubio pro legislatore* is a variant of both the more general principle of the presumption of constitutionality and the plenary reservation clause, which are explicitly provided for in Article 97 of the Brazilian Constitution[3].

To advance the theory, Sarmento and Souza Neto propose, based on Sweet and Mathews (2010), a leveling of "weak," "normal" or "moderate," and "strong" stages of the principle of the presumption of constitutionality.

For this reason, Sarmento and Souza Neto prefer to use the terminology "principle of the graduated presumption of constitutionality of normative acts", which is rooted in the following methodological parameters for analyzing a given law's degree of constitutionality, specifically the extent of: 1) the degree of democratic legitimacy of the normative act; 2) the degree of institutionalization of the legislative decision, which must respect the rules of the democratic system; 3) the degree of representativeness of minorities; 4) the degree of material or substantive relevance of the fundamental right in question; 5) the degree of possession of institutional capacity in very technical or specialized subjects; and 6) the temporal degree, that is, the period when the normative act was passed.

By way of theoretical exemplification, following these analytical parameters, a law approved under the current constitution, promulgated in a context of re-democratization, appears to have a higher presumption of constitutionality given that it has a greater degree of democratic legitimacy than a law approved

[3]Article 97. Courts may declare a law or a normative act of the government unconstitutional only by the vote of an absolute majority of their members or of the members of the respective special body (Brasil, 2022 [1988]).

under the previous constitution, granted during the military period.

In the hypothetical example above, in terms of constitutional jurisdiction, the evidential burden on the judge in matters of constitutional review will be more difficult as the degree of the act's democratic legitimacy increases. This has important implications for drafts approved directly by the people, such as via plebiscite or popular referendum, or for proposals approved by a qualified majority, such as constitutional amendments.

4. Methodology

The research methodology is inductive and based on a case study that focuses on the interpretive work of legislative propositions of subnational parliamentary origin by their respective legislative houses in the exercise of preventive control of the constitutionality of legislative propositions.

In this context, the units of analysis chosen were the main political-institutional actors who, according to the adopted theoretical framework, participate in the state constitutional legislative process, specifically the 27 state parliaments, including the legislative house of the Federal District, which encompasses both state and municipal powers according to constitutional terms[4].

The material analyzed originated from two phases of research. The first phase involved an exhaustive literature review of studies conducted in Brazil on *in dubio pro legislatore*. The studies included master's dissertations, doctoral theses, and scientific articles published over the past decade from 2013-2023.

The second and final phase of documentary research involved consulting the official and public online or digital search systems for the legislative activity of the permanent constitution and justice committees of the 27 Brazilian state parliaments[5].

These committees centralize the preventive control of constitutionality within state legislative houses by virtue of their respective internal regulations. The research strategy used was "textual search" in the database of accessory documents

[4]Article 32, Paragraph 1. The Federal District shall have the legislative powers reserved to the states and municipalities (Brasil, 2022 [1988]).

[5]Our total population consists of 27 units, corresponding to the following legislative houses, categorized by geographic region: Northern Region: Legislative Assembly of the State of Acre, Legislative Assembly of the State of Amapá, Legislative Assembly of the State of Amazonas, Legislative Assembly of the State of Pará, Legislative Assembly of the State of Roraima, Legislative Assembly of the State of Rondônia, Legislative Assembly of the State of Tocantins; Northeastern Region: Legislative Assembly of the State of Alagoas, Legislative Assembly of the State of Bahia, Legislative Assembly of the State of Ceará, Legislative Assembly of the State of Maranhão, Legislative Assembly of the State of Paraíba, Legislative Assembly of the State of Pernambuco, Legislative Assembly of the State of Piauí, Legislative Assembly of the State of Rio Grande do Norte, Legislative Assembly of the State of Sergipe; Central-Western Region: Legislative Assembly of the State of Goiás, Legislative Assembly of the State of Mato Grosso, Legislative Assembly of the State of Mato Grosso do Sul, Legislative Chamber of the Federal District; Southeastern Region: Legislative Assembly of the State of Espírito Santo, Legislative Assembly of the State of Minas Gerais, Legislative Assembly of the State of São Paulo, Legislative Assembly of the State of Rio de Janeiro; Southern Region: Legislative Assembly of the State of Paraná, Legislative Assembly of the State of Rio Grande do Sul, Legislative Assembly of the State of Santa Catarina.

of the constitution and justice committees, specifically in the category of "legislative opinions."

In these specific bases, the search parameters were as follows: <*in dubio pro legislatore*>. We also searched for Latin expressions equivalent to and synonymous with <*in dubio pro legislatore*>, as used in classical Brazilian literature on legal hermeneutics and the general theory of law (Nader, 2023), namely, the terms <*voluntas legislatoris*> and <*mens legislatoris*>, which literally mean, respectively, the will or intention of the legislator and the spirit or mind of the legislator.

As discussed below in the results, owing to the small amount of our documentary collection and considering that this is a case study, not a sample, it was not necessary to use specific content analysis techniques or statistical calculations to examine the population and the material found.

The research period chosen refers to the past decade, covering 2013-2023. We selected this timespan because the online and digital search systems for the production of state legislative powers were effectively implemented over these years, particularly in response to the demands of the information access system, following Federal Law No. 12.527 of November 18, 2011. Throughout Brazil, this law regulates the public policy about state agencies disclosing information of public interest, regardless of requests, and the use of communication means enabled by information technology.

5. Results

Between 2013 and 2023, out of a total of 27 units of analysis, we obtained results from only 14 legislative houses of the following subnational entities: the State of Acre, the State of Amapá, the State of Amazonas, the State of Roraima, the State of Rondônia, the State of Alagoas, the State of Piauí, the State of Paraíba, the State of Sergipe, the State of Goiás, the State of Mato Grosso, the State of Mato Grosso do Sul, the State of Espírito Santo, and the Federal District[6].

Statistically, this means that we were able to analyze the legislative production data of the respective constitution and justice committees for slightly more than half (≈52%) of the total set of 27 units.

Therefore, our analysis should be viewed cautiously to avoid inductively generalizing the findings to all state legislative houses.

Below, we present the sole outcome of the explicit application of in *dubio pro legislatore* as a "principle," i.e., as a binding "legal rule" by a state legislative institution. This case involved the Constitution, Justice, and Drafting Committee of the Legislative Assembly of the State of Mato Grosso (Assembleia Legislativa do Estado do Mato Grosso, 2018), specifically in the exercise of preventive con-

[6]In more detail, the following issues were encountered for the remaining 13 legislative houses: 1) non-inclusion of legislative opinions in the search system (State of Pará, State of Tocantins, State of Paraná, State of Rio Grande do Sul, State of Santa Catarina, State of Rio de Janeiro, State of Minas Gerais, State of Bahia, State of Maranhão, State of Rio Grande do Norte, State of Ceará); and 2) inconsistency of the search system parameters (State of São Paulo).

stitutional control of the State Ordinary Bill No. 118/2016, authored by then-State Deputy Wilson Santos, who was a member of the Brazilian Social Democracy Party (PSDB) at the time.

The Case of the Legislative Assembly of the State of Mato Grosso

As mentioned, the only case of explicit application of *in dubio pro legislatore* emerged from the Opinion of the Constitution, Justice, and Drafting Committee of the Legislative Assembly of the State of Mato Grosso, published on October 23, 2018.

Under the rapporteurship of State Deputy Janaina Riva (Brazilian Democratic Movement Party/MDB), the opinion dealt with Ordinary Bill No. 118/2016, whose normative object was the establishment of specific tie-breaking criteria in public procurement processes in the State of Mato Grosso.

According to the constitutional regime of legislative powers, the Brazilian Supreme Court has repeatedly deemed the creation of tie-breaking criteria in public procurement by subnational entities as formally unconstitutional for violating the exclusive power of the Federal Union to legislate on general national norms regarding bidding and contracting for all federative entities, then including the States[7]. Additionally, for the Brazilian Supreme Court, the approval of a state law on a matter that must be nationally cohesive would violate constitutional content, such as the constitutional principle of the federative pact, which would also render the norm materially unconstitutional.

Despite this, the rapporteur argued that the existence of binding superior jurisprudence should not impede the typical legislative function exercised by the parliament. She posited that, in accordance with supplementary superior jurisprudence, the Parliament can surpass binding judicial understanding at any time, thereby avoiding constitutional fossilization or petrification[8]. This, in turn, would amount to the Constitutional Court politically recognizing the need for initial judicial self-restraint and deference to the legislator's political choices, even at the state level, seeking to strengthen its inherent legislative power.

Additionally, in terms of constitutional content, the rapporteur argued that approval of the bill would stimulate the state economy. Consequently, the bill would be materially constitutional as it was in harmony with the fundamental objectives expressed in the Brazilian Constitution[9]. Finally, the rapporteur concluded that the bill did not violate national rules on public procurement ap-

[7]Article 22. The Union has the exclusive power to legislate on: (…) XXVII—general rules for all types of bidding and contracting for government bodies, agencies and foundations of the Union, states, Federal District, and municipalities, in accordance with Article 37, item XXI, and for state-owned and mixed-capital companies, under the terms of Article 173, paragraph 1, item III (Brasil, 2022 [1988]).

[8]For more details on the topic of constitutional fossilization in the Brazilian context, see Gonet Branco and Mendes, 2023.

[9]Article 3. The fundamental objectives of the Federative Republic of Brazil are: (…) III—to eradicate poverty and marginalization and to reduce social and regional inequalities (Brasil, 2022 [1988]).

proved by both the National Congress and the President of the Republic at the federal level. Thus, the bill was indeed within the scope of the state's power to legislate supplements on specific state matters without violating the powers belonging to the Federal Union[10].

Following this reasoning, the rapporteur concluded (p. 4) that the draft's subject, being constitutional, required judicial self-restraint should the competent courts decide to view the future law as unconstitutional. Along this line of thinking, the rapporteur ultimately linked the bill's constitutional validity to the presumption of the constitutionality of laws, which in this case concretized the maxim of *in dubio pro legislatore*.

Indirectly citing the traditional Brazilian theorist of the general theory of law and constitutional law, Paulo Bonavides, the rapporteur, in favor of approving the proposal, completed her analysis, despite the reiterated binding jurisprudence of the Brazilian Supreme Court regarding the subject (i.e., the creation of specific tie-breaking rules in public procurement mechanisms within the State of Mato Grosso), which were not provided for in existing national legislation at the time.

To overcome this jurisprudence, the rapporteur finally invoked a parallel binding understanding of the Supreme Court itself to assert the subject's presumption of constitutionality, which in turn concretized the rule of *in dubio pro legislatore*, as follows: "As can be seen, the proposal that should receive an unfavorable opinion in the prior control is only the one that is manifestly unconstitutional, while the project whose content is controversial in doctrine and on which the Supreme Court has not yet directly and bindingly ruled should receive a favorable opinion (…). it is not for [this committee] to side with one or another view and adopt its understanding on the matter to block the project's progress, under penalty of incurring partiality through assumptions and usurping the attributions of the remaining high courts, as the case may be, to decide on the controversy. This is a corollary of the principle *in dubio pro legislatore*, as explained by Paulo Bonavides (…). Therefore, the proposal does not violate norms or principles of the Federal Constitution and the entire legal system, from a systemic perspective, achieving the structural coupling between the scope of constitutional optimization commands and state statutes" (pp. 4-5).

After the constitution and justice committee voted for a favorable opinion on the project, the plenary approved the legislative proposal on December 4, 2018, and it was sent for sanction by the state governor, which occurred on December 18, 2018. Finally, on January 14, 2019, the proposal became law with its promulgation and publication as State Law No. 10.803/2019.

Notably, to date, the law remains in force, with no questions regarding its (un)constitutionality raised either in the high state court or the Supreme Court.

[10]Article 25. The states are organized and governed by the Constitutions and laws they may adopt, in accordance with the principles of this Constitution. Paragraph 1. All powers that this Constitution does not prohibit the states from exercising shall be conferred upon them (Brasil, 2022 [1988]).

Thus, the application of *in dubio pro legislatore*, as a principle in the above case, was politically effective.

6. Discussion

As seen in the theoretical debate narrated in the literature review, *in dubio pro legislatore* is sometimes conceptualized, in the neoconstitutionalist style, as a "principle," i.e., as a legal norm of constitutional interpretation, and sometimes conceptualized as an axiom, maxim, or interpretive precept without the normative density of a principle.

In both cases, both the Hispanic and Latin American lines of theorization and the American line of theorization—undeniably developed under the inspiration of Thayer's studies on the theory of evidence—*in dubio pro legislatore* was semantically associated with the more general principle of the presumption of constitutionality and the more specific theme of the burden of proof in the occurrence of real legal doubts.

Therefore, in the case of the preventive control of constitutionality by the Legislative Power, we found that it is not possible—at least not yet—to conceive of *in dubio pro legislatore* as an autonomous or independent precept.

Similarly, there is no theoretical consensus on the legal-normative character of *in dubio pro legislatore*, which does not seem to be the case with its associated institute, the presumption of constitutionality, which has been developed theoretically with greater rigor, as seen in the studies of Tommasini, and Sarmento and Souza Neto.

From the set of legislative houses researched, we obtained only a single outcome of the actual application of *in dubio pro legislatore* in the stage of the preventive control of constitutionality, which was the case for the opinion of the Constitution, Justice, and Drafting Committee of the Legislative Assembly of the State of Mato Grosso on State Ordinary Bill No. 118/2016.

From the perspective of legislative politics, the application of *in dubio pro legislatore* as a "principle," or as a "legal norm," to ultimately approve a bill that was initially considered unconstitutional according to the prevailing jurisprudence at the time can be seen as successful.

Indeed, the argumentative line of the opinion initially adopted the conceptual idea that *in dubio pro legislatore* was a legal maxim. However, in the end, after the rapporteur presented relevant claims, the reasons why superior binding jurisprudence should not be adopted became apparent (considering that the Brazilian Constitutional Court itself jurisprudentially acknowledges that a legislative power can legislate beyond judicial positioning), and the idea that *in dubio pro legislatore* was indeed a principle was adopted. To this end, surprisingly, traditional doctrine not identified as pertinent in our literature review was utilized, demonstrating the strategic use of established theorists as an "authority discourse."

Given that we could not retrieve results for the remaining 13 state parlia-

ments, the case of the Constitution and Justice Committee of the Legislative Assembly of the State of Mato Grosso can be a paradigm for other legislative houses in adopting hermeneutic strategies to overcome judicial understandings that may constrain legislative agency. This is particularly applicable in the Brazilian context, where empirical evidence shows that the Supreme Court has acted—without self-restraint—in place of the usual legislator, often using substantive arguments and a neoconstitutionalist orientation, aiming to maximize judicial discretion and judicial lawmaking.

Thus, the analysis of these results indicates that our hypothesis may be correct, namely that the use of *in dubio pro legislatore* is possibly associated with the adoption of non-interpretivist and proceduralist perspectives on legal interpretation in the preventive control of constitutionality exercised within the parliamentary domain, at the state level, in favor of legislative counter-activism and democratic experimentalism within the states.

A more robust confirmation of our hypothesis could follow several paths in the future. First, it is necessary to access the opinions of the permanent constitution and justice committees of state legislative houses (whose databases present issues) in order to determine, with more complete data, if there are other instances of the actual application of *in dubio pro legislatore*. To achieve this, one possibility involves obtaining access to the digitized opinions and reports for the researched period via information access requests.

Second, our study should be complemented with data from other legislative institutions to verify other manifestations of proceduralism in the preventive control of constitutionality, such as in the federal legislative branch (the House of Representatives and Federal Senate) and in the municipal legislative authorities.

In this study, it is relevant to include insights from political science, as there are other hypotheses to be addressed, such as whether or not the legislative power has used *in dubio pro legislatore* as a proceduralist political strategy to "judge" a bill in favor of electoral interests on the basis of a hypothetical "electoral-political defeasibility" of a future norm.

We may question whether the parliamentary use of *in dubio pro legislatore* in the preventive control of constitutionality can in fact politically support a form of accountability among legislators to their electoral base represented in the mandate, while at the same time transferring the political burden of possible political and judicial invalidation of a norm to other institutional veto players (Tsebelis, 2002), such as state supreme courts or the executive.

In other words, the parliament's weak application of *in dubio pro legislatore* might indicate a transfer of responsibility and the decision-making burden on legislative and constitutional matters to other institutional actors.

Third, studies are promising in terms of the application of *in dubio pro legislatore* also in the repressive judicial control of constitutionality to investigate whether this precept is adopted by high courts. If such an application exists, it is

necessary to investigate 1) the national and/or state policy matters for which this precept was applied; 2) whether this precept was applied in the rapporteur's votes or in dissenting votes; 3) which theories this precept was based on in judicial decisions; and 4) whether the application occurred on the basis of proceduralist or substantialist hermeneutics.

Finally, the new concept of the "principle of the graduated presumption of constitutionality," proposed by Sarmento and Souza Neto, holds special relevance for examining, in greater detail, the role of the legislative power in the institution of a given norm or public policy. This finding offers a new methodological approach to *in dubio pro legislatore*, enabling its empirical measurement in new case studies, as well as quantitative analysis.

With respect to current studies, the presumption of constitutionality is perceived as a well-established principle of constitutional hermeneutics, with *in dubio pro legislatore* being a variant or modality of this principle.

This demonstrates that in the end that, unlike the Hispanic and Latin American literature, there is still no consensus in Brazilian studies on whether *in dubio pro legislatore* is a real principle, i.e., a biding legal norm, or merely an interpretative axiom that may or may not possess juridical quality, depending on the discursive strategy used in the concrete case.

7. Conclusion

By conducting a case study of Brazilian state legislatures' exercise of preventive control of constitutionality from 2013 to 2023, we found that the application of *in dubio pro legislatore* occurred in only one instance. This instance was by the Constitution, Justice, and Drafting Committee of the Legislative Assembly of the State of Mato Grosso in 2018.

We observed that, in this sole case, *in dubio pro legislatore* was employed as a real legal "principle," in line with the Hispanic and Latin American literature on the subject.

This unique case may confirm our initial hypothesis, which suggests that the use of *in dubio pro legislatore* may emerge from the adoption of non-interpretative and proceduralist strategies concerning constitutional hermeneutics from the perspective of subnational parliaments in Brazil.

Acknowledgements

The author thanks the Program for National and International Academic Publications from the State University of Amapá—UEAP for the financial support. The author thanks the participants of the Work Group "Constitutional Law and Theory of State", from the 10th Brazilian Conference on Philosophy of Law and Sociology of Law, held on May 11, 2024 at the Ribeirão Preto Law School, University of São Paulo, for the helpful critiques during the initial phase of the research. The author also thanks the statistician Evellin Priscila Sousa do Nascimento for the methodological insights and correction during the research.

Conflicts of Interest

The author declares no conflicts of interest regarding the publication of this paper.

References

Alexander, L., & Sherwin, E. (2021). *Advanced Introduction to Legal Reasoning*. Edward Elgar Publishing. https://doi.org/10.4337/9781789903157

Assembleia Legislativa do Estado do Mato Grosso (2018). *Parecer Referente ao Projeto de Lei nº 118/2016, que "estabelece critério de desempate nos processos licitatórios no Estado do Mato Grosso"*. https://www.al.mt.gov.br/proposicao/cpdoc/37522/visualizar

Barak, A. (2005). *Purposive Interpretation in Law*. Princeton University Press. https://doi.org/10.1515/9781400841264

Barroso, L. R. (2020). *Curso De Direito Constitucional Contemporâneo: Os Conceitos Fundamentais e a Construção do Novo Modelo* (9th ed.). Saraiva Educação.

Bastos, C. R. (2014). *Hermenêutica e Interpretação Constitucional* (4th ed.). Malheiros.

Bernal Pulido, C. (2006). *El Neoconstitucionalismo a Debate*. Instituto de Estudios Constitucionales.

Binenbojm, G. (2014). *A Nova Jurisdição Constitucional Brasileira: Legitimidade Democrática e Instrumentos de Realização* (4th ed.). Renovar.

Brasil (2022 [1988]). *Constitution of the Federative Republic of Brazil*. https://www.stf.jus.br/arquivo/cms/legislacaoConstituicao/anexo/Brazil_Federal_Constitution_EC_125.pdf

Cavalcante Filho, J. T. (2022). *Processo Legislativo Constitucional* (5th ed.). Juspodivm.

Cisneros Vivar, B. R. (2016). *La Colegislación de la Corte de Constitucionalidade Aplicando el Principio in Dubio Pro Legislatore en la Creación del Acuerdo que Reformó el Procedimiento de Amparo*. Undergraduation Thesis, Universidad de San Carlos de Guatemala.

Dimoulis, D., & Lunardi, S. R. G. (2011). Ativismo e autocontenção judicial no controle de constitucionalidade. In A. Fellet, D. Paula, & M. Novelino (Eds.), *As Novas Faces do Ativismo Judicial* (pp. 459-473). Juspodivm.

Echeverri Quintana, E. (2016). La Interpretación Constitucional: ¿Eclipse del Control al Poder? *Revista IUS, 10,* 59-82. https://doi.org/10.35487/rius.v10i37.2016.9

Ely, J. H. (2001). *Democracy and Distrust: A Theory of Judicial Review* (13th ed.). Harvard University Press.

Ferreres Comella, V. (1997). *Justicia Constitucional y Democracia*. Centro de Estudios Políticos y Constitucionales.

Fonteles, S. S. (2014). *Hermenêutica Constitucional* (7th ed.). Juspodivm.

Gadamer, H. (1999). *Verdade e método: Traços fundamentais de uma hermenêutica filosófica* (3rd ed.). Vozes.

García Amado, J. A. G. (2007). Derechos y Pretextos. Elementos de Crítica al Neoconstitucionalismo. In M. Carbonell (Ed.), *Teoría del Neoconstitucionalismo. Ensayos Escogidos* (pp. 237-264). Trotta.

Gómez Villavicencio, R. (2022). El Control Constitucional en el Ecuador. Una Aproximación Teórica y Filosófica. *Foro: Revista de Derecho, 38,* 121-144. https://doi.org/10.32719/26312484.2022.38.6

Gonet Branco, P., & Mendes, G. F. (2023). *Curso de Direito Constitucional* (18th ed.). SaraivaJur.

Grau, E. (2014). *O Direito Posto e o Direito Pressuposto* (9th ed.). Malheiros.

Hesse, K. (1992). *Escritos de Derecho Constitucional* (2nd ed.). Centro de Estudios Constitucionales.

Horn, H. (2002). Jueces versus Diputados: Sistemas Americano y Austríaco de la Revisión Judicial. *Anuario Iberoamericano de Justicia Constitucional, 6,* 221-244.

Horn, H. (2012). Judicial Review in the Democratic System. In *25th IVR World Congress Law Science and Technology* (pp. 1-8). Paper Series No. 002/2012, Goethe University Frankfurt am Main.

Lora Deltoro, P. (2000). La Posibilidad Del Constitucional Thayeriano. *Doxa—Cuadernos De Filosofía Del Derecho, 23,* 49-75. https://doi.org/10.14198/DOXA2000.23.02

Nader, P. (2023). *Introdução Ao Estudo Do Direito* (45th ed.). Forense.

Perry, M. J. (1993). The Constitution, the Courts, and the Question of Minimalism. *Northwestern University Law Review, 88,* 84-164.

Sarmento, D., & Souza Neto, C. P. (2024). *Direito Constitucional: Teoria, História e Métodos de Trabalho* (2nd ed.). Forum.

Silva, A. G. da (2007). Pós-Positivismo e Democracia: em Defesa de um Neoconstitucionalismo Aberto ao Pluralismo. In *Anais do XVI Congresso Nacional do CONPEDI* (pp. 3337-3357). CONPEDI.

Silva, V. A. da (2019). *The Constitution of Brazil: A Contextual Analysis*. Hart Publishing. https://doi.org/10.5040/9781509995370

Streck, L. L. (2002). *Jurisdição Constitucional e Hermenêutica: Uma nova Crítica do Direito*. Livraria do Advogado.

Streck, L. L. (2012). Do Pamprincipiologismo à Concepção Hipossuficiente de Princípio. Dilemas da Crise do Direito. *Revista de Informação Legislativa, 49,* 7-21.

Sunstein, C. R. (1999). *One Case at a Time: Judicial Minimalism on the Supreme Court*. Harvard University Press.

Sweet, A. S., & Mathews, J. (2010). All Things in Proportion? American Rights Doctrine and the Problem of Balancing. *Emory Law Journal, 60,* 797-875. https://doi.org/10.2139/ssrn.1569351

Thayer, J. B. (1893). The Origin and Scope of the American Doctrine of Constitutional Law. *Harvard Law Review, 7,* 129-156. https://doi.org/10.2307/1322284

Tommasini, N. (2018). *A Presunção de Constitucionalidade e Inconstitucionalidade das Leis*. Master's Degree Thesis, University of São Paulo.

Tsebelis, G. (2002). *Veto Players: How Political Institutions Work*. Princeton University Press. https://doi.org/10.1515/9781400831456

Waldron, J. (2006). The Core of the Case against Judicial Review. *The Yale Law Journal, 115,* 1346-1406. https://doi.org/10.2307/20455656

West, R. (1993). The Aspirational Constitution. *Northwestern University Law Review, 88,* 241-268.

White, E. G. (1993). Revisiting James Bradley Thayer. *Northwestern University Law Review, 88,* 48-83.