

# ***HARMING CONSTITUTIONAL CHANGE:***

## **THE ROLE OF COUNTERMOVEMENTS IN CONSTITUTIONAL EQUALITY LITIGATION IN THE UNITED STATES, BRAZIL AND SOUTH AFRICA**

By-

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s/Thiago de Souza Amparo

## ABSTRACT

The dissertation entitled ***Harming Constitutional Change: The Role of Countermovements in Constitutional Equality Litigation in the United States, Brazil and South Africa*** narrates the ways through which constitutional equality jurisprudence have redefined what it means to be harmed in constitutionally relevant way, largely due to the influence of legal mobilization led by countermovements in and out of courts. By looking at three jurisdictions and their constitutional equality jurisprudences and frameworks, namely: Brazil, South Africa and the United States, this dissertation addresses analyzes countermovements' legal mobilization in those countries, inside and outside courts; and inquire the roles of apex courts in light of countermovements' legal mobilization, in particular how such courts make sense of new claims of harm.

This dissertation focuses on *countermovements which seek to protect traditional family values* – developed to oppose LGBT rights in Brazil, South Africa and the United States, and the *anti-affirmative action countermovements* – reacting to race-related affirmative actions in those countries. Through analyzing the constitutional changes in constitutional equality the legal mobilization of countermovements has promoted, this dissertation challenges the traditional way scholars have understood the role of apex courts amid legal mobilization by social movements and countermovements. It concludes by outlining what kinds of new claims of constitutional harm (e.g. complicit claims) apex courts will have to deal with in the future of constitutional equality.

*To my mom (1958-2017),  
in memoriam.  
With deepest love  
and saudades*

*“Can any one of us here still afford to believe that efforts to reclaim the future can be private or individual? Can anyone here still afford to believe that the pursuit of liberation can be the sole and particular province of any particular race, or sex, or age, or religion, or sexuality, or class? Revolution is not a one-time event. It is becoming always vigilant for the smallest opportunity to make a genuine change in established, outgrown responses; for instance, it is learning to address each other’s difference with respect.”*

*Audre Lorde*

*In: Sister Outsider: Essays and Speeches (Crossing Press, 2012), p. 265-266.*

*"[a] word is not a crystal, transparent and unchanged, it is the skin of a living thought, and may vary greatly in color and content according to the circumstances and the time in which it is used."*

*Justice Oliver Wendell Holmes Jr.*

*The US Supreme Court*

*In: Towne v. Eisner, 245 U. S. 425 (1918)*

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## INTRODUCTION

“The constitutionalization of social movements is characterized by the growing, massive, and expansive use of rights-based language and the courts by citizens, human rights organizations, social movements, community organizations, etc. Organized and unorganized citizens ‘go to court full of hope’ that it will take care of their needs or address their concerns.”<sup>1</sup> What happens then to constitutional equality when countermovements – that is, movements against LGBT rights or opposing affirmative action for black people – also go to court full of hope to influence what it means to be harmed in a constitutionally relevant way? Does the increasing involvement of countermovements in constitutional litigation of equality promote a change in our understanding of equality?

The traditional narrative of constitutional change of equality usually goes as follows: a change in the interpretation of equal protection by apex<sup>2</sup> courts are assessed by scholars in terms of progress or setback regarding the expansion of rights of members of historically discriminated groups. If an apex court recognizes same-sex marriage or if it gives a green light to race-based affirmative action programs, a commentator might say that the jurisprudence of equality in that country is moving towards expanding the rights of LGBT people and racially disadvantaged groups. Whether we are dealing with new constitutions founded on social mobilization (South Africa and Brazil) or with older constitutions whose interpretation has changed over

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<sup>1</sup> Mauricio Albarracín Caballero, “Social Movements and the Constitutional Court: Legal Recognition of the Rights of Same-Sex Couples in Colombia,” *Sur - International Journal on Human Rights* 8, no. 14 (2011): 8.

<sup>2</sup> Hereafter, I use the expression apex courts in order to refer to the highest courts in the three jurisdictions under analysis with the mandate to declare unconstitutional statutory laws or executive orders by binding judicial decisions. Those apex courts are namely: the Supreme Federal Tribunal of Brazil – STF, the United States Supreme Court and the Constitutional Court of South Africa.

time in response to social mobilization (the United States), this traditional narrative generally prevails among scholars.

This dissertation takes issue with this narrative and offers an alternative. The central claim here is that, when the increasing legal mobilization by countermovements is given due consideration, constitutional change of the interpretation of equality is best understood in terms of a contest of what it means to be harmed in a constitutionally relevant manner, rather than a game between functional minorities and majorities. In this dissertation, *countermovements are understood as social movements, in and of themselves, composed of actors whose shared language, repertoire of tactics, opportunities and threats are defined primarily (1) in opposition to an existing social movement (2) whose collective action is in a dialogue with state authorities as a challenger and/or ally*. The work will track how countermovements have increasingly promoted legal mobilization before apex courts as well as political branches not only to contest previous gains of social movements, but also to promote their own understanding of constitutional harm.

This dissertation seeks to answer the question: how has the legal mobilization of countermovements changed the constitutional understanding of equality, in particular what it means to be harmed in a constitutionally relevant way? The **first objective** is to analyze the legal mobilization of countermovements in Brazil, South Africa and the United States, inside and outside the courtroom. For that endeavor, the dissertation seeks to pinpoint when and how countermovements have proactively promoted non-textual constitutional change in equality and the role of apex courts in such change. The **second objective** is to inquire into the roles of apex courts in light of such legal mobilization, in particular how courts make sense of new claims of harm.

This dissertation focuses on *countermovements which seek to protect traditional family values* – developed to oppose LGBT rights in Brazil, South Africa and the United States, and the *anti-affirmative action countermovements* – reacting to race-related affirmative actions in those countries. The reason why this dissertation has looked more closely at those movements is their use of constitutional equality litigation as a tactic, often a central tactic. A focus on these countermovements opens out the possibility of an analysis of the impact they have had on constitutional change compared with previous gains by their opponents, in particular civil rights movements and LGBT movements. The work does not seek to provide a full historical account of those countermovements (because that has already been extensively researched by others), but rather focuses on the potentiality for legal mobilization to yield constitutional change. As will be shown, moments of constitutional change have tended to turn on the notion of constitutionally relevant harm.

The work is interested in countermovements as such, that is a movement developed in opposition to another social movement and in dialogue with existing authorities. It avoids a study of ‘conservative’ groups, religious or otherwise, in instances where their language and tactics are not defined as being in opposition to a pre-existing social movement. In other words, the focus is not on a church stance in favor of family values but rather how religious groups – which may or may not be associated with the church – have mobilized themselves legally to fight against the recognition of rights for LGBT people.

The three jurisdictions in which countermovements have been analyzed were chosen because in each of them considerable weight is placed on social movements and countermovements by those involved in legal debates on racial and sexual equality.

In fulfilment of the objectives of this work set out above, the dissertation is divided into three parts. **Part 1 (Chapters 1-2)** on theory and conceptual framework presents the traditional view of constitutional change of equality and offers an alternative tripartite conceptual framework. Any account on the countermovements' role in non-textual constitutional change, as the one proposed in this dissertation, must first unpack how the literature makes sense of the various roles of apex courts in managing contention derived from social movements' and countermovements' involvement in constitutional debate. Second, such an account must explain how the literature on legal mobilization conceptualizes the collective tactics social movements and countermovements employ, and how those movements seize legal and political opportunities (constitutional structure included) to advance their causes. For this effect, **Part 2 (Chapters 3-4)** sets out case studies addressing the first two parts of the tripartite conceptual framework presented in Part 1, namely apex courts' institutional openness to countermovements and countermovements' contestation outside courts. The objective in this part is to analyze the roles apex courts have played when faced with countermovements' legal mobilization. Finally, **Part 3 (Chapter 5 and conclusion)** presents and critically examines the third of the tripartite conceptual framework dealing with apex courts' role of managing notions of harm presented by countermovements' proactive litigation. It presents a tentative suggestion as to how future constitutional equality jurisprudence may unfold.

The dissertation concludes by presenting the likely direction of equality jurisprudence given the rise of countermovement litigation. It suggests that the future of equality jurisprudence will be less concerned with group historical disadvantage, and instead will grapple with individualized notions of harm. It concludes by affirming that the ongoing process of individualization of harm in constitutional equality opens the

judicial door to anticipatory legal mobilization by countermovements, by freeing them from the burden of contesting social movements. In turn, this leaves them to take a primary role in constitutional litigation of equality affirming rights on their own terms. Where historical disadvantage fades away as a criterion to mediate opposing claims of victimhood, apex courts will have to discover innovative ways to navigate (in other words, hierarchize) various claims of harm.

## **PART 1: CONCEPTUAL FRAMEWORK**

## **CHAPTER 1 CUTTING BOTH WAYS: NON-TEXTUAL CONSTITUTIONAL CHANGE, CONTENTION AND THE ROLE OF COURTS**

This Chapter seeks to understand to which extent existing theories of non-textual constitutional change are able to grasp or even explain countermovements' role in influencing constitutional change through courts. In order to do that, the present Chapter contrasts the US narrative on how meanings attributed to constitutional norms change over time without formal constitutional amendment (non-textual constitutional change) with alternative approaches to this topic, from two Global South countries: South Africa and Brazil.

The Chapter finds that neither US, nor Brazilian and South African theories are able to offer a proper place for countermovements in their understanding of constitutional change. Those theories are overtly focused on social movements – and not countermovements – as the legitimated triggers of constitutional change in constitutional equality. Constitutional change through equality litigation is rather the product of a pluralist process in which participants – including lawyers of social movements and countermovements – disagree fundamentally about conceptions of what it means to be constitutionally harmed.

Given that theories of constitutional change rely heavily on courts to deliver transformations in the meaning of equality, this Chapter sheds light on the dilemma of having at once constitutional discourses on equality seeking social change, and opposing groups accessing courts with alternative claims of harm. In this scenario, courts can cut both ways: they can accept claims of social movements, from countermovements or a combination of both, or even decide to leave certain issue to be



solved by the political branches. In this view, non-textual constitutional change would then be primarily the result of how courts conducting constitutional review mediate opposing claims of harm in concrete cases.

This Chapter presents elements of a **contention-centered approach to constitutional change** which offers a place for countermovements in legal discourse on constitutional change. A contention-centered approach to constitutional change does not take a *prima facie* preference for social movements over countermovements. It scrutinizes how courts conducting constitutional review are performing their role in mediating radically different concepts of what it means to have one's equal stature harmed in a constitutionally relevant manner. This Chapter ultimately shows that the seeds of such a contention-centered approach can already be found in the existing literature on non-textual constitutional change. It hereafter provides a closer look at prominent theories of constitutional change in search for those seeds.

This Chapter is structured as follows. Part 1 presents the basics of the architecture of the constitutional framework of the three countries, justifying why talking about non-textual constitutional change makes more sense than focusing on formal constitutional amendments, as far as social mobilization is concerned. Part 2 addresses socio-legal mobilization on racial and LGBT equality as the footprint of the constitutional framework of the three countries. This framework constitutes the playing field where countermovements' litigation takes place, being the reason why this Chapter starts with it. Part 3 introduces the rise of countermovements in constitutional litigation as a way to problematize existing theories of non-textual constitutional change centering on the role of social movements (and not countermovements) as triggers of change. Part 4-5 scrutinizes scholarly understandings of constitutional change in US, on the one hand, and Latin America and South Africa, on the other hand,

respectively. Part 6 concludes by making sense of countermovements' litigation as a way to better understand constitutional change.

## 1. The Basics: the Architecture of the Constitutional Framework of the Three Countries

Concentrating on non-textual constitutional change offers an advantageous standpoint across the countries analyzed in this dissertation. A focus on non-textual constitutional change makes more sense in the jurisdictions covered, as opposed to an emphasis on constitutional amendments, for different rationales.

In the United States, the amendment process of the Article V of the US Constitution<sup>3</sup> is so demanding that it is hardly pursued and, when it is, it arguably renders successful amendments 'irrelevant',<sup>4</sup> as David Strauss maintains, in light of the fast development of constitutional jurisprudence. Furthermore, as Ackerman argues, the amendment process in the US only made sense at the time of its adoption in the 18<sup>th</sup> century because "the Founders wrote Article V for a people who thought of themselves primarily as New Yorkers, or Georgians",<sup>5</sup> as opposed to US citizens. This becomes clear when one considers President Franklin Roosevelt's assertion, amid the conflict between Executive and the US Supreme Court in the 1930s regarding the New Deal laws: "Thirteen States which contain only five percent of the voting population can block ratification even though the thirty-five States with ninety-five percent of the

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<sup>3</sup> According to Article V of the US Constitution, which establishes the formal amendment process: "*The Congress, whenever two thirds of both houses shall deem it necessary, shall propose amendments to this Constitution, or, on the application of the legislatures of two thirds of the several states, shall call a convention for proposing amendments, which, in either case, shall be valid to all intents and purposes, as part of this Constitution, when ratified by the legislatures of three fourths of the several states, or by conventions in three fourths thereof, as the one or the other mode of ratification may be proposed by the Congress; provided that no amendment which may be made prior to the year one thousand eight hundred and eight shall in any manner affect the first and fourth clauses in the ninth section of the first article; and that no state, without its consent, shall be deprived of its equal suffrage in the Senate*".

<sup>4</sup> David A Strauss, "The Irrelevance of Constitutional Amendments," *Harvard Law Review* 114, no. 5 (March 2001): pp. 1457–1505.

<sup>5</sup> Ackerman, *We The People, Volume 3: The Civil Rights Revolution*, pp. 27–28.

population are in favor of it.”<sup>6</sup> Changing the US Constitution is so hard that when it did happen it was later qualified by the scholarship as extraordinary constitutional moments,<sup>7</sup> and even constitutional amendments supported by public mobilization failed such as the Equal Rights Amendment in the 1970s.<sup>8</sup>

Constitutional change in Brazil and South – unlike in the US – also happens through textual means, i.e. constitutional amendments, more often than not. From a quantitative perspective, Brazil and South Africa differ in terms of numbers of constitutional amendments. As of December 2017, the 1996 South African Final Constitution has been amended only 17 (seventeen) times,<sup>9</sup> while the 1988 Brazilian Constitution has been amended 99 (ninety-nine) times.<sup>10</sup>

Yet, constitutional change through amendment is not the primary locus for changes in the meaning of equality in these countries. From a qualitative point of view, constitutional amendments in both countries are less about changing the meaning of rights *per se*, but rather either to enact technical modifications or to make structural socioeconomic policy reforms constitutionally possible. This means that social movements and countermovements do not seek primarily changes in the constitutions of both countries, but rather make efforts elsewhere: before courts and also before legislatures in contestations outside courts.

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<sup>6</sup> As quoted in: Ibid., pp. 311–312.

<sup>7</sup> Bruce Ackerman, *We the People: Volume 2: Transformations* (Cambridge, Massachusetts, and London, England: Belknap Press of Harvard University Press, 1998).

<sup>8</sup> Reva B Siegel, “She the People: The Nineteenth Amendment, Sex Equality, Federalism, and the Family,” *Harvard Law Review* 115, no. 4 (2002): 947.

<sup>9</sup> SOUTH AFRICA, Constitutional Amendments, <http://www.gov.za/documents/constitution-amendments>. Last accessed on: 1 December 2017.

<sup>10</sup> BRAZIL, Constitutional Amendments, [http://www.planalto.gov.br/ccivil\\_03/Constituicao/Emendas/Emc/quadro\\_emc.htm](http://www.planalto.gov.br/ccivil_03/Constituicao/Emendas/Emc/quadro_emc.htm). Last accessed on: 23 February 2016.

In South Africa, constitutional amendments are seen by scholars – in the words of Pierre De Vos in 2012 – as “mere technical amendments of no real substantive or political effect.”<sup>11</sup> In Brazil, constitutional amendments are primarily an instrument to adjust the constitution to reality by allowing reforms in economic and social policies, rather than to change the interpretation of existing constitutional rights, or to reform the state organization, as the 2004 Amendment restructuring the judiciary.<sup>12</sup> This is partly the case – as mentioned earlier - because the Brazilian Constitution itself prohibits, through the so-called eternity clauses, the enactment of constitutional amendments that seek to restrict individual rights and guarantees.<sup>13</sup> It is also because the constitutional text – a product of a wide consensus-seeking process in the Constituent Assembly as argued by Paulo André Nassar et al.<sup>14</sup> – is vast and full of details on public policies. Furthermore, the Brazilian constitution, partly inspired by the Portuguese socialist tradition,<sup>15</sup> is considered by many scholars as designed to coordinate politics towards

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<sup>11</sup> Pierre De Vos, “On Changing the Constitution,” Constitutionally Speaking, 2012, <http://constitutionallyspeaking.co.za/on-changing-the-constitution/>. Last accessed on: 23 February 2016. One of exceptions is the last constitutional amendment (17<sup>th</sup>) from February 2013, in which the roles of the Chief Justice, the High Court and the Constitutional Court were redesigned, turning the latter into a classic supreme court concerned with issues beyond strictly constitutional ones. In other words, the 2013 Amendment expanded the jurisdiction of South Africa’s Constitutional Court to hear – in addition to constitutional matters - “any other matter, if the Constitutional Court grants leave to appeal on the grounds that the matter raises an arguable point of law of general public importance which ought to be considered by that Court.” (SOUTH AFRICA, *Final Constitution of 1996*, Section 167, 3.b.ii.). See: SOUTH AFRICA, 17<sup>th</sup> Constitutional Amendment, 1 February 2013, available at: [http://www.gov.za/sites/www.gov.za/files/36128\\_0.pdf](http://www.gov.za/sites/www.gov.za/files/36128_0.pdf). Last accessed on: 23 February 2016.

<sup>12</sup> BRAZIL, 45<sup>th</sup> Constitutional Amendment, 30 December 2004, available at: [http://www.planalto.gov.br/ccivil\\_03/Constituicao/Emendas/Emc/emc45.htm](http://www.planalto.gov.br/ccivil_03/Constituicao/Emendas/Emc/emc45.htm).

<sup>13</sup> Conrado Hubner Mendes, “Judicial Review of Constitutional Amendments in the Brazilian Supreme Court,” *Florida Journal of International Law* 17, no. 3 (2005): 450–57.

<sup>14</sup> “Nossa hipótese para explicar essa continuada reforma constitucional seria que a constituinte assumiu um compromisso maximizador e foi incapaz de redigir um texto homogêneo e em um único sentido. Resultado disso é uma Constituição com dispositivos contraditórios por todo o texto, assim redigida para atender os interesses, muitas vezes antagônicos, dos diferentes grupos representados na Assembleia Nacional Constituinte (ANC).” [*Our hypothesis to explain this ongoing constitutional reform would be that the constituent assumed a maximizing commitment and was unable to draw up a homogenous text and in one direction. As a result, there is a constitution with contradictory provisions throughout the text, as drafted to meet the interests, often antagonistic, of the different groups represented in the National Constituent Assembly (ANC).*] See Oscar Vilhena Vieira et al., *Resiliência Constitucional: Compromisso Maximizador, Consensualismo Político e Desenvolvimento Gradual* (Sao Paulo: Direito GV, 2013), 25.

<sup>15</sup> “Perhaps the only foreign model taken into account in a more systematic way during the Constitutional Assembly was the socially-oriented Portuguese Constitution of 1976. The result was a document that retained Brazil’s traditional political model as a presidential and federal republic. Moreover, the Constitution adopted a clear aspirational and dirigist drive, aiming to coordinate social, economic and political change. In this sense it attributed to the state a key role in promoting social welfare and economic development. The economic chapter of

social change, rather than merely limiting power – often being coined as a *constituição dirigente* [directive constitution].<sup>16</sup> This renders policy reform virtually impossible without going through necessary constitutional changes.

In South Africa and Brazil, despite their more detailed constitutions as opposed to the US one and the fact that those countries amend their constitutions more often, development of constitutional equality has occurred in the past decades primarily via the judiciary and its interaction with social movements and civil society organizations, rather than via textual change through constitutional amendments. It is so either because the apex court is called upon to decide on issues purposely left unsolved by the framers of the constitutional-building process, such as constitutionality of death penalty<sup>17</sup> or same-sex marriage<sup>18</sup> in South Africa, or because, in addition to it, the constitution itself prevents enactment of any amendment which aims “at abolishing ... individual rights and guarantees,”<sup>19</sup> to cite the Article 60, IV of the Brazilian Federal Constitution of 1988. Despite the dozens of amendments to the Brazilian Constitution not directly pertaining to individual rights and guarantees in the past two decades, this so-called *cláusula pétrea* (in Portuguese) or eternity clause has left the Brazilian apex court with a leadership role in having the last word even regarding a constitutional amendment.<sup>20</sup>

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the Constitution would be reformed in the nineties to adapt to more orthodox economic thinking. "Oscar Vilhena Vieira, "Public Interest Law: A Brazilian Perspective," *UCLA Journal of International Law and Foreign Affairs* 13 (2008): 231–32.

<sup>16</sup> José Joaquim Gomes Canotilho, *Constituição Dirigente e Vinculação Do Legislador: Contributo Para a Compreensão Das Normas Constitucionais Programáticas*, 2nd ed. (Coimbra Editora, 2001); Gilberto Bercovici, "O Poder Constituinte Do Povo No Brasil: Um Roteiro de Pesquisa Sobre a Crise Constituinte [The Constituent Power of the People in Brazil: A Roadmap for Research on the Constituent Crisis]," *Lua Nova: Revista de Cultura e Política*, no. 88 (2013): 305–25.

<sup>17</sup> SOUTH AFRICA, Constitutional Court, *S v Makwanyane and Another* (CCT3/94) [1995] ZACC 3; 1995 (6) BCLR 665; 1995 (3) SA 391; [1996] 2 CHRLD 164; 1995 (2) SACR 1 (6 June 1995).

<sup>18</sup> SOUTH AFRICA, Constitutional Court, *Minister of Home Affairs and Another v Fourie and Another* (CCT 60/04) [2005] ZACC 19; 2006 (3) BCLR 355 (CC); 2006 (1) SA 524 (CC) (1 December 2005).

<sup>19</sup> Hereafter, I will use the official English version of the Brazilian Federal Constitution of 1988, available at the website of the Brazilian House of Representatives: <http://bd.camara.gov.br/bd/handle/bdcamara/1344>. Last accessed on: 16th of May, 2014.

<sup>20</sup> For an analysis of the jurisprudence regarding unconstitutionality of amendments, see: Mendes, "Judicial Review of Constitutional Amendments in the Brazilian Supreme Court." For a general analysis of how Brazilian

If then courts play a leadership role in the countries here studied, it is key to state how social movements and countermovements access courts, in particular apex courts. The focus here is specifically the case law of apex courts in processes of constitutional litigation. This focus is necessary in order to allow a comparison between judicial discourses on constitutional change in the three countries, which – albeit not exclusively – primarily occurs at the level of apex courts in the three countries. While the primary focus of the dissertation will be on apex courts, due to their special role in determining what the constitution means, on certain occasions the broader expression “courts conducting constitutional review” will be used here, in order to also include lower courts.

In the US and Brazil, there is a decentralized system of constitutional review, which combines an incidental constitutional review practiced by any judge in the land, who can decline to apply a certain law to a specific case for violation of a constitutional norm, and a concentrated constitutional review system, where the Supreme Courts in both countries have the last, binding word on constitutional interpretation in the cases they hear. Yet, in order to access the US Supreme Court claims must be framed not in abstract terms, rather as a personal injury linkable to a state action as a rule of standing. Also, in the US, the US Supreme Court can decline to grant certiorari to hear a case, allowing the US Supreme Court often to delay giving the last word on a controversial matter.

Differently, the Brazilian judicial review system combines a decentralized/concrete system (any court of any instance can decline to apply a legal norm in a concrete case if it considers that the law or Executive act is unconstitutional)

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constitutional framework changes while keeping its basic structure see: Vieira et al., *Resiliência Constitucional: Compromisso Maximizador, Consensualismo Político e Desenvolvimento Gradual*.

with a centralized/abstract system through direct constitutional challenge. In the later, few high level actors, such as political parties and Attorney General, can challenge the constitutionality of a law or Executive act directly before the Brazil's Supreme Court (STF) whose decision can struck down the legal norm altogether from the legal system.

For the past decade, bearing in mind their lack of standing to present on their own constitutional challenges in abstract before the STF, representatives of various social movements have increasingly used other participatory institutional mechanisms provided by the Brazilian Supreme Court in those abstract, direct constitutional review procedures. They have done so mainly via two institutional mechanisms formally established by the laws in 1999 regulating abstract review by the STF<sup>21</sup>: public hearings (*audiências públicas*), especially since this mechanism was regulated in 2009<sup>22</sup> in the internal rules of the Court, and *amici curiae* interventions. Through these mechanisms, representatives of social movements and countermovements have sought to influence the court's interpretation, particularly in controversial rights-related cases, such as race-oriented affirmative actions in higher education<sup>23</sup> and women's right to terminate pregnancy in the case of anencephalic fetus.<sup>24</sup> In those cases, just to name two of them, Brazil's top court has convened public hearings with members of religious groups, human rights organizations, and scholars

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<sup>21</sup> BRAZIL, Law n. 9.868/99 (which regulates the procedure regarding the direct action of unconstitutionality and the declaratory action of constitutionality), available at: [http://www.planalto.gov.br/ccivil\\_03/leis/19868.htm](http://www.planalto.gov.br/ccivil_03/leis/19868.htm), as well as Law n. 9882/99 (which regulates the procedure regarding the allegation of disobedience of fundamental precept), available at: [http://www.planalto.gov.br/ccivil\\_03/leis/19882.htm](http://www.planalto.gov.br/ccivil_03/leis/19882.htm). Last accessed on: Oct. 31st, 2013.

<sup>22</sup> BRAZIL, Amendment n. 29 to the Internal Rules of the STF, available at: <http://www.stf.jus.br/ARQUIVO/NORMA/EMENDAREGIMENTAL029-2009.PDF>. Last accessed on: Oct. 31st, 2013.

<sup>23</sup> BRAZIL, Supreme Federal Tribunal, *Claim of Fundamental Principle Violation (ADPF) 186*, decided on April 26<sup>th</sup> 2012, hereafter *affirmative action in universities case*.

<sup>24</sup> BRAZIL, Supreme Federal Tribunal, *Claim of Fundamental Principle Violation (ADPF) 54*, decision on April 12<sup>th</sup> 2012, hereafter *right to terminate pregnancy in the case of anencephalic fetus* (2012).

Social participation in constitutional review is both analyzed by the literature in Brazil as a means of democratizing the constitutional debate – as Gilmar Mendes and Inocêncio Coelho call ‘opening of constitutional interpretation’<sup>25</sup> –, or as a method of strategic litigation by civil society organizations and social movements to use constitutional fora to advance their social struggles.<sup>26</sup> These studies are complementary since they analyze the issue of social participation in constitutional review, on the one hand, as an attempt of the Court to open up its procedure to different groups often left out of the political process, and, on the other hand, as an effort by social actors to seize those spaces for legal mobilization.

In addition, a concrete case can reach the STF on appeal if it involves a constitutional argument, and the Court can either decide only within the parameters of the specific parties of the case or, on the contrary, decide to extend the decision effects to all cases due to the general applicability of the case, in fact deciding similarly as it would in abstract judicial review system (the so-called “*repercussão geral*”).<sup>27</sup> Unlike in the US and in South Africa, the Brazilian Supreme Court cannot as a matter of rule decline to hear a case if all the procedural requirements are met. What the Brazil’s STF

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<sup>25</sup> Gilmar Ferreira Mendes, “O Pensamento de Peter Häberle Na Jurisprudência Do Supremo Tribunal Federal [Peter Häberle’s Thought in the Jurisprudence of the STF],” *Observatório Da Jurisdição Constitucional* 2 (2008); Inocêncio Mártires Coelho, “As Idéias de Peter Häberle e a Abertura Da Interpretação Constitucional No Direito Brasileiro,” *Direito Público*, no. 6 (2004).

<sup>26</sup> Evorah Lusci Cardoso and Fabiola Fanti, “Movimentos Sociais e Direito: O Poder Judiciário Em Disputa [Social Movements and Law: The Judiciary in Dispute],” in *Manual de Sociologia Jurídica*, ed. Felipe Gonçalves Silva and José Rodrigo Rodriguez (São Paulo: Saraiva, 2013), 237–54; Marcela Vieira and Flavia Annenberg, “Remarks on the Role of Social Movements and Civil Society Organisations in the Brazilian Supreme Court,” in *Transformative Constitutionalism: Comparing the Apex Courts of Brazil, India and South Africa* (Pretoria: Pretoria University Law Press, 2013), 491–518. Eloísa Machado de Almeida, “Sociedade Civil e Democracia: A Participação Da Sociedade Civil Como Amicus Curiae No Supremo Tribunal Federal [Civil Society and Democracy: Civil Society Participation as Amicus Curiae in the Supreme Court]” (PUC/SP, 2006).

<sup>27</sup> BRAZIL, Civil Procedural Code, Article 434-A, paragraph 1: “For the purpose of general repercussion, consideration shall be given to the existence or not of issues of economic, political, social or juridical importance that go beyond the subjective interests of the process.” Available at: [http://www.planalto.gov.br/ccivil\\_03/\\_Ato2004-2006/Lei/L11418.htm/](http://www.planalto.gov.br/ccivil_03/_Ato2004-2006/Lei/L11418.htm/). Last accessed on: 30<sup>th</sup> Sept., 2018. For more details, see: Frans Viljoen, Oscar Vilhena, and Upendra Baxi, *Transformative Constitutionalism: Comparing the Apex Courts of Brazil, India and South Africa* (Pretoria: Pretoria University Law Press, 2013).



can do – and it often does – is delaying to put a case to be voted or asking for more time to review a case (so-called *pedido de vista*).

Interestingly, in Brazil, changes in procedural law governing the so-called called “extraordinary appeals of general repercussion” (originally in Portuguese, *recursos extraordinários com repercussão geral*) reinforced the role of this litigation avenue as a way to challenge the constitutionality of laws. Given that Brazil’s rules of standing for abstract and direct challenges of constitutionality are very restrict, limiting the access to this kind of lawsuit with *erga omnes* effect<sup>28</sup> to a handful of high level political and legal actors,<sup>29</sup> social movements have increasingly made use of extraordinary appeals of general repercussion to bypass such procedural limitation of direct challenges of constitutionality. In an interim decision by Justice Barroso in August 2018,<sup>30</sup> the procedural limitation of the rules of standing for abstract and direct challenges of constitutionality may change in near future towards accepting direct constitutionality changes by social movements and civil society organizations. In a case presented by the National LGBT Association on the treatment of trans people incarcerated, Justice Barroso granted standing on the grounds that – while the STF jurisprudence has traditionally understood that only national unions or economic

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<sup>28</sup> BRAZIL, Brazilian Federal Constitution of 1988, Article 102, paragraph 2. “Final decisions on merits, pronounced by the supreme federal court, in direct actions of unconstitutionality and declaratory actions of constitutionality shall have force against all, as well as a binding effect, as regards the other bodies of the Judicial power and the governmental entities and entities owned by the federal Government, in the federal, state, and local levels.”

<sup>29</sup> BRAZIL, Brazilian Federal Constitution of 1988, Article 103, “The following may le direct actions of unconstitutionality and declaratory actions of constitutionality: (CA No. 3, 1993; CA No. 45, 2004)

I – the President of the Republic;

II – the directing board of the Federal Senate;

III – the directing board of the Chamber of Deputies;

iv – the directing board of a state legislative assembly or of the federal District Legislative Chamber;

V – a State Governor or the Federal District Governor;

VI – the Attorney-General of the Republic;

VII – the Federal Council of the Brazilian Bar Association;

VIII – a political party represented in the National Congress;

IX – a confederation of labor unions or a professional association of a nationwide nature.”

<sup>30</sup> BRAZIL, Supreme Federal Tribunal, *Claim of Fundamental Principle Violation (ADPF) 527*, interim decision on June 29<sup>th</sup> 2018, hereafter the case on the rights of incarcerated trans people.

association has standing for direct constitutionality challenges – national rights’ associations should also participate in constitutional litigation. Besides being a promising jurisprudential change, only time will tell whether the rest of the apex court in Brazil will follow.

Meanwhile, extraordinary appeals in concrete, rather than abstract, cases are the best options for movements and countermovements and their clients. According to procedural law, if Brazil’s Supreme Court finds that a concrete appeal on constitutional grounds by specific individuals (extraordinary appeal) involve “relevant issues from an economic, political, social or legal points of view that go beyond the subjective interests of the process”,<sup>31</sup> the STF will then grant the effect of general repercussion to the case, so its decision will be binding not only to the specific individuals on that case, but to the whole country, similarly to a decision of the US Supreme Court in cases before it or similarly to the Brazil’s Supreme Court practice in direct challenges of constitutionality. A constitutional amendment in 2004<sup>32</sup> stipulated that appellants in extraordinary appeals before the STF must show that their case is relevant to the point of deserving a *erga omnes* effect of decision, making this litigation avenue even closer to the one of direct constitutional challenges.

The situation is different in South Africa, where it makes sense of talking primarily about the highest court in the land, since the Constitutional Court in that country “must confirm any order of invalidity made by the Supreme Court of Appeal, the High Court of South Africa, or a court of similar status, before that order has any

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<sup>31</sup> BRAZIL, Civil Procedural Code, Article 1035, paragraph 1, available at: [http://www.planalto.gov.br/ccivil\\_03/\\_ato2015-2018/2015/lei/113105.htm](http://www.planalto.gov.br/ccivil_03/_ato2015-2018/2015/lei/113105.htm). Last accessed on: 2 April 2018.

<sup>32</sup> BRAZIL, *Brazilian Federal Constitution of 1988*, Article 102, paragraph 3. “In an extraordinary appeal, the appealing party must demonstrate the general repercussion of the constitutional issues discussed in the case, under the terms of the law, so that the court may examine the possibility of accepting the appeal, and it may only reject it through the opinion of two thirds of its members.”

force.”<sup>33</sup> After a 2012 Amendment, the Constitutional Court of South Africa consolidated itself as the highest court in the land ‘in all constitutional matters’ and ‘in all other matters’, subject to its leave, in case of issues of ‘general public importance’.<sup>34</sup> Thus, in South Africa, the Constitutional Court can be reached either by automatic appeal when a lower court issued an invalidity order or directly subject to the constitutional court’s leave.

## 2. Socio- Legal Mobilization on Racial and LGBT Equality:

Social movements’ participation in constitutional litigation is not a new phenomenon. The legal mobilization<sup>35</sup> of social movements – in which strategic litigation constitutes a key, albeit not the only, strategy for social change - has ultimately targeted courts conducting constitutional review, in particular apex courts. Therefore, the topic of social movements’ legal mobilization has occupied an increasingly prominent role in the literature on non-textual constitutional change.

Hereafter, I use the concept of social movements put forward by David Snow et. al., as

“collectivities acting with some degree of organization and continuity outside institutional or organizational channels for the purpose of challenging or defending extant authority, whether it

<sup>33</sup> SOUTH AFRICA, Final Constitution of 1996, Section 167, paragraph 5: “The Constitutional Court makes the final decision whether an Act of Parliament, a provincial Act or conduct of the President is constitutional, and must confirm any order of invalidity made by the Supreme Court of Appeal, a High Court, or a court of similar status, before that order has any force.” [Sub-s (5) Substituted by s. 3(b) of Constitution Seventeenth Amendment Act, 2012.]

<sup>34</sup> SOUTH AFRICA, Constitution Sixteenth Amendment, 2012, available at: [https://www.gov.za/sites/default/files/36128\\_0.pdf](https://www.gov.za/sites/default/files/36128_0.pdf). Last accessed on: 30 January 2018.

<sup>35</sup> As explained by Madlingozi, “*legal mobilization is used here in a narrow sense to refer to those instances when social movements explicitly employ rights strategies and tactics in their interactions with the State and other opponents.*” Tshepo Madlingozi, “Post-Apartheid Social Movements and Legal Mobilisation,” in *Socio-Economic Rights in South Africa: Symbols or Substance?*, ed. Malcolm Langford et al. (Cambridge: Cambridge University Press, 2013), 92.

is institutionally or culturally based, in the group, organization, society, culture, or world order of which they are a part,”<sup>36</sup>

This definition is sufficient at the present stage, while an in-depth discussion will be presented on Chapter 2. In a related manner, countermovement is defined as “*a movement that makes contrary claims simultaneously to those of the original movement.*”<sup>37</sup> The present dissertation dissects precisely this modality of non-textual constitutional change in Brazil, South Africa and United States. However, as explained in the introduction, the focus will not be on social movements per se, but rather on the active involvement of countermovements with equality litigation on race and sexual orientation. By doing so, this dissertation will shed light on instances where countermovements have shaped judicial discourse on equality, helping to fill in the gap on constitutional scholarship otherwise overtly focused on social movements’ litigation endeavors.

In constitutional litigation involving historically disadvantaged groups in Brazil, South Africa and the United States, courts – specifically apex ones - become “sites of contention.”<sup>38</sup> Before those courts, lawyers of social movements and countermovements present conflicting claims within the frame of the Constitution. Such legal mobilization influences how courts interpret constitutional law and thus how the meaning of the constitution changes over time even without textual modification in the shape of formal textual amendments. The road to constitutional change is paved with contention.

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<sup>36</sup> David A. Snow, Sarah A. Soule, and Hanspeter Kriesi, *The Blackwell Companion to Social Movements, The Blackwell Companion to Social Movements* (Malden, MA: Blackwell Publishing, 2007), 11.

<sup>37</sup> David S. Meyer and Suzanne Staggenborg, “Movements, Countermovements, and the Structure of Political Opportunity,” *The American Journal of Sociology* 101, no. 6 (1996): 1631.

<sup>38</sup> Charles Tilly and Sidney Tarrow, whose work on contentious politics will be analyzed in more detail in Chapter 2, describe ‘sites of contestation’ as: “*human settings that serve as originators, objects, and/or arenas of contentious politics.*” See: Charles Tilly and Sidney Tarrow, *Contentious Politics* (Boulder: Paradigm Publishers, 2007), 203.

Constitutional scholars have already employed the expression contentious politics approach to define the legal tactics used by social movements and countermovements.<sup>39</sup> In the present Chapter, hereafter, I employ contention in the sense of ‘contentious politics’ as defined by McAdam, Tarrow and Tilly as: “*episodic, public, collective interaction among makers of claims and their objects when (a) at least one government is a claimant, an object of claims, or a party to the claims and (b) the claims would, if realized, affect the interests of at least one of the claimants.*”<sup>40</sup>

In this sense, **contention** is used here to describe generally the phenomenon of contentious constitutional change in processes of constitutional adjudication before apex courts. In contrast, when I use the term of **contestation**, I refer specifically to the conflict between social movements and countermovements in the constitutional debate. It is a similar use as made by the US constitutional scholar Reva Siegel in her account of constitutional conflict in the United States.<sup>41</sup>

The expansion of scholarly interest in social movements reflects comparable, yet sharply distinct, historical patterns in the United States, South Africa and Brazil. In the United States, from the mid-20<sup>th</sup> century, the interest of constitutional scholarship in social movements flourished as a reaction either in the form of appraisal or criticism of the Court of Chief Justice Warren (1953-69) and its decisions on racial equality, of which *Brown v. Board of Education* from 1954,<sup>42</sup> declaring school racial segregation unconstitutional, is the primary example. Yet, the prominence of race in the

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<sup>39</sup> Tshepo Madlingozi, “Post-Apartheid Social Movements and Legal Mobilisation,” in *Socio-Economic Rights in South Africa: Symbols or Substance?*, ed. Malcolm Langford et al. (Cambridge: Cambridge University Press, 2013), pp. 92–131.

<sup>40</sup> Doug McAdam, Sidney Tarrow, and Charles Tilly, *Dynamics of Contention, Social Movement Studies* (Cambridge: Cambridge University Press, 2004), 5.

<sup>41</sup> Reva B Siegel, “Constitutional Culture, Social Movement Conflict and Constitutional Change: The Case of the De Facto Era. 2005-06 Brennan Center Symposium Lecture,” *California Law Review* 94, no. 5 (2006): p. 1323.

<sup>42</sup> THE UNITED STATES, US Supreme Court, *Brown v. Board of Education of Topeka (1)*, 347 U.S. 483 (1954).

constitutional jurisprudence on equal protection of the highest court in the United States goes back many years before the Warren Court, in the 1920s-30s due to cases concerning the rights of criminal defenders, most of them black and from the South.<sup>43</sup>

Much of the non-textual constitutional change in the US jurisprudence in the past sixty years is arguably traceable to specific social movements. As William Eskridge convincingly portrays, one of the core goals of last century's social movements was to fight legal discrimination in several spheres of life (e.g. education, workplace and transportation), particularly on the grounds of race, gender, sexual orientation, and disability. In this sense, for Eskridge, the uniqueness of the 20<sup>th</sup> century identity-based social movements as compared to earlier 19<sup>th</sup> social movements (such as the US labor movement) lies in their 'politics of recognition'<sup>44</sup>, i.e. an attempt by historically discriminated individuals to modify their inferior legal status, rather than primarily seeking material redistribution.<sup>45</sup>

The Civil Rights Movement influenced racial equality jurisprudence in the 1950s-60s, the women's movement impacted sexual and reproductive rights' jurisprudence in the 1970s, the sexual minorities' rights movement challenged sodomy laws and later continued on antidiscrimination issues and on marriage equality cases in the 1980s onwards. Yet, in the last two decades, part of the scholarly attention of the US has been dedicated to the effects of countermovements, seeking to protect

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<sup>43</sup> See: Michael J. Klarman, "The Racial Origins of Modern Criminal Procedure," *Michigan Law Review* 99, no. 1 (2000): 48–97.

<sup>44</sup> William N Eskridge Jr., "Channeling: Identity-Based Social Movements and Public Law," *University of Pennsylvania Law Review* 150, no. 1 (November 01, 2001): p. 425.

<sup>45</sup> There is no clear-cut division between material redistribution and identity politics. The theoretical debate about it, which I will not enter at this early stage, is best signaled by the exchanges between Nancy Fraser and Alex Honneth in their join book: Nancy Fraser and Alex Honneth, *Redistribution Or Recognition?: A Political-Philosophical Exchange* (New York: Verso, 2003). Yet, Eskridge's portrait of 20<sup>th</sup> century social movements in the US as identity-based could be arguably challenged also on historical grounds. A look at the Critical Race Literature illustrates this point, since more radical sectors of the civil rights movement not only demanded the end of segregation but also equal material conditions with the white population in the United States. See: Derrick A Bell, "Serving Two Masters : Integration Ideals and Client Interests in School Desegregation Litigation," *The Yale Law Journal* 85, no. 4 (1976): 470–516.

traditional values in the case of sexual orientation<sup>46</sup> or groups of white applicants claiming reverse discrimination in affirmative action cases in the 2000s.<sup>47</sup> Such claims have challenged in courts the gains of those earlier social movements or, at least, have made the legal battles of social movements in certain cases much harder to fight in courts.

In post-apartheid South Africa and in post-dictatorship Brazil, in contrast, the relationship between social movements and apex courts<sup>48</sup> dates back to the foundations of those countries' constitutions. First, in both countries, unlike in the US, social movements participated in the constitution-building processes that took place in the transitions from military dictatorship and apartheid to constitutional democracies. In Brazil, in 1987, "more than twenty thousand people attended the [Constitutional] Assembly every day, in a process that is considered the most democratic moment of Brazilian political life."<sup>49</sup> For instance, racism is considered a crime without the possibility of parole in the Constitution due to the influence of the black movement

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<sup>46</sup> William N Eskridge Jr, "No Promo Homo: The Sedimentation of Antigay Discourse and the Channeling Effect of Judicial Review," *New York University Law Journal* 75 (2000): 1327–1411.

<sup>47</sup> Reva Siegel, "Foreword: Equality Divided," *Harvard Law Review* 127, no. 1 (2013).

<sup>48</sup> Two recent works shed light on this issue of apex courts and social movements in Brazil and South Africa. See: Marcela Vieira and Flavia Annenberg, "Remarks on the Role of Social Movements and Civil Society Organisations in the Brazilian Supreme Court," in *Transformative Constitutionalism: Comparing the Apex Courts of Brazil, India and South Africa* (Pretoria: Pretoria University Law Press, 2013), 491–518. See also: Tshepo Madlingozi, "Social Movements and the Constitutional Court of South Africa," in the same book.

<sup>49</sup> Vieira, "Public Interest Law: A Brazilian Perspective," p. 231. For a complete history and political analysis of the constitution building process in Brazil, see the 2013 dossier published in the journal *Lua Nova* in June, 2013, entirely on this topic, see especially: Cicero Araujo, "O Processo Constituinte Brasileiro, a Transição E O Poder Constituinte [The Brazilian Constitutional Process, the Transition and the Constituent Power]," *Lua Nova: Revista de Cultura E Política*, no. 88 (2013): 327–80; Antônio Sérgio Rocha, "Genealogia Da Constituinte: Do Autoritarismo À Democratização [Genealogy of the Constituent: From Authoritarianism to Democratization]," *Lua Nova: Revista de Cultura E Política*, no. 88 (2013): 29–87; Andrei Koerner and Lígia Barros de Freitas, "O Supremo Na Constituinte E a Constituinte No Supremo [The Supreme Court in the Constituent and the Constituent in the Supreme Court]," *Lua Nova: Revista de Cultura E Política*, no. 88 (2013): 141–84. Furthermore, see the following PhD thesis arguing that participation became a core principle of the progressive social movements at the constitutional building process: J. Louback, "The Concepts of Equality, Citizenship and Democracy on the Popular Statements throughout the National Constitutional Assembly in 1987-1988." (Universidade do Estado do Rio de Janeiro, 2016), [http://www.iesp.uerj.br/wp-content/uploads/2017/06/Tese\\_Joyce-Louback-Lourenço.pdf](http://www.iesp.uerj.br/wp-content/uploads/2017/06/Tese_Joyce-Louback-Lourenço.pdf).

participating in the constitution-making.<sup>50</sup> Thus, not surprisingly, the constitutional document produced as the result of the Brazilian constitutional process (the 1988 Federal Constitution) is often qualified as a “citizen constitution”.<sup>51</sup> In South Africa, similarly, the constitution-building process, albeit more complex than the Brazilian one due to its two-phase structure, was also conducted within a participatory framework.<sup>52</sup> The constitution-building processes in both countries bolstered an active group of social movements and civil society organizations around constitutional norms, verified later on by their influence on constitutional jurisprudence of equality through litigation.

Second, in both countries, race has played a key role in the constitutional debate on equality, in light of the new constitutional documents, from 1994 (interim) and 1996 (final) in South Africa and from 1988 in Brazil. Race is one of the grounds of prohibited unfair discrimination in the South African Constitution.<sup>53</sup> In addition, affirmative action as a remedial measure to address the effects of apartheid is permitted by the South African Constitution itself.<sup>54</sup> Nevertheless, affirmative action is the subject of an ongoing debate in South Africa, especially on how race should be used explicitly in remedial policies without representing a perpetuation of race-based policies of the

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<sup>50</sup> Natália Neris da Silva Santos, “A Voz e a Palavra Do Movimento Negro Na Assembleia Nacional Constituinte (1987/1988): Um Estudo Das Demandas Por Direitos [The Voice and the Word of the Black Movement in the National Constituent Assembly (1987/1988): A Study of the Demands for Rights]” (FGV, 2015).

<sup>51</sup> Rocha, “Genealogia Da Constituinte: Do Autoritarismo à Democratização [Genealogy of the Constituent: From Authoritarianism to Democratization],” p. 85. See also: José Murilo de Carvalho, *Cidadania No Brasil: Um Longo Caminho [Citizenship in Brazil: A Long Road]* (Rio de Janeiro: Civilização Brasileira, 2010).

<sup>52</sup> For more details on the constitution-building process, see: Heinz Klug, *The Constitution of South Africa: A Contextual Analysis* (Oxford; Portland, Ore.: Hart, 2010), chap. 2. And also, the very detailed account by one of the legal experts who participated in the process, see: Christina Murray, “A Constitutional Beginning: Making South Africa’s Final Constitution,” *University of Arkansas Law Review* 23 (2000): 809–38.

<sup>53</sup> See SOUTH AFRICA, Section 9(3) of the 1996 Final Constitution: “The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.”

<sup>54</sup> See SOUTH AFRICA, Section 9(2) of the 1996 Final Constitution: “Equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken.”



apartheid era.<sup>55</sup> A similar focus on race in light of remedial affirmative action programs, specifically in the realm of public universities and public hiring<sup>56</sup> as well as other race-based measures such as the criminalization of racism were also present in the Brazilian debate on equality during the constitution-building process due to the active participation of black movements in the Constituent Assembly in Brazil. Thus, the 1988 Brazilian Constitution itself establishes equality in substantive terms, opening the possibility for remedial measures.<sup>57</sup> Thus, from the outset, race has played a pivotal role in South Africa and Brazilian constitutional frameworks, due to historical contexts (slavery in Brazil and apartheid in South Africa) as well as strong participation of social movements in the constitution building processes in both countries.

Sexual orientation – unlike race – was only included in the constitutional text in South Africa. In Brazil, ‘sexual orientation’ is not one of the prohibited grounds in the 1988 Constitution,<sup>58</sup> yet not surprisingly so at a time where no other national constitution explicitly included sexual orientation into their antidiscrimination clause. In fact, the inclusion of the expression ‘sexual orientation’ during the constitution-building process was object of vote twice and was defeated due to the resistance of

<sup>55</sup> Pierre De Vos, “The Past Is Unpredictable: Race, Redress and Remembrance in the South African Constitution,” *The South African Law Journal* 129 (2012): 73–103.

<sup>56</sup> Daniela Ikawa, *Ações Afirmativas Em Universidades [Affirmative Actions in Universities]* (Rio de Janeiro: Lumen Juris - RJ, 2008). Adilson José Moreira, “Racial Justice in Brazil: Building an Egalitarian Future” (Harvard University, 2013), chap. 4.

<sup>57</sup> See BRAZIL, Federal Constitution, Art. 3 (IV): “The fundamental objectives of the Federative Republic of Brazil are: IV - to promote the well-being of all, without prejudice as to origin, race, sex, colour, age and any other forms of discrimination.”

<sup>58</sup> Juan P. Marsiaj, “Brazil: From AIDS to Human Rights,” in *The Lesbian and Gay Movement and the State: Comparative Insights into a Transformed Relationship*, ed. Manon Tremblay, David Paternotte, and Carol Johnson (Farnham: Ashgate, 2011), 57–72. Samuel Friedman and Thiago Amparo, “On Pluralism and Its Limits: The Constitutional Approach to Sexual Freedom in Brazil and the Way Ahead,” in *Transformative Constitutionalism: Comparing the Apex Courts of Brazil, India and South Africa* (Pretoria: Pretoria University Law Press, 2013), pp. 267–289. For other works analyzing sexual minorities’ jurisprudence in Brazil, see: Adilson José Moreira, “We Are Family!: Legal Recognition of Same-Sex Unions in Brazil,” *The American Journal of Comparative Law* 60 (2012): 1002–1042. See also: Alexandre Gustavo Melo Franco Bahia and Paulo Roberto Iotti Vecchiatti, “ADI N. 4.277 – Constitutionality and Relevance of the Decision on Same-Sex Union: The Supreme Court as a Countermajoritarian Institution in the Recognition of a Plural Conception of Family,” *Revista Direito GV* no. 17 (2013): 65–92.

center and right-wing political parties.<sup>59</sup> Importantly, however, several state constitutions in Brazil that entered into force right after Brazil's Federal Constitution indeed managed to include an explicit reference to sexual orientation in their antidiscrimination clause, including the state constitutions of Sergipe, Mato Grosso e Pará.<sup>60</sup>

In South Africa, the combination of an accessible constitution building process, support from the legal and political elites<sup>61</sup> as well as the post-apartheid liberation context where equality was a prominent legal and political discourse, and the leadership of the South African National Coalition for Gay and Lesbian Equality (NCGLE) contributed to enshrine, as a first in the world, the words 'sexual orientation' in the 1996 Constitution.<sup>62</sup>

Sexual orientation was the subject of carefully crafted litigation strategies - initiated in the aftermath of the adoption of the new constitutions in both countries - at the state and federal levels in the case of Brazil and before the Constitutional Court in the case of South Africa, in order to gradually tackle legal discrimination. In South Africa, as shown in this dissertation, there was an orchestrated litigation effort by the LGBT movement in that country in a saga which in 2006 culminated with the recognition of same-sex marriage in the country.<sup>63</sup>

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<sup>59</sup> Gustavo Gomes da Costa Santos, "Movimento LGBT e Partidos Políticos No Brasil [LGBT Movement and Political Parties in Brazil]," *Revista Semestral Do Departamento e Do Programa de Pós-Graduação Em Sociologia Da UFSCar* 6, no. 1 (2016): 201–2.

<sup>60</sup> Adriana Vianna and Paula Lacerda, *Direitos e Políticas Sexuais No Brasil: Mapeamento e Diagnóstico [Sexual Rights and Politics in Brazil: Mapping and Diagnosis]* (Rio de Janeiro: CEPESC, 2004).

<sup>61</sup> Sheila Croucher, "South Africa: Opportunities Seized in the Post-Apartheid Era," in *The Lesbian and Gay Movement and the State: Comparative Insights into a Transformed Relationship*, ed. Manon Tremblay, David Paternotte, and Carol Johnson (Ashgate, 2011), 158–62.

<sup>62</sup> NCGLE carefully crafted a gradual litigation strategy that culminated in the recognition of same-sex marriage by the South African Constitutional Court in 2006. Natalie Oswin, "Producing Homonormativity in Neoliberal South Africa: Recognition, Redistribution, and the Equality Project," *Signs* 32, no. 3 (2007): 649–69.

<sup>63</sup> Pierre De Vos and Jaco Barnard, "Same-Sex Marriage, Civil Unions and Domestic Partnerships in South Africa: Critical Reflections on an Ongoing Saga," *South African Law Journal*, no. 4 (2007): 795.

The apex court in Brazil, since its decision recognizing the equal status of same-sex de facto unions in 2011<sup>64</sup> - has moved towards a generous notion of LGBT rights. After this decision, the LGBT movement has taken up other legal battles before the STF to boost protections against discrimination on the basis of sexual orientation and gender identity.<sup>65</sup>

Third, in light of the expressly ‘transformative’<sup>66</sup> mandate of those constitutions in Brazil and in South Africa, the constitutional literature in those two Global South countries often refers to their apex courts as the “institutional voice of the poor”,<sup>67</sup> partly because constitutional texts heavily focused on economic and social rights in Brazil and in South Africa. Such expectation regarding the role of apex courts in the newly-formed democracies of Brazil and South Africa reinforces the role of law in fighting against inequality in both countries, thus making constitutional changes on the meaning of equality of higher importance in constitutional circles. This perspective also

<sup>64</sup> BRAZIL, Supreme Federal Tribunal (STF), the Claim of Fundamental Principle Violation (ADPF) 132 and the Direct Action on Unconstitutionality (ADI) 4277 and, jointly decided on May 5<sup>th</sup> 2011, hereafter called *same-sex union case 1* and *same-sex union case 2*, respectively.

<sup>65</sup> Christina Queiroz, “Um Arco-Íris de Exigências [A Rainbow of Demands],” *Revista Fapesp* (São Paulo, February 2018). This includes for instance contesting prohibition of blood donation by men who have sex with men (BRAZIL, Supreme Federal Tribunal (STF), Direct Action on Unconstitutionality (ADI) 5543 (pending), hereafter called *gay blood donation case*) as well as seeking to right to use public toilet facilities according one’s gender identity (BRAZIL, Supreme Federal Tribunal (STF), Extraordinary Appeal (REX) 845.779 (pending), hereafter called *public toilet case*) both still pending until April 2018. As far as the cases already decided on their merits are concerned, Brazil’s STF has consistently moved towards enhancing protection for LGBTs in recent years, e.g. recognizing equal inheritance rights for same-sex couples, (BRAZIL, Supreme Federal Tribunal (STF), Extraordinary Appeal (REX) 646.721, decided on May 10<sup>th</sup> 2017, hereafter called *inheritance rights for same-sex couples case*) and the right of trans people to change their gender identity in official documents without the requirement of a gender-reassignment surgery (BRAZIL, Supreme Federal Tribunal (STF), Extraordinary Appeal (REX) 670.422 and Direct Action on Unconstitutionality (ADI) 4.275, jointly decided on February 28<sup>th</sup>, 2018, hereafter called *gender identity in official documents cases*).

<sup>66</sup> For the only scholarly comparative analysis between transformative constitutionalism in Brazil and South Africa, see: Viljoen, Vilhena, and Baxi, *Transform. Const. Comp. Apex Court. Brazil, India South Africa*. The transformative constitutionalism debate in South Africa was sparked by Karl Klare’s suggestion that “transformative constitutionalism connotes an enterprise of inducing large-scale social change through nonviolent political processes grounded in law”, *In*: Karl Klare, “Legal Culture and Transformative Constitutionalism,” *South African Journal on Human Rights* 14 (1998): 150. Such formulation, although important due to the transformative text of the South African 1996 Final Constitution, was received with criticism among the legal scholarship from South Africa. See, for instance: Theunis Roux, “Transformative Constitutionalism and The Best Interpretation of the South African Constitution: Distinction without a Difference?,” *Stellenbosch Law Review* 20 (2009): 258–85; Karin van Marle, “Transformative Constitutionalism As/And Critique,” *Stellenbosch Law Review* 20, no. 2 (2009): 286–301.

<sup>67</sup> Roberto Gargarella, Pilar Domingo, and Theunis Roux, *Courts and Social Transformation in New Democracies: An Institutional Voice for the Poor?* (Hampshire: Ashgate, 2006).

led to a literature critical of the actual performance of their apex courts, particularly against the background of extreme inequality in both countries.<sup>68</sup>

This is the background for the overview presented in the following pages. Despite the diversity of political, legal and social contexts in the three countries, it has been shown here that the usual narratives of constitutional scholarship on equality are focused on the role of social movements - racial and sexual minorities' ones especially - in constitutional overview. In the following pages, this Chapter will enquire whether countermovements' involvement in constitutional litigation has the potential to disrupt the explanatory power of such narratives on contemporary equality litigation.

### 3. Rise of Litigation by Countermovements: Contesting Constitutional Change

This dissertation argues that, after decades of litigation on constitutional equality being led by social movements in these three countries,<sup>69</sup> particularly in the realm of race and sexual orientation, countermovements have, on certain occasions, taken the lead in triggering non-textual, interpretative constitutional change. This phenomenon calls for a reassessment of mainstream narratives of constitutional equality. Or, in other words, in certain occasions, countermovements – and not social movements – have changed the direction of the wind. Yet, this change of wind (or at least the rise of

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<sup>68</sup> Octavio Luiz Motta Ferraz, "Harming the Poor Through Social Rights Litigation: Lessons from Brazil," *Texas Law Review* 89, no. 7 (June 2011): 1643–1668; Jackie Dugard, "Courts and Structural Poverty in South Africa: To What Extent Has the Constitutional Court Expanded Access and Remedies to the Poor?," in *Constitutionalism of the Global South: The Activist Tribunals of India, South Africa, and Colombia*, ed. Daniel Bonilla Maldonado (New York: Cambridge University Press, 2013), 293–327.

<sup>69</sup> For a comprehensive overview of the impact of social movements in constitutional law in the United States, see: William N Eskridge Jr., "Some Effects of Identity-Based Social Movements on Constitutional Law in the Twentieth Century," *Michigan Law Review* 100, no. 8 (2002): 2062–2407. For an equivalent analysis in South Africa, see: Madlingozi, "Post-Apartheid Social Movements and Legal Mobilisation." Equally, for a Brazilian take on the topic, see: Vieira and Annenberg, "Remarks on the Role of Social Movements and Civil Society Organisations in the Brazilian Supreme Court."

countermovements in bringing it by) remains undertheorized in constitutional literature.

A key area where countermovements have made their presence felt in courts is constitutional equality litigation. Equality has been a key battlefield between opposing movements. One of the traditional roles expected in liberal constitutional democracies from courts is protecting minorities in equality cases.<sup>70</sup> Yet, the mainstream narratives of constitutional equality stumble when faced with increasing litigation by countermovements raising competing equality claims. In the last two decades, the apex courts' interpretation of constitutional equality in the United States, South Africa and Brazil suggests such a change of wind.<sup>71</sup>

As mentioned in the introduction of this dissertation, two main countermovements are analyzed: *countermovements which seek to protect traditional*

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<sup>70</sup> John Hart Ely, *Democracy and Distrust: A Theory of Judicial Review* (Cambridge: Harvard University Press, 1980).

<sup>71</sup> Unfortunately, wind-change is not originally my metaphor. It was used in 2007, by the Reverend Jim Wallis, a US progressive Evangelist, and reused by the legal scholars Lani Guinier and Gerald Torres in relation to constitutional change. Rev. Wallis provides an insightful (yet odd) imagery of the nature of changing the wind. He says "... here's how you recognize a member of Congress. They're the ones walking around with their fingers up in the air. And then they lick their finger and they put it back up and they see which way the wind is blowing. You can't change a nation by replacing one wet-fingered politician with another. You change a nation when you change the wind. You change the way the wind is blowing, it's amazing how quickly they respond. And so you look at Selma, Alabama, and how that led to a Voting Rights Act five months later. Johnson had told King just before Selma, it'll take five years to get a Voting Rights Act. King said, I can't wait five years." Available at: <http://www.onbeing.org/program/new-evangelical-leaders-part-i-jim-wallis/transcript/1299>. Also, cited in: Lani Guinier and Gerald Torres, "Changing the Wind: Notes Toward a Demosprudence of Law and Social Movements," *Yale Law Journal* 123 (2014): 2742. Additionally, professors Lani Guinier and Gerald Torres are also famous for another metaphor related to constitutional change, the idea of "miner's canary". For them, "*race (...) is like the miner's canary. Miners often carried a canary into the mine alongside them. The canary's more fragile respiratory system would cause it to collapse from noxious guess long before human were affected, thus alerting the miners to danger. The canary's distress signaled that it was time to get out of the mine because the air was becoming too poisonous to breathe. Those who are racially marginalized are like the miner's canary: their distress is the first sign of a danger that threatens us all*". See: Lani Guinier and Gerald Torres, *The Miner's Canary: Enlisting Race, Resisting Power, Transforming Democracy* (Harvard University Press, 2009), 9.

*family values* in Brazil,<sup>72</sup> South Africa<sup>73</sup> and the United States<sup>74</sup> – developed in opposition to the marriage equality movements in those three countries more specifically and LGBT movements more generally, and the *countermovements opposing affirmative action* in those three jurisdictions – established as a reaction against movements which are in favor of race-based affirmative action programs in universities and workplaces in these three countries.<sup>75</sup>

As far as *countermovements which seek to protect traditional family values* are concerned, in the US not only are they well institutionalized, those countermovements are often structured along strategies of **anticipatory countermobilization**. By this term, Dorf and Tarrow tell the story of instances where “it was not the gay and lesbian community that moved the issue of marriage equality to the top of the social policy agenda, but an archipelago of Christian conservative and ‘family values’ groups responding to court rulings and legislation that were less threatening to traditional values than marriage equality was.”<sup>76</sup> In other words, in the US much of the

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<sup>72</sup> Rafael De la Dehesa, *Queering the Public Sphere in Mexico and Brazil: Sexual Rights Movements in Emerging Democracies* (Duke University Press, 2010); Marcelo Natividade and Leandro de Oliveira, “Sexualidades Ameaçadoras: Religião E Homofobia (S) Em Discursos Evangélicos Conservadores [Threatening Sexualities: Religion and Homophobia(s) in Conservative Evangelical Discourses],” *Sexualidad, Salud Y Sociedad-Revista Latinoamericana*, no. 2 (2009): 121–61; Regina Facchini, “Conexões, Processos Políticos E Movimentos Sociais: Uma Reflexão Teórico-Metodológica a Partir Do Movimento LGBT [Connections, Political Processes and Social Movements: A Theoretical and Methodological Reflection from the LGBT Movement],” *Revista Advir* 28 (2012): 6–20.

<sup>73</sup> Madlingozi, “Post-Apartheid Social Movements and Legal Mobilisation”; Ryan Richard Thoreson, “Somewhere over the Rainbow Nation: Gay, Lesbian and Bisexual Activism in South Africa,” *Journal of Southern African Studies* 34, no. 3 (2008): 679–97; Louise Vincent and Simon Howell, “‘Unnatural’, ‘Un-African’ and ‘Ungodly’: Homophobic Discourse in Democratic South Africa,” *Sexualities* 17, no. 4 (2014): 472–83; Helen Kruuse, “Conscientious Objection to Performing Same-Sex Marriage in South Africa,” *International Journal of Law, Policy and the Family* 28, no. 2 (2014): 150–76.

<sup>74</sup> Eskridge’s account of identity-based social movements and countermovements’ dynamics and their influence on constitutional law identifies “traditional family values” as a inspiration of the countermovement he focused on. Eskridge Jr., “Channeling: Identity-Based Social Movements and Public Law”; Eskridge Jr., “Some Effects of Identity-Based Social Movements on Constitutional Law in the Twentieth Century.”

<sup>75</sup> Despite the country-to-country differences in the precise contours of those countermovements, defining them broadly is sufficient at this moment, while specific cases will be spotted on throughout the dissertation.

<sup>76</sup> Michael C Dorf and Sidney Tarrow, “Strange Bedfellows: How an Anticipatory Countermovement Brought Same-Sex Marriage into the Public Arena,” *Law & Social Inquiry* 39, no. 2 (2014): 450.

countermovements' reaction<sup>77</sup> to judgments protecting LGBT rights consisted basically of raising even more loudly the issue of LGBT rights. Countermobilization for family values then anticipated the future legal and political battles that would soon develop before legislatures and courts across the United States by mobilizing movements in order to protect family values. As a result, more recently several cases before the US Supreme Court on LGBT rights have raised concerns about anti-LGBT laws passed at the federal level (Defense of Marriage Act, DOMA) – e.g. *Windsor*<sup>78</sup> - or state laws as result of popular ballots outlawing same-sex marriage at the state level (Proposition 8 in California) – e.g. *Perry*.<sup>79</sup> As scholars focusing on anticipatory countermobilization show and the next Chapter explains in more detail, it is not only a matter of which movement comes first. Rather, by organizing a proactive<sup>80</sup> reaction to LGBT movement, countermovements focused on family values. This raised the importance of the legal debate over marriage equality in order to win the hearts and minds of American people and legislatures, crafting its contestation outside courts to fit into the evolving case law on LGBT rights, thus shifting the opportunity structures such countermovement dealt with.<sup>81</sup>

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<sup>77</sup> Tina Fetner, *How the Religious Right Shaped Lesbian and Gay Activism* (Minneapolis, London: University of Minnesota Press, 2008); Amy L Stone, *Gay Rights at the Ballot Box* (Minneapolis, London: University of Minnesota Press, 2012); Amy L Stone, "The Impact of Anti-Gay Politics on the LGBTQ Movement," *Sociology Compass* 10, no. 6 (2016): 459–67.

<sup>78</sup> THE UNITED STATES, US Supreme Court, *United States v. Windsor*, 570 U.S. \_ (2013).

<sup>79</sup> THE UNITED STATES, US Supreme Court, *Hollingsworth v. Perry*, 570 US \_ (2013).

<sup>80</sup> Stone, "The Impact of Anti-Gay Politics on the LGBTQ Movement," 4.

<sup>81</sup> "Although they may not use the term, the impact of court decisions on social movements. We have already noted three examples of how key court decisions in the same-sex marriage story had an impact on the LGBT movement, its opponents, or both: 1. *Baehr* both put marriage on the agenda of a reluctant LGBT movement and "panicked" the antigay right (Stone 2012, 31) into pushing to pass DOMA at the national level and "little" DOMAs in the states. 2. *Romer* discouraged the right from trying to pass broadly antigay laws, leading the countermovement to turn to the narrower ground of opposing marriage, while encouraging the LGBT movement to believe that the courts might sustain more gay-friendly equal protection cases. Finally, in *Lawrence*, the Court did not endorse same sex marriage, but by declaring that it was no business of a state to forbid same-sex relationships between consenting adults, Justice Kennedy gave encouragement to advocates in Massachusetts to take same-sex marriage restrictions to court."

While US countermovements for family values managed to obtain success specially in certain ballot initiatives, in South Africa a combination of political alignment between the post-apartheid political elite with the LGBT movement resulted in an unsuccessful countermovement. One could expect that a country like South Africa with a societal resistance towards LGBT rights as well as racial tensions inherited from apartheid would be a fruitful place for legal mobilization through contestation outside courts. Yet, countermovements in South Africa have not been successful before the South African Constitutional Court – which has consolidated itself as a beacon for LGBT rights as well as it has upheld race-related remedial programs designed to overcome structural inequality for the past two decades.<sup>82</sup> In addition, given the political predominance of one political party, African National Congress as the main political force in the political branches, countermovements have not been successful either before the country's legislature and executive branches.<sup>83</sup>

In Brazil, both in terms of countermovements against LGBT rights and against affirmative actions based on race, the key litigators in constitutional equality cases at the level of Brazil's apex court are not the countermovements themselves or nonprofit organizations associated with them, but rather conservative political parties. This led to the so-called 'judicialization of politics' in Brazil, where the apex court plays the role of both mediating between minority-majority claims as well as between different entities of the public administration at the local, state and federal levels,<sup>84</sup> with slightly more prominent participation of left-wing political parties in presenting constitutional claims before Brazil's Supreme Court in support of social movements, although center

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<sup>82</sup> Theunis Roux, *The Politics of Principle: The First South African Constitutional Court, 1995-2005* (New York: Cambridge University Press, 2013).

<sup>83</sup> Thoreson, "Somewhere over the Rainbow Nation: Gay, Lesbian and Bisexual Activism in South Africa," 684.

<sup>84</sup> Luiz Werneck Vianna, *A Judicialização Da Política e Das Relações Sociais No Brasil [The Judicialization of Politics and Social Relations in Brazil]* (Rio de Janeiro: Editora Revan, 1999).



and right-wing parties have increasingly accessed the STF as well supporting countermovements' claims.<sup>85</sup> The key challenge to racial quotas as affirmative action in universities (decided by Brazil's Supreme Court in 2012 – hereafter the *affirmative action case*)<sup>86</sup> as well as the main attack against the nationwide recognition of same-sex marriage (a case still pending before Brazil's apex court)<sup>87</sup> were both presented by parliamentary rightwing political parties within a context of countermobilization around issues of racial remedial measures and marriage equality in Brazil.<sup>88</sup>

As a couple of cases dealing with trans rights<sup>89</sup> will show later on, presented with the support of Brazil's LGBT movements, in addition to direct constitutionality challenges, general repercussion extraordinary appeals are a powerful avenue of constitutionality control in Brazil. This opens up the possibility for countermovements to challenge in the future the constitutionality of laws on the basis of an individual case (similarly to the US rules of standing which require a personal injury fairly traceable to a state action), without needing the legal backing of one of the few political and legal actors with standing to present an abstract challenge of constitutionality before the Court, such as the Attorney General or political parties. If in the future Brazil's countermovements manage to make the case that their members are individually impacted by certain laws and Executive acts protecting LGBT or Afro-Brazilian people,

<sup>85</sup> Luiz Werneck Vianna, Marcelo Baumann Burgos, and Paula Martins Salles, "Dezessete Anos de Judicialização Da Política [Seventeen Years of Judicializing Politics]," *Tempo Social* 19, no. 2 (2007): 39–85.

<sup>86</sup> BRAZIL, Supreme Federal Tribunal, *Claim of Fundamental Principle Violation (ADPF)* 186, decided on April 26<sup>th</sup> 2012, hereafter *affirmative action in universities case*.

<sup>87</sup> BRAZIL, Supreme Federal Tribunal, *Direct Action on Unconstitutionality (ADI)* 4966, hereafter *challenge to same-sex marriage case*, more information available at: <http://www.stf.jus.br/portal/cms/verNoticiaDetalhe.asp?idConteudo=240588>. Last accessed on: 2 April 2017.

<sup>88</sup> BRAZIL, Supreme Federal Tribunal, *Extraordinary Appeal (REX)* 845.779 (pending), hereafter called public toilet case; *Extraordinary Appeal (REX)* 670.422, decided on February 28<sup>th</sup>, 2018, hereafter called gender identity in official documents cases.

<sup>89</sup> BRAZIL, Supreme Federal Tribunal, *Extraordinary Appeal (REX)* 845.779 (pending), public toilet case; *Extraordinary Appeal (REX)* 670.422, decided on February 28<sup>th</sup>, 2018, gender identity in official documents case.

for instance, they will be able to challenge laws directly through extraordinary appeals with general repercussion, that is to say with *erga omnes* effect of their decisions.

Some countermovements are more institutionalized than others in their legal mobilization. Part of the countermovement in South Africa<sup>90</sup> and in the United States<sup>91</sup> is considerably institutionalized in the sense of having the institutional backing of non-profit organizations supporting their cause. In general, countermovements often are modelled on or imitate the structure and strategies of successful social movements, being the American Civil Liberties Union, the National Coalition for the Advancement of Colored People (NAACP),<sup>92</sup> in the case of the US civil rights movement, or the National Coalition for Gay and Lesbian Equality, in the case of the LGBT movement in South Africa.<sup>93</sup>

Much of the *anti-affirmative action countermovements'* litigation at the level of the US Supreme Court discussed in this dissertation is supported by the non-profit Project on Fair Representation (hereafter, PFR), founded in 2005 by “a self-described autodidact who has no law degree or formal scholarly background”<sup>94</sup> named Edward Blum. PFR defines itself as “a not-for-profit legal defense foundation that is designed to support litigation that challenges racial and ethnic classifications and preferences in state and federal courts.”<sup>95</sup> Structured as a *pro bono* law firm, PFR is financially

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<sup>90</sup> Steven Budlender, Gilbert Marcus, and Nico M Ferreira, *Public Interest Litigation and Social Change in South Africa: Strategies, Tactics and Lessons* (Atlantic Philanthropies, 2014).

<sup>91</sup> Steven M Teles, *The Rise of the Conservative Legal Movement: The Battle for Control of the Law* (Princeton University Press, 2012).

<sup>92</sup> Mark V. Tushnet, *The NAACP's Legal Strategy against Segregated Education, 1925-1950* (Chapel Hill: The University of North Carolina Press, 2005).

<sup>93</sup> Pierre De Vos, “Inevitability of Same-Sex Marriage in South Africa’s Post-Apartheid State, The,” *South African Journal on Human Rights*, no. 3 (2007): 432.

<sup>94</sup> Morgan Smith, “One Man Standing Against Race-Based Laws,” *The New York Times*, February 24, 2012. Available at: [http://www.nytimes.com/2012/02/24/us/edward-blum-and-the-project-on-fair-representation-head-to-the-supreme-court-to-fight-race-based-laws.html?\\_r=0](http://www.nytimes.com/2012/02/24/us/edward-blum-and-the-project-on-fair-representation-head-to-the-supreme-court-to-fight-race-based-laws.html?_r=0).

<sup>95</sup> PROJECT ON FAIR REPRESENTATION, available at: <https://www.projectonfairrepresentation.org/cases/>. Last accessed on: 10 July 2016.

supported by large donors, including *DonorsTrust* (a conservative foundation “dedicated to the ideals of limited government, personal responsibility, and free enterprise”<sup>96</sup>). PFR’s employs a similar structure and *modus operandi*, in terms of strategic litigation, of its counterparts in the civil rights movement. Namely, it is designed as a network of liked-minded *pro bono* lawyers, who take up cases selected through communication strategy.

One of the latest legal battles in the US against affirmative action programs in universities – discussed later in more detail – illustrates countermovements’ legal mobilization. The legal battle in the pair cases *Fisher I* and *Fisher II*,<sup>97</sup> presented by a white applicant rejected in the selection process of the University of Texas (UT), was supported by the PFR. More specifically, Fisher was selected through a video campaign seeking new applicants eager to challenge the UT affirmative action program, with the larger goal of tackling a series of legal battles race-conscious policies. In a similar logic, in South Africa several challenges to affirmative action (e.g. *Barnard* case<sup>98</sup> and the *Solidarity v. DCS* case,<sup>99</sup> discussed here later on) were presented by the trade union Solidarity (*Solidariteit*, in Afrikaans).<sup>100</sup> Solidarity Union is a labor union, which seeks – as an overall goal - to revert affirmative action policies in the workplace in South Africa and has also a civil society initiative called AfriForum, which seeks to ‘counter

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<sup>96</sup> DONORSTRUST, available at: <http://www.donorstrust.org/who-we-are/mission-principles/>. Last accessed on: 10 July 2016.

<sup>97</sup> THE UNITED STATES, US Supreme Court, *Fisher v. University of Texas at Austin*, 570 U.S. \_\_\_\_ (2013), hereafter *Fisher I*; US Supreme Court, *Fisher v. University of Texas at Austin*, 579 US \_ (2016), hereafter *Fisher II*.

<sup>98</sup> SOUTH AFRICA, Constitutional Court, *South African Police Service v Solidarity obo Barnard* (CCT 01/14) [2014] ZACC 23; 2014 (6) SA 123 (CC); [2014] 11 BLLR 1025 (CC); 2014 (10) BCLR 1195 (CC); (2014) 35 ILJ 2981 (CC) (2 September 2014).

<sup>99</sup> SOUTH AFRICA, Constitutional Court, *Solidarity v Department of Correctional Services*, (CCT 78/15) [2016].

<sup>100</sup> Available at: <https://solidariteit.co.za/en/who-are-we/>.

the withdrawal of minority racial groups from South African society”,<sup>101</sup> focusing on white minority.

In a study on conservative lawyering in South Africa, Budlender et. al point out that:

“The trade union Solidarity boasts a membership of more than 150 000 (mostly white) workers. It has a legal department with more than 30 staff members, including attorneys and advocates, and provides a range of legal services to its members.<sup>23</sup> Solidarity has fought a number of affirmative action cases in court as part of a deliberate and concerted campaign to limit the implementation of affirmative action legislation by public sector employers.<sup>102</sup>

In relation to traditional family values in South Africa, the non-profit Christian organization Freedom of Religion South Africa<sup>103</sup> is invested in protecting what it believes to be a Bible-based view of family, including fighting against gender equality and for the right of corporal punishment of children by their parents. The South African Constitutional Court granted leave to this organization in 2018 to defend the constitutionality of corporal punishment against children.<sup>104</sup>

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<sup>101</sup> Budlender, Marcus, and Ferreira, *Public Interest Litigation and Social Change in South Africa: Strategies, Tactics and Lessons*, 17.

<sup>102</sup> Budlender, Marcus, and Ferreira, 16.

<sup>103</sup> See more here: <https://forsa.org.za>. Last accessed: September 2018.

<sup>104</sup> SOUTH AFRICA, Constitutional Court, *Freedom of Religion South Africa vs. Minister of Justice and Constitutional Development, Minister of Social Development and National Director of Public Prosecutions*, YG, A263/2016, to be heard on 29 November 2018, see more here: <https://collections.concourt.org.za/handle/20.500.12144/36570>. Last accessed: September 2018. The case is still pending.

#### 4. Understanding non-textual constitutional change from US Experience

How does one explain the non-textual constitutional changes that the involvement of countermovements in constitutional litigation might promote (and indeed has already promoted in certain circumstances)? In order to understand fully the context in which non-textual constitutional change through countermovements' litigation occurs, it is important to outline how the role of courts was understood traditionally in the US.

In a commonly used concept in constitutional scholarship, coined representation-reinforcement by John Hart Ely, courts perform a corrective function, adjusting malfunctions in political representation when minorities are left out of political processes, or get to be harmed by them.<sup>105</sup> The so-called *Carolene Products* model, named after a US Supreme Court case decided in 1938 and its famous Footnote Four,<sup>106</sup> inspired Ely's theory. This footnote determined that a narrower presumption of constitutionality shall be considered when laws are directed at religious, national and racial minorities, or even in the case where the so-called "discrete and insular minorities" suffer as a result of political processes which would otherwise protect them. In light of this, Ely developed a theory seeking to enforce the importance of representation, being one of the role of courts to keep the channels of political change open. From a countermovements' perspective, it follows that the representation-reinforcement model is unable to cope with a context in which more and more groups seek judicial protection and, in particular, when the protection of one group would then necessarily undermine the protection given to another group. In a nutshell, increasing pluralism of constitutional protection undermines the explanatory power of the

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<sup>105</sup> For Ely, "malfunction occurs when the process is underserving of trust, when (1) the ins are choking off the channels of political change to ensure that they will stay in and the outs will stay out; or (2) (...) effective majority are systematically disadvantaging some minority out of simple hostility." Jon Hart Ely, *Democracy and Distrust: A Theory of Judicial Review*, p. 103.

<sup>106</sup> THE UNITED STATES, *United States v. Carolene Products Company*, 304 US 144 (1938).

representation-reinforcement model. Here lies the advantage of a counter-movements' perspective: it directly addresses the issue of pluralism.

Against this background, an increasing number of US scholars has showed the difficulties of Ely's model by taking account of pluralism at different levels. Kenji Yoshino has called attention to an increasing 'pluralism anxiety'<sup>107</sup> in the US Supreme Court, faced with an increasing number of different groups accessing the court and claiming special protection, including those not historically discriminated (e.g. religious majoritarian groups claiming objection to same-sex marriage). Thus, from Yoshino's perspective, pluralism means more and more groups accessing the heightened standard under Equal Protection Clause, with a fear of balkanization<sup>108</sup> of the constitutional doctrine of equality. William Eskridge<sup>109</sup> (reviewed in more detail below) proposes a four-tier framework to understand how social movements and counter-movements have shaped constitutional equality throughout time, including through counter-movements' claims of preservation of the existing *status quo*.<sup>110</sup>

The next two sections will look more closely at theories of constitutional change in the US (Part 4) and in South Africa and Brazil (Part 5), in order to carve the space counter-movements occupy (or do not occupy) in those theories. In this Part 4, two US theories will be explored: Bruce Ackerman's understanding of constitutional moments and Jack Balkin's view of 'our' constitution. Both theories purposefully place social mobilization at the center of their understanding of constitutional change, while sidelining the increasing influence of counter-movements. Despite Ackerman's and

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<sup>107</sup> Kenji Yoshino, "The New Equal Protection," *Harvard Law Review* 124 (January 2011): 747–803.

<sup>108</sup> Reva B Siegel, "From Colorblindness to Antibalkanization: An Emerging Ground of Decision in Race Equality Cases," *The Yale Law Journal* 120 (April 1, 2011): 1278.

<sup>109</sup> William N Eskridge Jr, "Pluralism and Distrust: How Courts Can Support Democracy by Lowering the Stakes of Politics," *Yale Law Journal*, 2005, 1279–1328.

<sup>110</sup> Eskridge Jr, 1283.

Balkin's theories, the phenomenon of non-textual constitutional change in general – let alone through countermovements' mobilization – is undertheorized across the countries, thus the need for the present project.

#### 4.1. Constitutional Moments and Canons as Solidifying Constitutional Change

Bruce Ackerman's theory of constitutional moments has gained wide attention from US constitutional literature.<sup>111</sup> In his three volumes on this topic<sup>112</sup> and in other writings<sup>113</sup>, he has introduced a unique understanding of constitutional change in the US: generational restructuring of constitutional meaning that transcends daily politics and does not pass through the established amendment procedure of Article V of the US Constitution. Ackerman's importance here lies in his reliance on public mobilization in order to explain how major constitutional changes occur while leaving the text of the constitution untouched. Ackerman dedicates the third volume of his series of work on constitutional change to the Civil Rights Movement.<sup>114</sup>

Ultimately, Ackerman's theory seeks to explain great instances of constitutional change. Ackerman does that with reference to political mobilization that change constitutional law, i.e. those rare moments when We the People is able to speak for itself outside the formal amendment procedure. Those transformative moments include,

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<sup>111</sup> Mark Tushnet, "Living in a Constitutional Moment?: Lopez and Constitutional Theory," *Case Western Reserve Law Review* 46 (1995): pp. 845–875; Walter Dean Burnham, "Constitutional Moments and Punctuated Equilibria: A Political Scientist Confronts Bruce Ackerman's 'We the People'," *The Yale Law Journal* 108 (1999): pp. 2237–2277; Sujit Choudhry, "Ackerman's Higher Lawmaking in Comparative Constitutional Perspective: Constitutional Moments as Constitutional Failures?," *International Journal of Constitutional Law* 6, no. 2 (March 21, 2008): pp. 193–230; Daniel Taylor Young, "How Do You Measure a Constitutional Moment? Using Algorithmic Topic Modeling To Evaluate Bruce Ackerman's Theory of Constitutional Change," *The Yale Law Journal* 122, no. 7 (2013): pp. 1990–2054.

<sup>112</sup> Ackerman, *We the People: Volume 2: Transformations*; Bruce Ackerman, *We the People, Volume 1: Foundations* (Cambridge, Massachusetts, and London, England: Belknap Press of Harvard University Press, 1993); Ackerman, *We The People, Volume 3: The Civil Rights Revolution*.

<sup>113</sup> Bruce Ackerman, "A Generation of Betrayal," *Fordham Law Review* 65, no. 4 (1996): pp. 1519–1536. Ackerman, *We the People: Volume 2: Transformations*; Ackerman, *We the People, Volume 1: Foundations*; Ackerman, *We The People, Volume 3: The Civil Rights Revolution*.

<sup>114</sup> Ackerman, *We The People, Volume 3: The Civil Rights Revolution*.

inter alia, “from loose confederation to federal union, from slavery to freedom, from laissez-faire to the activist regulatory state”<sup>115</sup>. For him, the amendment process in the United States, as described in Article V, constitutes a “division of powers between the states and the central government to organize debate and decision on constitutional amendments.”<sup>116</sup>

Thus, for Ackerman, non-textual constitutional changes occur under circumstances of popular mobilization, confirmed by successive elections, and concordance between different branches of power. Similarly to the contention-centered approach adopted in this dissection, Ackerman’s model is premised upon social conflict as a trigger for constitutional change. Yet, while Ackerman is mostly interested in cases where constitutional actors are seeking public support and framing their agendas in constitutional terms accordingly, this dissertation is more interested in how groups generally insufficiently represented in political branches seek litigation to get their claims recognized.

Within Ackerman’s model, the US Supreme Court alone cannot be the primary place of non-constitutional change, since, although it might exercise ‘judicial leadership’<sup>117</sup> towards change (as it did in the case of civil rights for over a decade from mid-1950’s to the adoption of the Civil Rights Act in 1964), the highest court in the land still needs support from the political branches and ultimately needs public support in order to make non-textual constitutional change last in a legitimate way. A recent example illustrates this point vividly: after litigation promoted by countermovements

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<sup>115</sup> Ackerman, *We the People: Volume 2: Transformations*, p. 11.

<sup>116</sup> Ackerman, *We The People, Volume 3: The Civil Rights Revolution*, p. 4. In contrast, another model, a *separation of powers model*, is characteristic of non-textual constitutional change in the US, as Ackerman explains. For him, “Reconstruction Republicans and New Deal Democrats increasingly relied on the separation of powers between the presidency, the Congress and the Supreme Court to earn the broad popular consent required for fundamental change in the name of We The People.” (Ibid.)

<sup>117</sup> Ackerman, *We The People, Volume 3: The Civil Rights Revolution*, pt. 3.



challenging racial affirmative action programs in universities,<sup>118</sup> the US Department of Justice decided to set up a unit for ““investigations and possible litigation related to intentional race-based discrimination in college and university admissions.”<sup>119</sup> At first, the setting up of this unit seems to be a mere administrative response. From a constitutional change perspective, this administrative change is seen as a move towards a policy direction constitutionally enabled by the recent equality jurisprudence making more difficult for universities to set up affirmative action programs when other racially neutral alternatives are available. This administrative change shows the interplay between political branches and judiciary towards shaping constitutional change.

Ackerman’s central thesis is that “the basic unit [of the Constitution] is The Generation. Constitutional meaning is not primarily created by judges out of texts but emerges in the course of the struggle by ordinary Americans to hammer out fundamental political understandings.”<sup>120</sup> Importantly, Ackerman calls this moment of struggle a “constitutional moment”<sup>121</sup>, which “occurs when a rising political movement succeeds in placing a new problematic at the center of American political life. Such a decisive transformation in the operational agenda is both a rare and important event”.<sup>122</sup> It is confirmed when successive elections signal that the general public accepts the proposed changes in constitutional law.

Taking into account such mobilization around constitutional meanings, one way to dig more deeply into the contexts in which constitutional norms operate is to unpack

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<sup>118</sup> As primary examples, see: THE UNITED STATES, US Supreme Court, *Fisher v. University of Texas at Austin*, 570 U.S. \_\_\_\_ (2013), hereafter *Fisher I*; US Supreme Court, *Fisher v. University of Texas at Austin*, 579 US \_ (2016), hereafter *Fisher II*.

<sup>119</sup> Sari Horwitz and Emma Brown, “Justice Department Plans New Project to Sue Universities over Affirmative Action Policies,” *The Washington Post*, August 2017.

<sup>120</sup> Ackerman, “A Generation of Betrayal,” p. 1519.

<sup>121</sup> Ackerman, 1519.

<sup>122</sup> Ackerman, 1519.

how legal norms other than constitutional ones help to define constitutional meaning. In the last volume of “We The People”, devoted to the Civil Rights Movement, Ackerman refers to the notion of ‘constitutional canons’, i.e. “the body of texts that law-trained professionals should place at the very center of their constitutional understanding.”<sup>123</sup> Ackerman suggests that the civil rights statutes (Civil Rights Act of 1964 and Voting Rights Act of 1965, in particular) are part of the constitutional canons in the sense that they are “a source of constitutional principles.”<sup>124</sup> In this regard, Ackerman uses landmark statutes (or what Eskridge calls “super statutes”<sup>125</sup>) as a way of identifying constitutional change. Such statutes do not amend directly the constitution, but are a source of principles to interpret it. Thus, to study landmark legislation in times of constitutional change might provide, for Ackerman, the key to understanding how constitutional meaning changes.

The conceptualization of super statutes as constitutional canons is not uniquely a US experience. In Brazil, a civil law country, the enactment of landmark legislation, promoted by social movements, is often used as a way to advance constitutional understanding on a given issue. In this sense, major discrimination legislation adopted recently in Brazil such as the Racial Equality Statute (*Estatuto da Igualdade Racial*) from 2010<sup>126</sup> or the Statute of the Persons with Disabilities (*Estatuto das Pessoas com Deficiência*) from 2015<sup>127</sup> are super statutes which compose the general law of antidiscrimination law<sup>128</sup> in the country while advancing the equality constitutional

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<sup>123</sup> Ackerman, *We The People, Volume 3: The Civil Rights Revolution*, p. 7.

<sup>124</sup> *Ibid.*, p. 8.

<sup>125</sup> Eskridge Jr., “Some Effects of Identity-Based Social Movements on Constitutional Law in the Twentieth Century,” 2312.

<sup>126</sup> BRAZIL, Law Number 12.288, 20<sup>th</sup> July 2010.

<sup>127</sup> BRAZIL, Law Number 13.146, 6<sup>th</sup> July 2015.

<sup>128</sup> Roger Raupp Rios, *Direito Da Antidiscriminação [Law of Antidiscrimination]*, Porto Alegre: Livraria Do Advogado, 2008.

mandate. The relevance of such super statutes in constituting rights is key for countermovements, as seen for example in the intense advocacy to prevent the enactment of the Racial Equality Statute in Brazil.<sup>129</sup> Likewise, in South Africa, the Constitutional Court has used the standards of the South African Employment Equity Act (Act 55/1998) as a standard to interpret the constitutional mandate of affirmative action and non-discrimination in the workplace.<sup>130</sup>

An important aspect of constitutional canons, whether being judicial decisions or super-statutes, is their potential for advancing a general understanding of what wrongs equality law seeks to remedy. Even when courts consider that previous decisions were dead wrong on the day they were decided, those worst decisions are often still cited by the courts as an example not to follow, or as an ‘anticanons’.<sup>131</sup> Anticanons reinforce rather than undermine the very idea that certain judicial or statutes can become references to what the constitution means (or do not mean).

Ackerman’s argument illustrates that at constitutional moments the constitutional debate between social movements and countermovements – as this dissertation will show – evolves around the issue of what it means to be harmed in a constitutionally relevant way. Ackerman argues that *Brown v. Board of Education*,<sup>132</sup> the iconic case that in 1954 struck down racial school segregation referring to ‘feelings of inferiority’ imposed by the segregation itself, endorsed a constitutional “anti-

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<sup>129</sup> Tanya Katerí Hernández, *Racial Subordination in Latin America: The Role of the State, Customary Law, and the New Civil Rights Response* (Cambridge University Press, 2012), 148–70.

<sup>130</sup> SOUTH AFRICA, Constitutional Court, *South African Police Service v Solidarity obo Barnard* (CCT 01/14) [2014] ZACC 23; 2014 (6) SA 123 (CC); [2014] 11 BLLR 1025 (CC); 2014 (10) BCLR 1195 (CC); (2014) 35 ILJ 2981 (CC) (2 September 2014), para. 40.

<sup>131</sup> Jamal Greene, “The Anticanon,” *Harvard Law Review* 125 (2011): 379–475.

<sup>132</sup> THE UNITED STATES, US Supreme Court, *Brown v. Board of Education of Topeka (No. 1.)*, 347 U.S. 483 (1954)

*humiliation principle.*”<sup>133</sup> *Brown*’s reference to ‘badge of inferiority’<sup>134</sup> is a response to the same argument which was rejected by the majority in *Plessy*, which endorsed segregation in public transportation. Such a principle, Ackerman’s argument follows, was confirmed a decade after by civil rights legislation in the US, thus entering the US constitutional canon of the 20<sup>th</sup> century. Humiliation is an important concept, for this dissertation, since it illustrates how the understanding of what constitutes harm for constitutional purposes developed in the US. This in turn allows comparing interpretative changes in equality cases *across the board*, e.g. whether they are about race or sexual orientation, in light of an overreaching constitutional principle of harm. By focusing on harm, this dissertation applies the comparative potential of such arguments of humiliation or symbolic harm. It starts from the premise that constitutional changes, including non-textual ones, ultimately are the formal packaging for the underlying debate on what it means to be harmed across discrimination grounds and across jurisdictions. Such comparative potential is clear when Ackerman analyzes the 2013 decision of the US Supreme Court in *Windsor*,<sup>135</sup> which struck down the federal definition of marriage as union between man and woman, using a concept of harm comparable to the one seen in *Brown*. This aspect of possible overarching principles which would tie different grounds of discrimination is important to keep in mind when analyzing countermovements’ litigation in Chapter 5 through the lens of harm theories.

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<sup>133</sup> Ackerman, *We The People, Volume 3: The Civil Rights Revolution*, 128.

<sup>134</sup> “We consider the underlying fallacy of the plaintiff’s argument to consist in the assumption that the enforced separation of the two races stamps the colored race with a badge of inferiority. If this be so, it is not by reason of anything found in the act, but solely because the colored race chooses to put that construction upon it. The argument necessarily assumes that if, as has been more than once the case and is not unlikely to be so again, the colored race should become the dominant power in the state legislature, and should enact a law in precisely similar terms, it would thereby relegate the white race to an inferior position. We imagine that the white race, at least, would not acquiesce in this assumption.” (THE UNITED STATES, US Supreme Court, *Plessy v. Ferguson*, 163 US 537 (1896), p. 551).

<sup>135</sup> THE UNITED STATES, US Supreme Court, *United States v. Windsor*, 570 U.S. \_ (2013). Kenji Yoshino, “The Anti-Humiliation Principle and Same-Sex Marriage,” *Yale Law Journal* 123, no. 8 (2014): 3076–3103.

#### 4.2. 'Our' Constitution as ongoing change

The second theory of non-textual constitutional change discussed here is Jack Balkin's idea of living constitutionalism. Balkin's normative assumption is, to a certain extent, a complement to Ackerman's idea of high lawmaking: instead of only the basic law ("basic framework of government")<sup>136</sup> and a higher law ("a repository of values and principles"),<sup>137</sup> Balkin affirms that the US Constitution should be read also as "our" constitution.

The idea of **"our" constitution involves a "collective identification"**<sup>138</sup> **with the Constitution**, a feeling of ownership vis-à-vis the Constitution, and then for Balkin "we have the right to interpret it for ourselves and make claims in its name."<sup>139</sup> For Balkin, this right to dispute the constitutional text "depends in part on a protestant constitutionalism – the ability of ordinary citizens to claim the Constitution as their Constitution, to assert in public what they believe it truly means, to organize in civil society and in politics and persuade others of their views."<sup>140</sup> Balkin defines this aspect under the idea of the "constitutional story",<sup>141</sup> i.e. "a constitutive narrative through which people imagine themselves as a people, with shared memories, goals, aspirations, values, duties, and ambitions."<sup>142</sup>

The idea of 'our' constitution is central to Balkin's understanding of social mobilization in non-textual constitutional changes. If the Constitution would be a

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<sup>136</sup> Balkin, *Living Originalism*, p. 59.

<sup>137</sup> Ibid., p. 60.

<sup>138</sup> Balkin, "The American Constitution as Our Law," p. 113.

<sup>139</sup> Balkin, 113.

<sup>140</sup> Balkin, *Constitutional Redemption: Political Faith in an Unjust World*, p. 235. The idea of judicial activity as a narrative is also present Dworkin's theory. See, for instance: Ronald Dworkin, *Law's Empire* (Harvard University Press, 1986), chap. 7.

<sup>141</sup> Balkin, *Living Originalism*, p. 61.

<sup>142</sup> Balkin, 61.

sacred text beyond the reach of ordinary citizens, or only modified through amendments or large historical moments that happen less than a dozen times in two centuries, the kind of social mobilization theorized by Balkin would have not been possible. **One must understand the constitutional text as inviting social contestation of its meaning in order to open up constitutional politics as widely as Balkin suggests.** Thus, a contention-based approach to constitutional change requires, as Balkin does, understanding the constitutional text in ways that welcome, rather than limit, disagreement over constitutional meaning.

In this sense, Balkin reads the Constitution as an empowering text, one that fosters public mobilization around its norms and principles.<sup>143</sup> Accordingly, Balkin's constitutionalism, instead of conceiving the Constitution as a limitation to politics, is closer to 'democratic constitutionalism'<sup>144</sup> of the type proposed by Siegel and Post, whereas contestation (including disagreement among judges themselves) over the meaning of the Constitution is not a threat to constitutional authority<sup>145</sup> but, rather, its very democratic basis.

Balkin's theory offers valuable insights on two core elements of a contentious approach to non-textual constitutional change as formulated in this dissertation: regarding **constitutional law as a collective frame for social movements and**

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<sup>143</sup> As Balkin puts it, "*A very familiar argument for constitutionalism is that it seeks to limit future discretion and prevent future generations from making bad decisions or straying from good values. Although some constitutional features have this purpose and effect, I do not believe that this is the best general argument for constitutionalism. Constitutions are designed to create political institutions and to set up the basic elements of future political decisionmaking. Their basic job is not to prevent future political decisionmaking but to enable it*", In: Balkin, *Living Originalism*, p. 24.

<sup>144</sup> Robert Post and Reva Siegel, "Roe Rage: Democratic Constitutionalism and Backlash," *Harvard Civil Rights-Civil Liberties Law Review* 42 (2007): 373–433.

<sup>145</sup> As Siegel points out, "*The authority of the federal constitution depends upon popular participation in collective deliberation. Because exercises of constitutional lawmaking play a restricted role in the American constitutional order—the United States Constitution has been amended less than twenty times since the founding—the system needs other forms of citizen participation to ensure its continuing authority*", In: Siegel, "Constitutional Culture, Social Movement Conflict and Constitutional Change: The Case of the De Facto Era. 2005-06 Brennan Center Symposium Lecture," p. 20.

**countermovements, and the idea of constant contestation of constitutional norms.**

In other terms, contention over constitutional norms involving social movements and countermovements, as argued here, requires firstly that those movements make claims in constitutional terms and, secondly that those movements see the judicial interpretation of constitutional law as constantly challengeable. This approach reinforces the overall argument put forward here, that after such framing of social struggles in constitutional terms, courts conducting constitutional review will then mediate those claims – in different ways, either reconciling claims, whenever it is possible and desirable, or choosing among them, whenever it is not - thus producing change either way.

What happens to Balkin’s understanding when countermovements’ litigation on constitutional grounds is also understood as their interpretative exercise of seeing the Constitution as *their* Constitution? The theoretical problem of seeing constitutional change in the way Balkin does starts when, in a pluralistic society, different movements – social movements and countermovements mainly – conflict with each other *within courtrooms* claiming that their own view, to a lesser or higher extent contradictory with each other, is the right understanding of the Constitution. When this is the case – as often as it is in when it comes to countermovements litigation – Balkin’s theory will have a limited explanatory power: its reliance on social mobilization as supporting interpretative change does not help explaining instances when such social mobilization (or more accurately social *mobilizations*) is not linear, but rather multidirectional. In such cases where countermovements promote legal mobilization under equal protection, Balkin’s notion of “our” Constitution is in fact diluted into multiple claims on what it means to be harmed in a constitutionally relevant way. “Our” Constitution becomes multiple and often opposing Constitutions. Thus, when controversial cases on

equality involve different groups (including their internal tensions), the picture of change via social mobilization is a much more complex one than Balkin might suggest.

## 5. Understanding non-textual constitutional change from Brazil's and South Africa's experiences

Ackerman and Balkin's theories offer different explanatory models for constitutional changes. Ackerman reminds us of the importance of disagreement between different political branches and the role of national elections in confirming or rejecting certain constitutional views proposed by one of the political branches. Ackerman's theory, if translated into the terms of social movements' literature, presupposes that, like the US, there is a myriad of conflicting political and legal opportunity structures (Executive, Legislative, Judiciary and public sphere at large and other agencies) that enable contention over, and then changes of, constitutional meaning. Yet, such an approach would not necessarily follow in other national contexts with a less strict separation of powers. In this regard, the inclusion in this dissertation of countries with a single-party predominance,<sup>146</sup> such as South Africa, and with a 'coalition presidentialism',<sup>147</sup> as in the case of Brazil, will offer interesting insights about the applicability of Ackerman's separation-of-powers theory to other institutional contexts. The notion of 'coalition presidentialism' highlights the predominance of Executive power over the legislative in multi-party democracies marked by party discipline and the necessity of large coalitions for governance.

<sup>146</sup> For a portrait of civil society organization and social movements in South Africa as using the Constitutional Court to make opposition to the leading party, African National Congress – ANC, in the aftermath of the apartheid, see: Lauren Paremoer and Courtney Jung, "The Role of Social and Economic Rights in Supporting Opposition in Postapartheid South Africa," in *After Apartheid: Reinventing South Africa?*, ed. Ian Shapiro and Kahreen Tebeau (Charlottesville and London: University of Virginia Press, 2011), 199–230.

<sup>147</sup> Fernando Limongi and Argelina Figueiredo, "Institutional Foundations of Coalition Presidentialism," *Lua Nova: Revista de Cultura e Política*, no. 44 (1998): 81–106.



In contrast, Balkin is more concerned with how the constitutional text itself ought to be read. Although Balkin partly bases his theory on judicial ‘partisan entrenchment’<sup>148</sup> to justify changes in constitutional interpretation, he seems more concerned with a structural view on how the constitutional text invites public mobilization. This aspect will be useful in Chapter 2 as a reminder that constitutional texts often serve as a frame for social movements’ and countermovements’ claims in constitutional adjudication processes.

While US scholars see social mobilization in constitutional adjudication as an interpretative exercise towards constitutional change in light of an otherwise dry text. In contrast, **in Latin America and in Brazil, scholars are more inclined to see it as a way to break into the closed space reserved for participation** in order to realize the generous transformational mandate of their respective constitutions. This section will outline two contemporary strands in Global South Constitutionalism partly responsible for the emphasis on the role of the judiciary and social mobilization to deliver change: Latin America’s Neoconstitutionalism and South Africa’s Transformative Constitutionalism and their respective critics.

In Brazil and in South Africa constitutional change via mobilization has been seen as a way to both realize the transformational mandate of a detailed and generous constitutional text as well as to promote ways – including via the judiciary – to actively exercise citizenship in the face of a hierarchical, closed political environment. Such closeness is either derived from a virtually single-party system in South Africa, which has made the country’s Constitutional Court play the role of opposition fostered by

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<sup>148</sup> In Balkin’s and Levinson’s words, “(...) judges and Justices resemble Senators who are appointed for 18-year terms by their parties and never have to face election. They are temporally extended representatives of particular parties, and hence, of popular understandings about public policy and the Constitution. The temporal extension of partisan representation is what we mean by partisan entrenchment”, In: Jack M. Balkin and Sanford Levinson, “Understanding the Constitutional Revolution,” *Virginia Law Review* 87, no. 6 (2001): p. 1067.

social mobilization,<sup>149</sup> or due to the historical impenetrability of the political system for certain minority claims in the Brazilian political system, which is based on wide multiparty consensus as condition for governability.<sup>150</sup> As mentioned above, this led to the so-called judicialization of politics, with the recurrent use of lawsuits by political parties to directly challenge the constitutionality of laws and executive acts as a second round of the parliamentary debate.

### 5.1. Latin America's Neoconstitutionalism

In the aftermath of the post-1988 judicialization of politics in Brazil, more recent studies—grouped under the label of neoconstitutionalism—have emerged in Brazil in order to take stock of increasing social mobilization before the judiciary, an extensive constitutional bill of rights, and hierarchical decision-making processes in the political branches. To be sure, neoconstitutionalism is a term imported in Brazil from Spain and Italy, and it does not have a unique definition, as the Brazilian scholar Daniel Sarmento points out.<sup>151</sup> Some authors even question the very relevance of the theory itself, since it does not carry—as Dimitri Dimoulis argues<sup>152</sup>—distinctive aspects which would allow differentiating it from traditional constitutionalism.

<sup>149</sup> Lauren Paremoer and Courtney Jung, “The Role of Social and Economic Rights in Supporting Opposition in Postapartheid South Africa,” in *After Apartheid: Reinventing South Africa?*, ed. Ian Shapiro and Kahreen Tebeau (Charlottesville and London: University of Virginia Press, 2007), 199–230.

<sup>150</sup> Argelina Cheibub Figueiredo and Fernando Limongi, “Political Institutions and Governmental Performance in Brazilian Democracy,” in *The Political System of Brazil*, ed. Dana de la Fountaine and Thomas Stehnen (Springer, 2016), 63–83. The authors indicate that the predominance of the Executive over economic issues have left room for the Congress to address social policies, including issues of discrimination. Figueiredo and Limongi, 81. Yet, as indicated in the footnote 143, certain minority claims—such as those related to gender identity and sexual orientation—often find more space among Executive bureaucracy rather than parliamentary support.

<sup>151</sup> Daniel Sarmento, “O Neoconstitucionalismo No Brasil: Riscos e Possibilidades [The Neoconstitutionalism in Brazil: Risks and Possibilities],” in *Direitos Fundamentais e Estado Constitucional: Estudos Em Homenagem a JJ Gomes Canotilho* (São Paulo: RT, 2009), 9–49.

<sup>152</sup> Dimitri Dimoulis, “Anotações Sobre o ‘Neoconstitucionalismo’ (e Sua Crítica)” (Sao Paulo, 2008), <http://bibliotecadigital.fgv.br/dspace/bitstream/handle/10438/2856/WP17.pdf?sequence=1>.

One of the most frequently used definitions of neoconstitutionalism in Brazil is the one proposed by Luís Roberto Barroso, currently a Justice of Brazil's Supreme Court. Barroso argues that neoconstitutionalism combines three main aspects: "a) the acknowledgement of the normative force of the Constitution; b) the expansion of the constitutional jurisdiction; c) and the development of the new dogma of constitutional interpretation."<sup>153</sup> Essentially, neoconstitutionalism in Brazil is seen as praise of the triumph of constitutional law, which is now mainstreamed in all corners of the legal system, from administrative law to family law. In this sense, judges throughout the country have applied constitutional norms directly to a myriad of issues, which has turned the judiciary into a protagonist in deciding contentious issues, often with the involvement of social movements and countermovements. For instance, the litigation in Brazil around the issue of same-sex unions – both in favor and against, as chronicled by Adilson Moreira<sup>154</sup> – has shown the impact of neoconstitutionalist doctrines of constitutionalizing family law in convincing ordinary judges to analyze cases on this matter from a constitutional angle.

Neoconstitutionalism provides ways to understand constitutional change in heavily detailed constitutions such as in Brazil's, as well as it allows scholars to understand changes in constitutional equality as a struggle over constitutional principles which occur primarily – although not exclusively – before courts. It does so by stressing the prominence of courts in new democracies as well as post-positivist theories of constitutional interpretation. As Sarmento recalls, Barroso's definition of neoconstitutionalism rests on post-positivist assumptions in which a moral reading of

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<sup>153</sup> Luiz Roberto Barroso, "Neoconstitucionalismo e Constitucionalização Do Direito: O Triunfo Tardio Do Direito Constitucional No Brasil [Neoconstitutionalism and Constitutionalization of Law: The Late Triumph of Constitutional Law in Brazil]," *Revista de Direito Administrativo*, no. 240 (2005): 5.

<sup>154</sup> Moreira, "We Are Family!: Legal Recognition of Same-Sex Unions in Brazil."

constitutional rights<sup>155</sup> as well as a principle-based understanding of constitutional text<sup>156</sup> set new ways of interpreting the constitution, which often leads to treating general constitutional principles as norms to be enforced by a judiciary with expanded powers. In light of this, in his doctoral thesis at Harvard University, Adilson Moreira has advocated – regarding racial equality – for understanding neoconstitutionalism as “provid[ing] the foundation for an interpretive approach that poses the elimination of group disadvantage as a central political goal.”<sup>157</sup> In this sense, the combination of a post-positivist understanding of constitutional text as well as the judicialization of politics would open the door for disadvantaged groups to seize constitutional adjudication in order to advance their claims.

Opening Brazil’s constitutional litigation to participation of social groups allows a more prominent role for judiciary, which is aligned with neoconstitutionalism. Such participation – as shown above in discussing rigid standing rules in Brazil for abstract constitutional claims – has occurred mainly through *amici curiae* interventions and participation in public hearings convened by the Court.

Brazilian constitutionalism has more recently praised the idea of social participation in constitutional review—at the level of the apex court in particular – as a way to counterbalance rigid standing rules. One of the key elements that triggers the plethora of claims by social movements and countermovements is the fact that a significant number of constitutions – such as the Brazilian and South African ones - are

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<sup>155</sup> Ronald Dworkin, *Freedom’s Law: The Moral Reading of the American Constitution* (New York: Oxford University Press, 1996). For a Brazilian take on Dworkin’s theory, see: Ronaldo Porto Macedo Junior, *Do Xadrez à Cortesia: Dworkin e a Teoria Do Direito Contemporânea [From Chess to Courtesy: Dworkin and the Contemporary Legal Theory]* (São Paulo: Editora Saraiva, 2013).

<sup>156</sup> Robert Alexy, “On the Structure of Legal Principles,” *Ratio Juris* 13, no. 3 (2004): 294–304; Virgílio Afonso da Silva, “Comparing the Incommensurable: Constitutional Principles, Balancing and Rational Decision,” *Oxford Journal of Legal Studies* 31, no. 2 (March 17, 2011): 273–301.

<sup>157</sup> Moreira, “Racial Justice in Brazil: Building an Egalitarian Future,” chap. 4.

internally ‘disharmonic’<sup>158</sup>, i.e. they contain internal tensions. One example is the recognition of both post-racialism and affirmative action<sup>159</sup> in the South African constitutional order. Such internal tensions which give ammunition to opposing movements – both social movements and countermovements, including their internal fractions<sup>160</sup> - to frame their claims in constitutional terms. As Oscar Vilhena names it in the case of Brazil, the Constitution works to please to the fullest degree possible different and sometimes conflicting interests represented in the constitution-building process.<sup>161</sup>

Neoconstitutionalism enables constitutional participation because it positions the judiciary, in particular apex courts, in a prominent role within the legal system. At the same time it spreads the influence of constitutional law through the entire legal system through the constitutionalization of private law (e.g. family and contractual law).

From a countermovement perspective, neoconstitutionalist inclination towards a jurisprudence of equality focused on remedying historical disadvantages dissipates when one bears in mind a common critique made against neoconstitutionalism. Simply put, it gives too much power to the judiciary in defining the meaning of general constitutional rights such as equality. With this power comes the possibility of both

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<sup>158</sup> Gary Jeffrey Jacobsohn, *Constitutional Identity* (Cambridge, Massachusetts, and London, England: Harvard University Press, 2010).

<sup>159</sup> I note that for some South African scholars the correct term for that legal system is “reverse discrimination”, and not the US-inspired term “affirmative action”. Yet, I use here the later rather than the former merely because most of the jurisdictions analyzed in this dissertation (Brazil and US) tend to use more often “affirmative action”. See: Pierre De Vos, “Constitutional Court: Addressing Redress,” *Daily Maverick*, July 20, 2016, <https://www.dailymaverick.co.za/opinionista/2016-07-20-constitutional-court-addressing-redress/#.Wfjp3MaZNE5>.

<sup>160</sup> Holning Lau, “An Introduction to Intragroup Dissent and Its Legal Implications,” *Chicago-Kent Law Review* 89, no. 2 (2014): 537–46; Scott L Cummings, “How Lawyers Manage Intragroup Dissent,” *Chicago-Kent Law Review* 89, no. 2 (2014): 547–67.

<sup>161</sup> Vieira et al., *Resiliência Constitucional: Compromisso Maximizador, Consensualismo Político e Desenvolvimento Gradual*.

advancing a transformative jurisprudence focused on remedying historical disadvantages (in different and often conflictive ways of doing so) as well as the possibility of reading the same general rights in a conservative manner, particularly under the influence of countermovements. As it is commonly said, the knife could cut both ways. Sarmiento<sup>162</sup> and Moreira<sup>163</sup> clearly envisioned such risk.

Moreira puts this critique in a clear manner:

“New Constitutionalism caused significant institutional changes as courts began to implement many of the premises that characterize this legal doctrine. But scholars have appointed its limits to promote the structural transformations that many societies long for. The most common critique refers to intuition that substantive catalogues of rights can promote social egalitarianism. Comparative studies show that this premise is highly problematic. The most obvious case is the institutional resistance to employ a progressive equal protection methodology in questions regarding social and economic rights. Although courts utilize transformative parameters in cases dealing with civil liberties, they usually resort to traditional liberal discourse to address issues involving matters of distributive policy. The supreme courts of these countries have altered the social status of certain groups who suffered social exclusion because of status-based inequalities such as same-sex couples. However, they have generally employed a less generous interpretive position when it comes to initiatives that seek to regulate income

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<sup>162</sup> Sarmiento, “O Neoconstitucionalismo No Brasil: Riscos e Possibilidades [The Neoconstitutionalism in Brazil: Risks and Possibilities],” 11.

<sup>163</sup> Moreira, “Racial Justice in Brazil: Building an Egalitarian Future,” 260.

distribution, housing, and employment. New Constitutionalism has been criticized on the basis that the most powerful groups continue to influence the decision-making process despite the existence of mechanisms that facilitate political participation. This comes as a consequence of the fact that powerful groups have disproportionate access to policy-making bodies, which makes the insulation of certain issues from popular politics an important way to maintain their hegemony.”<sup>164</sup>

It is concluded here that, *per se*, neoconstitutionalism only provides the tools for a strong judiciary with the interpretative abilities of reading the constitution in a transformative way in response to claims by social movements as well as countermovements. Neoconstitutionalism does not preclude constitutional change fostered by countermovements – since judicial activism<sup>165</sup> can go both ways. For a more substantive understanding of constitutional change, one would need then a transformative concept. The next section focuses precisely on such conception.

## 5.2. Transformative Constitutionalism In and Beyond South Africa

Transformative constitutionalism is commonly articulated within South African legal discourse. In its core, it stands for seeking structural social change – such as redistribution of wealth, and recognition of rights of historically disadvantaged groups -through constitutional means.

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<sup>164</sup> Moreira, 260.

<sup>165</sup> Robert M. Cover, “The Origins of Judicial Activism in the Protection of Minorities,” *The Yale Law Journal* 91, no. 7 (1982): 1287–1316.

Transformative constitutionalism is by no means alien to Latin American constitutionalism.<sup>166</sup> From the 1988 Brazilian one<sup>167</sup> to the 1991 Colombian Constitution,<sup>168</sup> there is a sense in the region that constitutionalism has come to address the common theme of Latin American inequality, with a particular focus on socioeconomic structures as well as on the fight against legacies of arbitrary power. The South African understanding of transformative constitutionalism is an useful comparator in order to understand the potentials and limits of constitutionalism in new constitutional democracies from the Global South as well as to highlight the context in which countermovements' litigation takes place in those new democracies.

In the aftermath of the adoption of the Final Constitution in 1996, Karl Klare famously advocated for a “transformative constitutionalism”<sup>169</sup> in South Africa, where social change would be promoted through law.<sup>170</sup> In Klare's view, “transformative constitutionalism connotes an enterprise of inducing large-scale social change through nonviolent political processes grounded in law”<sup>171</sup>. Such a heavy burden upon a new constitution is also a central feature of the new constitutionalism in the Global South<sup>172</sup>, particularly in Brazil and South Africa, subjects of the present dissertation.

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<sup>166</sup> Armin von Bogdandy, “Ius Constitutionale Commune in Latin America: Observations on Transformative Constitutionalism,” *I-CONnect*, 2014, <https://www.asil.org/blogs/symposium-constitutionalization-international-law-latin-america-ius-constitutionale-commune-en>.

<sup>167</sup> Viljoen, Vilhena, and Baxi, *Transform. Const. Comp. Apex Court. Brazil, India South Africa*.

<sup>168</sup> Caballero, “Social Movements and the Constitutional Court: Legal Recognition of the Rights of Same-Sex Couples in Colombia.”

<sup>169</sup> Karl E Klare, “Legal Culture and Transformative Constitutionalism,” *South African Journal on Human Rights* 14 (1998): 150. He defines the term in the following terms: “transformative constitutionalism I mean a long-term project of constitutional enactment, interpretation, and enforcement committed (not in isolation, of course, but in a historical context of conducive political developments) to transforming a country's political and social institutions and power relationships in a democratic, participatory, and egalitarian direction. Transformative constitutionalism connotes an enterprise of inducing large-scale social change through nonviolent political processes grounded in law” (p. 150).

<sup>170</sup> Klare, “Legal Culture and Transformative Constitutionalism,” 1998.

<sup>171</sup> Klare, “Legal Culture and Transformative Constitutionalism,” 1998, 150.

<sup>172</sup> Gargarella, Domingo, and Roux, *Court. Soc. Transform. New Democr. An Institutional Voice Poor?*



Klare's view of transformative constitutionalism encompasses, at least, two dimensions. First, Klare qualifies the South African Constitution as a post-liberal document, since it "may plausibly be read not only as open to but committed to large-scale, egalitarian social transformation."<sup>173</sup> Second, the South African Constitution also requires such commitment to transformative constitutionalism from judges and other legal professionals in their methods of interpretation. For Klare, the South African Constitution invites thinking about constitutional interpretation as a "meaning-creation activity,"<sup>174</sup> which would soften the differences "between law and politics and between the professional and the strategic"<sup>175</sup>. The boundaries between law and politics are even blurrier when one considers that Klare's legal professionals in real life are often involved in constitutional litigation promoted by social movements and countermovements as part of a broader legal and political mobilization.

In an opposite direction, reflecting primarily on the first decade of jurisprudence after apartheid, Theunis Roux developed one of the main criticisms to Klare's approach to transformative constitutionalism.<sup>176</sup> The core of Roux's liberal critique of transformative constitutionalism relies on the idea that Klare's project, assuming it is indeed required by the constitutional text, is perfectly in accordance with the liberal ideal of the "strict law/politics distinction."<sup>177</sup> In other words, for Roux, there is no need to ally oneself with an ideological view of transformative constitutionalism in order to defend it, including from a liberal standpoint, considering that what Klare defended is actually mandated by the text of the Constitution itself. Therefore, Roux advocates that

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<sup>173</sup> Klare, "Legal Culture and Transformative Constitutionalism," 1998, 151.

<sup>174</sup> Klare, 159.

<sup>175</sup> Klare, 159.

<sup>176</sup> Roux, "Transformative Constitutionalism and The Best Interpretation of the South African Constitution: Distinction without a Difference?"

<sup>177</sup> Roux, 266.

“a mainstream liberal could read the Constitution as a transformative Constitution using a Dworkinian best-interpretation approach.”<sup>178</sup> Accordingly, the criticism presented by Roux is related to the idea that there is no direct connection between a transformative constitution, one that mandates an overall social and legal change, and a specific method of interpretation, in Klare’s case, a transformative one. Thus, Roux’s problem is not with the label of transformative constitutionalism, but rather with what happens to constitutional interpretation after the label is affixed.

Regardless of whether Klare or Roux is right on the need for a transformative interpretation to advance this kind of constitutionalism, the idea of **transformative constitutionalism is often associated with the role of courts in serving as an “institutional voice of the poor.”**<sup>179</sup> Siri Gloppen argues that “courts may contribute to social transformation directly by providing an arena in which concerns of marginalized groups can be raised as legal claims” and “by serving as a bulwark against erosion of existing pro-poor institutional arrangements.”<sup>180</sup>

Yet, ironically enough, the origins of South African constitutionalism and its reliance in strong judicial powers of constitutional review are themselves far from transformative in the sense employed by Klare. Ran Hirschl, a critic of excessive judicial powers, maintained that it was the former apartheid regime rather than the new anti-apartheid leaders who first embraced the idea of entrenched constitutional rights

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<sup>178</sup> Roux, 266.

<sup>179</sup> Roberto Gargarella, Pilar Domingo, and Theunis Roux, *Courts and Social Transformation in New Democracies: An Institutional Voice for the Poor?* (Hampshire: Ashgate, 2006).

<sup>180</sup> Siri Gloppen, “Courts and Social Transformation: An Analytical Framework,” in *Courts and Social Transformation in New Democracies: An Institutional Voice for the Poor?*, ed. Roberto Gargarella, Pilar Domingo, and Theunis Roux (Hampshire: Ashgate, 2006), 38.

and constitutional review in order to preserve some of their previous power from the horrifying apartheid past for the future.<sup>181</sup>

What might be in question then is not so much the transformative nature of the South African Constitution, but rather the extent to which legal institutions – such as constitutional review by courts – are able to deliver such transformation through law. Challenging Hirschl’s skepticism of the transformative power of liberal constitutionalism, Theunis Roux sustains that “[t]he problem with this [“interest-based hegemonic preservation”] thesis when applied to South Africa, however, is that the South African Constitution is not a ‘classic’ liberal–democratic constitution on the American model.”<sup>182</sup> Making use of Heinz Klug’s reading of South African constitutionalism,<sup>183</sup> Roux sustains that South African constitutionalism values liberal institutions such as a strong judiciary, in light of the transformative constitutionalism of the post-apartheid era. Ultimately, then, liberal institutions would have a value in themselves and, for authors like Roux, nothing would prevent those institutions, in principle, from delivering the kind of social change transformative constitutionalism professes. If so, Hirsch’s skepticism is unfounded.

When the debate is put in those terms, transformative constitutionalism is considerably reminiscent of Latin American neoconstitutionalism: both put **considerable expectation in the judiciary to deliver constitutionally mandated social transformation**. From this angle then social movements would play a vital role in seizing (or, to repeat John Gaventa’s term, “claiming”<sup>184</sup>) the space of courts to foster

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<sup>181</sup> Ran Hirschl, *Towards Juristocracy: The Origins and Consequences of the New Constitutionalism* (Cambridge, Massachusetts, and London, England: Harvard University Press, 2004), 92.

<sup>182</sup> Theunis Roux, “A Brief Response to Professor Baxi,” in *Transformative Constitutionalism: Comparing the Apex Courts of Brazil, India and South Africa* (Pretoria: Pretoria University Law Press, 2013), 50.

<sup>183</sup> Heinz Klug, *Constituting Democracy: Law, Globalism and South Africa’s Political Reconstruction* (Cambridge: Cambridge University Press, 2000), 18–23.

<sup>184</sup> John Gaventa, “Finding the Spaces for Change: A Power Analysis,” *IDS Bulletin* 37, no. 6 (2006): 27.

this kind of social transformation. One of the obvious ways this has been done in South Africa and elsewhere is advancing – via litigation – a substantive reading of equality, with both eyes on a constant, transformative constitutional change, as Cathi Albertyn and Beth Goldblatt argue while analyzing South African equality jurisprudence.<sup>185</sup>

Taking into consideration the endorsement of transformative constitutionalism by the country’s political elites in the post-apartheid era, one can plausibly ask the extent to which transformative constitutionalism will be able to guide South African apex courts in mediating claims between opposing claims by social movements and countermovements. This is an issue shared by other countries, such as Brazil, with a comparable transformative constitutionalism.

Will courts simply reject – on the basis of the constitution’s transformative mandate – claims of countermovements seeking to preserve the status quo? The mere fact that in South Africa some scholars – despite the recognition of marriage equality in December 2005 by the Constitutional Court<sup>186</sup> - have argued for a “right to discriminate”<sup>187</sup> against LGBT persons by religious organizations indicates that one needs a better theoretical account of constitutional change. One change that recognizes the central role of **apex courts as sites of contention between opposing groups**, rather than simply as messengers of an imprecise idea of transformation which, in certain

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<sup>185</sup> For Cathi Albertyn and Beth Goldblatt: “Addressing these inequalities is an important part of the constitutional project of transformation. To do so using law requires both a strong concept of equality and an idea of law that does not preserve the status quo. For many in academia and the Constitutional Court, this conception is captured in the idea of substantive equality.” Cathi Albertyn and Beth Goldblatt, “Towards a Substantive Right to Equality,” in *Transformative Constitutionalism: Comparing the Apex Courts of Brazil, India and South Africa* (Pretoria: Pretoria University Law Press, 2013), 232. See also: Cathi Albertyn and Beth Goldblatt, “Facing the Challenge of Transformation: Difficulties in the Development of an Indigenous Jurisprudence of Equality,” *S. Afr. J. on Hum. Rts.* 14 (1998): 248–76.

<sup>186</sup> SOUTH AFRICA, Constitutional Court, *Minister of Home Affairs and Another v Fourie and Another* (CCT 60/04) [2005] ZACC 19; 2006 (3) BCLR 355 (CC); 2006 (1) SA 524 (CC) (1 December 2005).

<sup>187</sup> Patrick Lenta, “In Defence of the Right of Religious Associations to Discriminate: A Reply to Bilchitz and De Freitas,” *South African Journal on Human Rights* 29, no. 2 (2013): 429–47.

issues, can actually do more harm than good to vulnerable groups.<sup>188</sup> Litigation is primarily adversarial in the sense of having opposing groups presenting contrasting claims.<sup>189</sup> Yet, the stakes are higher in constitutional litigation on equality, when contestation between opposing groups encompasses different world views competing as the view embraced by the constitution.

Bearing in mind that transformative constitutionalism and neoconstitutionalism rely on a strong judiciary to deliver social transformation, and that a strong judiciary is a knife that can cut both ways – i.e. may or may not provide social transformation through constitutional interpretation and all possibilities in between, scholars in South Africa have looked for a way out of this dilemma. What needs to be reconciled in those theories and the constitutional practices that follow from them in Brazil and South Africa is the danger of countermovements coopting constitutional litigation of equality for their own claims in a context where constitutions determine social transformation of progressive nature and the judiciary have wide powers. How to reconcile the pressure upon courts for reading constitutional harm from countermovements’ perspectives in light of a transformative constitutional culture?

One way out of this dilemma is what Stu Woolman<sup>190</sup> suggests as an “experimental constitutionalism”. One that would institutionalize – including in the space of constitutional review – what he calls “participatory bubbles”, i.e. spaces where a shared understanding of constitutional text might be developed, and redeveloped, throughout the time. Such a participatory approach – also seen in Brazil, as well as in

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<sup>188</sup> SOUTH AFRICA, *S v Jordan and Others (Sex Workers Education and Advocacy Task Force and Others as Amici Curiae)* (CCT31/01) [2002] ZACC 22; 2002 (6) SA 642; 2002 (11) BCLR 1117 (9 October 2002). For a critique of women’s rights in South Africa, see: Christina Murray and Michelle O’Sullivan, *Advancing Women’s Rights: The First Decade of Democracy* (Juta and Company Ltd, 2005).

<sup>189</sup> Regarding the US, see Robert A. Kagan, *Adversarial Legalism: The American Way of Law* (Cambridge, Massachusetts, and London, England: Harvard University Press, 2001).

<sup>190</sup> Stu Woolman, *The Selfless Constitution: Experimentalism and Flourishing as Foundations of South Africa’s Basic Law* (Juta and Company Ltd, 2013), 277–318.

the US theories of democratic constitutionalism – is often considered a possible solution to reconcile transformative constitutions with a strong judiciary by basically opening the doors of courts to social groups which do not get access in ways that are unthinkable or unavailable in democratic representative institutions.

## 6. Conclusion: Making Sense of Countermovements' Litigation to Understand Constitutional Change Better

A **contention-centered approach to constitutional change** offers a place for countermovements in constitutional scholarship on constitutional change. It assumes that those changes occur within an adversarial context where social movements and countermovements often play a key role. This Chapter has shown that both the very architecture of constitutional equality as well as theories of non-textual constitutional change in the three countries are related to social mobilization around issues of race and LGBT rights.

The visible successes of countermovements' litigation in the three countries makes this contention-centered perspective even more pressing – whether those countermovements are institutionalized or not, whether they are anticipatory or reactive or whether they are supported by political parties or not. As seen in Part 2, countermovements pro-family values and countermovements against racial quotas engage in legal mobilization before the apex courts of the three countries. Such involvement challenges existing theories of non-textual constitutional change to offer those countermovements a place in their understandings of change.

Overall, the explanatory power of these theories when faced with active involvement of countermovements in constitutional adjudication over equality quickly fades away. Countermovements do not fit easily into the US-type of We The People, peculiar to forms of democratic and living constitutionalism, because they challenge

rather than reaffirm the cohesion that *We The People* presupposes. Also, countermovements do not easily fit into the transformative rhetoric of Global South Constitutionalism, because, in fact, they often seek to revert constitutional changes promoted by social movements seeking social transformation. This reinforces the gap in the literature which this dissertation - in its core - pursues to address.

This Chapter provided a critical reading of different theories of non-textual constitutional change, which reconcile constitutionalism with non-textual modification fostered by social mobilization. Brazilian and South African literatures added to the US perspective a story of constitutional change as a function of transformative (neo)constitutionalism in democracies with closed political spaces and prominent judiciaries. The objective was to measure the explanatory power of theories of non-textual constitutional change in light of the rise of countermovements in constitutional litigation on equality.

Neither of these theories presented above is able to offer a proper place for countermovements (and their rising litigation) in their understanding of constitutional change. Yet, constitutional scholarship from Brazil and South Africa offer some answers to fill this gap. Both Latin America's neoconstitutionalism and South Africa's transformative constitutionalism put great emphasis on a strong judiciary to deliver social transformation promised in the constitution. Thus, in both countries, non-textual constitutional change is seen as a byproduct of constitutionally framed social transformation through law, and through courts in particular, which, to a large extent, assumes some level of non-textual constitutional change.

What can we taken away from the theories presented in this Chapter? First, there is a underlying theme in the three countries of the prominence of the judiciary in promoting constitutional changes in equality terms. Despite the different packings in

which this theme is presented in each of those countries (democratic constitutionalism and evolution of the equal protection jurisprudence, transformative constitutionalism or neoconstitutionalism), judiciary is a central player trying to address high expectation of non-textual constitutional change. Second, one ought to be careful with powerful institutions. Exactly for being a powerful institution from which opposing groups expect remedies for equality violations, judiciary is a knife that can cut both (or even) multiple ways, depending on the groups reaching out for it through legal mobilization. Third, the answer to this dilemma presented by part of the literature (more participation) is not enough. Even when courts become participatory bubbles where opposing groups meet, the question of what difference it makes when those social groups knocking at the courts' doors are reactionary countermovements remains. In other words, the problem is not only opening the doors of courts for a varied of claims by social movements and countermovements. Participation will not solve the underlying, more fundamental problem of where to draw the line of what it means (and what it does not mean) to be harmed in a constitutionally relevant. Equality litigation invites exactly disputes on constitutional wrongs in the shape of constitutional harms.

This dissertation will seek to address ways in which courts as well as political branches draw this line on constitutional harms, without which legal mobilization on equality would be primarily a power play between different groups rather than a constitutional debate.



## CHAPTER 2 A TRIPARTITE CONCEPTUAL FRAMEWORK: INSTITUTIONAL OPENNESS, CONTESTATION AND HARM-MANAGEMENT

The present dissertation asks, how have courts conducting constitutional review responded to countermovements' claims in particular in equality cases?

This question is particularly important in light of the main take-away from Chapter 1: courts have assumed a prominent role in non-textual constitutional change and, amid mobilization by opposing movements, such strong judicial power can cut both ways of the contestation.

When countermovements' involvement with constitutional equality litigation enters the picture, the explanatory power of both neoconstitutionalism and transformative constitutionalism – seen in the previous Chapter - are subject to serious reservations. Here, three hypotheses are drawn from social science literature in order to explain the dynamics of countermovements' legal mobilization in the constitutional arena, and the impact of their intervention on non-textual constitutional change. Taken together, these three hypotheses compose the conceptual framework of the present dissertation.

The **proposed three-tier conceptual framework** takes into account the dynamic exchange between social movements and countermovements' in constitutional equality litigation. The overall objective of this Chapter is to provide a comprehensive conceptual framework for studying the impact of the interaction of social movements and their countermovements on constitutional change to be undertaken in the comparative case studies developed in Part 2 of this dissertation. This Chapter 2 looks at how legal and social science scholars concerned with social

movements have understood countermovements' involvement with legal structures in general, and with constitutional litigation in particular.

The present Chapter is structured as follows. The **first section** begins with the current stage of the literature on social movements and law in constitutional litigation in order to build up the narrative for the next discussion on countermovements' legal mobilization. The **second section** offers an overview on the common themes from social science literature regarding countermovements' legal mobilization, while the **third section** is dedicated to the work of William N. Eskridge Jr. in the U.S. which serves as the main reference in the field of countermovements and constitutional law. The final section presents, on the basis of the literature presented before, a new framework for analyzing countermovements' legal mobilization and its impact on constitutional harm and on the legal opportunity structure in which such mobilization takes place.

As a final step, and as a chapter synthesis, the **fourth section** will state the conceptual framework of the present research, defining **institutional openness contestation, and harm-management propositions** regarding the functions of courts conducting constitutional review in equality litigation, developed in further detail in this dissertation in Chapters 3, 4 and 5, respectively.

## 1. Law and Social Movements in Constitutional Cases

One point of debate in this scholarship is the role of law in enabling the emergence of social movements and countermovements. According to McCann, the role of law in relation to social movements can be defined as “**rights consciousness raising.**”<sup>191</sup> By

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<sup>191</sup> Michael McCann, “Law and Social Movements: Contemporary Perspectives,” *Annual Review of Law Social Science* 2 (2006): 25.

this term, McCann refers to two aspects of the role of law in relation to social mobilization. First, **law builds identity**, primarily due to “the process of agenda setting by which movement actors draw on legal discourses to name and to challenge existing social wrongs or injustices.”<sup>192</sup> Second, **law opens strategic opportunities**, by exploring the vantage points where, from a legal point of view, there is a “sense of vulnerability”<sup>193</sup> of the targets of the social movement. Thus, law can serve as a “catalyst” for social movements.<sup>194</sup>

On the other hand, much has also been said about the “myth of rights.” Part of the literature argues that courts cannot deliver legal reform conducive to social change that social movements expect they do (Rosenberg’s idea of hollow hope).<sup>195</sup> In addition, this literature also emphasizes that many successful stories of impactful movement-led litigation are an indirect result of courts’ actions, rather than deriving directly from judicial remedies, as Scheingold emphatically puts it.<sup>196</sup>

Meanwhile, the Brazilian and South African literature on social movements and law are incipient, but still emerging. Social movements in those two jurisdictions have participated in the constitution building processes – finalized only a couple of decades ago – and even before it, they had been fighting against the oppressive regimes<sup>197</sup> that preceded the current constitutions. In the contemporary Brazilian context, socio-legal literature has focused particularly on the role of social movements and NGOs in making

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<sup>192</sup> McCann, 25.

<sup>193</sup> McCann, 26.

<sup>194</sup> Michael W. McCann, *Rights at Work* (Chicago and London: The University of Chicago Press, 1994), chap. 3.

<sup>195</sup> Gerald N. Rosenberg, *The Hollow Hope: Can Courts Bring About Social Change*, 2nd ed. (Chicago and London: The University of Chicago Press, 2008).

<sup>196</sup> Stuart A. Scheingold, *The Politics of Rights: Lawyers, Public Policy, and Political Change*, 2nd. Editi (Ann Arbor: The University of Michigan Press, 2007), xx.

<sup>197</sup> Richard Abel, *Politics By Other Means: Law in the Struggle Against Apartheid, 1980-1994* (New York: Routledge, 1995); Vieira, “Public Interest Law: A Brazilian Perspective”; Viljoen, Vilhena, and Baxi, *Transform. Const. Comp. Apex Court. Brazil, India South Africa*.

use of the apex court by *amicus curiae* briefs and participation in public hearings to make their claims heard,<sup>198</sup> as well as the role of state lawyers in promoting strategic litigation on their own or in partnership with the civil society organizations.<sup>199</sup> In the Brazilian context, the generous bill of rights – enshrined in a detailed constitution – motivates social movements and NGOs to bring politics into the judicial sphere,<sup>200</sup> advocating for an open<sup>201</sup> judiciary, particularly at the level of the country’s apex court. Also, as far as contestation outside courts, the Brazilian literature has additionally explored the relation between political parties and the LGBT movement,<sup>202</sup> as well as countermovements’ proactive agenda in the legislative branch seeking to adopt laws that restrictive the legal concept of family to different-sex unions.<sup>203</sup>

Equally, in South Africa, social movements have flourished in the context of the struggle against the oppression during apartheid, and in the constitution building process. Contemporary literature on social movements and law in the country stresses the lack of space for political participation at the level of local bureaucracies as well as persisting economic inequalities,<sup>204</sup> and a single-party dominance of the federal politics,<sup>205</sup> as composing the context for active legal mobilization by social movements before courts, e.g. the LGBT movement and the movement around the right to health.

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<sup>198</sup> Vieira and Annenberg, “Remarks on the Role of Social Movements and Civil Society Organisations in the Brazilian Supreme Court”; Almeida, “Sociedade Civil e Democracia: A Participação Da Sociedade Civil Como Amicus Curiae No Supremo Tribunal Federal [Civil Society and Democracy: Civil Society Participation as Amicus Curiae in the Supreme Court]”; Carolina Alves Vestena, “Participação Ou Formalismo?: O Impacto Das Audiências Públicas No Supremo Tribunal Federal Brasileiro” (Fundação Getúlio Vargas, 2010).

<sup>199</sup> Vieira, “Public Interest Law: A Brazilian Perspective.”

<sup>200</sup> Vianna, *A Judicialização Da Política e Das Relações Sociais No Brasil [The Judicialization of Politics and Social Relations in Brazil]*.

<sup>201</sup> Coelho, “As Idéias de Peter Häberle e a Abertura Da Interpretação Constitucional No Direito Brasileiro.”

<sup>202</sup> Santos, “Movimento LGBT e Partidos Políticos No Brasil [LGBT Movement and Political Parties in Brazil].”

<sup>203</sup> Juliana Cesário Alvim Gomes, *Por Um Constitucionalismo Difuso: Cidadãos, Movimentos Sociais e o Significado Da Constituição [For a Diffuse Constitutionalism: Citizens, Social Movements and the Meaning of the Constitution]* (Salvador: Editora JusPodivm, 2016).

<sup>204</sup> Madlingozi, “Social Movements and the Constitutional Court of South Africa.”

<sup>205</sup> Paremoer and Jung, “The Role of Social and Economic Rights in Supporting Opposition in Postapartheid South Africa,” 2011.

Thus, there is an underlying assumption in the South African literature about the value of an institutionally open judicial system for the claims of social movements. Accordingly, as mentioned in the previous Chapter, in South Africa, as in Brazil, there is an over-emphasis in the literature – naturally derived from the country’s history – on social movements rather than countermovements (with few exceptions).<sup>206</sup> In South Africa, there have been attempts of legal mobilization by countermovements – “engaged in creative and successful mobilization of socio-economic rights strategies to preserve the privileges of their constituencies, including campaigns to maintain Afrikaans-only schools, to obtain eviction orders, to thwart mixed-income settlements, and to set up gated communities.”<sup>207</sup> However, apart from this socio-economic rights litigation, racial and sexual orientation countermobilization did not succeed as much in South African courts.

Since the 1980s,<sup>208</sup> a handful of contributions in the US<sup>209</sup> have tried to fill the gap in the constitutional and public interest law scholarship regarding the role of conservative lawyering in the development of constitutional law. Notably, in the 2000s, US constitutional scholarship has moved from an analysis of specific movements to more complex studies of the interplay between social movements and countermovements in constitutional litigation. In that sense, countermovements and their relationship with social movements have become more important in constitutional

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<sup>206</sup> Thoreson, “Somewhere over the Rainbow Nation: Gay, Lesbian and Bisexual Activism in South Africa”; Thiago Amparo, “Notes on Countermovements and Conservative Lawyering: The Bumpy Road to Constitutional Marriage Equality in Brazil,” *FGV Direito SP Research Paper Series*, no. 124 (2015).

<sup>207</sup> Madlingozi, “Post-Apartheid Social Movements and Legal Mobilisation,” n. 3.

<sup>208</sup> Lee Epstein, *Conservatives in Court* (University of Tennessee, 1985).

<sup>209</sup> Ann Southworth, “Conservative Lawyers and the Contest over the Meaning of Public Interest Law,” *UcLA L. Rev.* 52 (2004): 1223; Ann Southworth, *Lawyers of the Right: Professionalizing the Conservative Coalition* (University of Chicago Press, 2009); Teles, *The Rise of the Conservative Legal Movement: The Battle for Control of the Law*.

studies, although the gap has not yet been fulfilled in Brazil and in South Africa, despite notable attempts to analyze, for instance, anti-gay discourses in law.<sup>210</sup>

Another aspect peculiar of litigation is worth mentioning. The very dynamics of litigation force litigants to propose to courts a framing for their claims. By “constitutional framing”, we refer – using Mary Ziegler’s definition – to the process by which “movements, countermovements, and officials in constitutional debates compete and collaborate in changing or reinforcing the meaning of social practices.”<sup>211</sup> Framing equals assigning certain meaning to a set of social practices. **Constitutional law offers a series of those meanings, from which movements are likely to draw when litigating.** For instance, part of the LGBT movement might reinforce the idea of monogamous love when litigating same-sex marriage in a jurisdiction where constitutional law privileges a traditional concept of marriage;<sup>212</sup> or the black movement might stress the concept of diversity in universities in a jurisdiction which privileges diversity rather than remedying past discrimination as justification for affirmative actions.<sup>213</sup> Those choices of framing are important because they influence how constitutional norms contribute to privileging some social movements and countermovements’ claims and, consequently, silence others.

In other words, the simple fact of presenting a judicial petition or writing *amici curiae* necessarily assumes that a framing, or a range of framings, is chosen (of course, it does not assume that such choice is free of boundaries – in any political or legal

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<sup>210</sup> Roger Raupp Rios, Célio Golin, and Paulo Gilberto Cogo Leivas, *Homossexualidade e Direitos Sexuais: Reflexões a Partir Da Decisão Do STF [Homosexuality and Sexual Rights: Reflexions on the Basis of the STF Decision]* (Editora Sulina, 2011); Vincent and Howell, “‘Unnatural’, ‘Un-African’ and ‘Ungodly’: Homophobic Discourse in Democratic South Africa.” Thoreson, “Somewhere over the Rainbow Nation: Gay, Lesbian and Bisexual Activism in South Africa.”

<sup>211</sup> Mary Ziegler, “Framing Change: Cause Lawyering, Constitutional Decisions, and Social Change,” *Marq. L. Rev.* 94, no. 1 (2010): 267.

<sup>212</sup> Douglas NeJaime, “Marriage, Cruising, and Life in Between: Clarifying Organizational Positionalities in Pursuit of Polyvocal Gay-Based Advocacy,” *Harvard Civil Rights-Civil Liberties Law Review (CR-CL)* 38 (2003): 511–62.

<sup>213</sup> Sumi Cho, “Post-Racialism,” *Iowa Law Review* 94, no. 5 (2008): 1589–1649.

sense). While courts may or may not decide the given issue ultimately using the litigants' terms, those who first propose a legal framing, drawing from the existing legal norms but often expanding or limiting their meaning, occupy a privileged position in movement-counter-movements legal dynamics.

This insight about framing and its importance in social mobilization has received great attention from the social science literature.<sup>214</sup> David Snow<sup>215</sup> emphasizes that **framing focuses, articulates and transforms meanings**. It *focuses* meaning by telling what deserves attention and what does not (for instance, which instances of past historical discrimination matter for analyzing certain affirmative action). It *articulates* meaning by organizing events or experiences in one unifying concept (for instance, defining a white person rejected in an university application due to a race-inspired affirmative action as constitutional *harm* being). Finally, it *transforms* meaning by changing the connotation of an event or experience (for instance, by convincing courts to treat affirmative action and discrimination alike). Movements' framings compose what Tarrow calls the 'repertoire of contention'<sup>216</sup> – a set of new and old meanings that movements' participants can relate to from their own experiences. In this dissertation, we will look more closely at **how the reframing of constitutional harm serves the purpose of focusing, articulating and transforming meanings of equality**

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<sup>214</sup> David A. Snow, "Framing Processes, Ideology, and Discursive Fields," in *The Blackwell Companion to Social Movements* (Malden, MA: Blackwell Publishing, 2004), 380–412; David A. Snow, "Framing Processes, Ideology, and Discursive Fields," *The Blackwell Companion to Social Movements*, 2007, 380–412; David A. Snow et al., "Frame Alignment Processes, Micromobilization, and Movement Participation," *American Sociological Review* 51, no. 4 (1986): 464–81. For examples of application of a framing perspective, see: Deana A. Rohlinger, "Framing the Abortion Debate: Organizational Resources, Media Strategies, and Movement-Counter-movement Dynamics," *The Sociological Quarterly* 43, no. 4 (2002): 479–507, <http://www.jstor.org/stable/4120936>; Andrew Tucker, "Framing Exclusion in Cape Town's Gay Village: The Discursive and Material Perpetration of Inequitable Queer Subjects," *Area* 41, no. 2 (2009): 186, doi:10.2307/40346187.

<sup>215</sup> Snow, "Framing Processes, Ideology, and Discursive Fields," 2004, 384. Examples are mine.

<sup>216</sup> Sidney Tarrow, *Power in Movement: Social Movements and Contentious Politics*, 3rd ed. (Cambridge: Cambridge University Press, 2011), 29. See also: Doug McAdam, *Political Process and the Development of Black Insurgency*, 2nd. (Chicago and London: The University of Chicago Press, 1999), 51.

## 2. Social Science Literature on Countermovements

In Sidney Tarrow's words, social movement – as a specific kind of collective action – is a group “whose actions are based on dense social networks and effective connective structures and draw on legitimate, action-oriented cultural frames, [and] ... sustain these actions even in contact with powerful opponents.”<sup>217</sup> In that sense, social movements<sup>218</sup> are more stable than a single protest, yet less institutionalized than a political party. In a nutshell,<sup>219</sup> social movements are comprised of collectivities, with a social basis of participants, who address – by defending or challenging – an existing authority while seeking social change,<sup>220</sup> often, yet not exclusively, through extra-institutional means of protest.<sup>221</sup> A classic example is the Civil Rights Movement in the

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<sup>217</sup> Tarrow, *Power in Movement: Social Movements and Contentious Politics*, 16.

<sup>218</sup> To use a similar and famous formulation, by Snow et al., social movements are “collectivities acting with some degree of organization and continuity outside institutional or organizational channels for the purpose of challenging or defending extant authority, whether it is institutionally or culturally based, in the group, organization, society, culture, or world order of which they are a part.” Snow, Soule, and Kriesi, *Blackwell Companion to Soc. Movements*, 11.

<sup>219</sup> David Snow et. al offer key elements to a definition: “Although the various definitions of movements may differ in terms of what is emphasized or accented, most are based on three or more of the following axes: collective or joint action; change-oriented goals or claims; some extra- or non-institutional collective action; some degree of organization; and some degree of temporal continuity.” David A. Snow, Sarah A. Soule, and Hanspeter Kriesi, “Mapping the Terrain,” in *The Blackwell Companion to Social Movements*, ed. David A. Snow, Sarah A. Soule, and Hanspeter Kriesi (Oxford: Blackwell Publishing, 2004), 6.

<sup>220</sup> Importantly, to affirm that social movements seek an overall social change is not the same as to say that there are no significant differences between streams within the same broad social movement on what kind of social change should be pursued. For instance, a history of the gay movement in the United States shows a dispute between a liberal stream in favour of a formal equality approach, often associated with marriage equality, and other more radical streams which question the very basis of the societal understanding of sexual and gender roles and, thus, tend to question the centrality of marriage itself. In this sense, seeking societal change does not equal to say social movements are monolithic groups – which is also key to understand the existence of different claims within the same countermovement. The phenomenon of “intragroup dissent” has given rise to prolific literature, which explores how social movements' lawyers have managed intragroup dissent, how courts have favoured a monolithic view of social groups rather than embracing a richer view of intra-group dissent, as well as how intra-group dissent helped shaped constitutional change. See: Tomiko Brown-Nagin, *Courage to Dissent: Atlanta and the Long History of the Civil Rights Movement* (Oxford: Oxford University Press, 2011); Madhavi Sunder, “Cultural Dissent,” *Stanford Law Review*, 2001, 495–567; Scott L Cummings, “How Lawyers Manage Intragroup Dissent,” *Chicago-Kent Law Review* 89, no. 2 (2014): 547–67; Lau, “An Introduction to Intragroup Dissent and Its Legal Implications.”

<sup>221</sup> “If there is a single element that distinguishes social movements from other political actors, however, it is the strategic use of novel, dramatic, unorthodox, and noninstitutionalized forms of political expression to try to shape public opinion and put pressure on those in positions of authority.” See: Verta Taylor and Nella Van Dyke, “‘Get up, Stand up’: Tactical Repertoires of Social Movements,” in *The Blackwell Companion to Social Movements*, ed. David A. Snow, Sarah A. Soule, and Hanspeter Kriesi (Oxford: Blackwell Publishing, 2004), 263.



US,<sup>222</sup> which emerged in the Southern states of the US in the 1950s, composed of activists, community leaders, church members, adopting from disruptive actions of street marches and sit-ins to more institutionalized methods such as litigation.

Importantly, social movements (and countermovements alike) are not defined by their actual membership, but more by the causes or positions those movements pursue. Social movements' scholars Zald and McCarthy makes it clear. For them,

“social movements may or may not be based upon the grievances of the presumed beneficiaries. Con-science constituents, individual and organizational, may provide major sources of support. And in some cases supporters-those who provide money, facilities, and even labor-may have no commitment to the values that underlie specific movements.”<sup>223</sup>

For the purposes of litigation then, it is important to highlight that more relevant than who actually engages directly in a given movement (e.g. speaking on its behalf) is who contributes somehow to the underlying cause of a given movement (e.g. organizations or even individuals litigating movements' causes).

Social movements have been the form of contentious politics most studied by sociologists and increasingly by legal scholars in the past decades. While the literature on the theories of social movements has been overwhelmingly US-centric, it resonates in all three countries here analyzed.<sup>224</sup> One of the main reasons for the explosion of

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<sup>222</sup> Aldon D Morris, *The Origins of the Civil Rights Movement: Black Communities Organizing for Change* (New York; London: Free Press; Collier Macmillan, 1984).

<sup>223</sup> McCarthy and Zald, “Resource Mobilization and Social Movements: A Partial Theory,” 1216.

<sup>224</sup> McAdam, Tarrow, and Tilly, *Dynamics of Contention*; Tarrow, *Power in Movement: Social Movements and Contentious Politics*; Doug McAdam, John D McCarthy, and Mayer N Zald, *Comparative Perspectives on Social Movements: Political Opportunities, Mobilizing Structures, and Cultural Framings* (Cambridge University Press, 1996); Mayer N Zald and John David McCarthy, *Social Movements in an Organizational Society: Collected Essays* (Transaction publishers, 1987); Angela Alonso, “As Teorias Dos Movimentos Sociais: Um Balanço Do Debate [The Theories of Social Movements: A Review of the Debate],” *Lua Nova: Revista de Cultura e Política*, no. 76 (2009):

scholarly interest is the sense that we might live in a “social movement society.”<sup>225</sup> The “social movement society” is a product of historical circumstances, it is nowhere disappearing in the near horizon.<sup>226</sup> Social movements are one of many actors participating in ‘contentious politics.’<sup>227</sup> Political action of the type of contentious politics is the genus of which social movements are the species.<sup>228</sup>

In industrialized contemporary democracies, social movements’ activities became so frequent to the point of constituting one of the most relevant ways a society organizes itself collectively in order to make claims before authorities - apart from the ordinary, institutionalized political ways of doing so, such as voting in elections or individually petitioning before bureaucratic organs. The historical context of industrialized capitalist societies shapes the concept of social movements, where political opportunities and threats enable the emergence of this form of *claim-making*.

Social movements’ victories can take many forms – from a march attracting attention from the media and the general public (e.g. the 1968 women’s march in the US and the iconic bra-burning)<sup>229</sup> to a successful declaration of a right before a court of law (e.g. recognition of same-sex marriage by the South African Constitutional Court in 2006).<sup>230</sup> Winning legal cases, in particular before an apex court with the power of

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49–86; Facchini, “Conexões, Processos Políticos e Movimentos Sociais: Uma Reflexão Teórico-Metodológica a Partir Do Movimento LGBT [Connections, Political Processes and Social Movements: A Theoretical and Methodological Reflection from the LGBT Movement].” Tshepo Madlingozi, “Post-Apartheid Social Movements and the Quest for the Elusive ‘New’ South Africa,” *Journal of Law and Society* 34, no. 1 (2007).

<sup>225</sup> David S Meyer and Sidney G Tarrow, *The Social Movement Society: Contentious Politics for a New Century* (Rowman & Littlefield, 1998), 4.

<sup>226</sup> Tarrow, *Power in Movement: Social Movements and Contentious Politics*, 118.

<sup>227</sup> Per Snow et. al.: “Social movements are only one of numerous forms of collective action. Other types include much crowd behavior, as when sports and rock fans roar and applaud in unison; some riot behavior, as when looting rioters focus on some stores or products rather than others; some interest-group behavior, as when the National Rifle Association mobilizes large numbers of its adherents to write or phone their respective congressional representatives; some “gang” behavior, as when gang members work the streets together; and large-scale revolutions. Since these are only a few examples of the array of behaviors that fall under the collective.” See: Snow, Soule, and Kriesi, “Mapping the Terrain,” 6.

<sup>228</sup> McAdam, Tarrow, and Tilly, *Dynamics of Contention*, 5.

<sup>229</sup> See: Taylor and Van Dyke, “‘Get up, Stand up’: Tactical Repertoires of Social Movements,” 263.

<sup>230</sup> De Vos, “Inevitability of Same-Sex Marriage in South Africa’s Post-Apartheid State, The.”

setting a binding precedent for all lower courts, represents an important kind of victory social movements have pursued many times in the past decades by turning their political claims into rights' ones.<sup>231</sup> Courts' decisions are of such fundamental importance that even a judicial loss<sup>232</sup> can have positive effects over a social movement: mobilization of its constituencies, larger appeal to the general public and shift of strategy to lower courts or to political branches.

Yet, social movements and the authorities with which they interact are not the only inhabitants of the ecosystem of contentious politics. More often than not, opponents to social movements also take the form of a social movement themselves, which hereafter is called countermovement. In the present dissertation, the focus is on how opposing movements have used constitutional litigation and in which ways such conflict between opposing movements has shaped contemporary constitutional equality jurisprudence in Brazil, South Africa, and United States.

Countermobilization should not come as a surprise. Social movements' victories – whatever they might be – commonly generate a reaction from their competitors. This will be the case whenever challengers invest resources, seize available opportunities, overcome threats, and share common ideas, which, taken together, enable sustained countermobilization.<sup>233</sup>

Countermobilization can also take various forms. In many instances, legal victories have provoked a powerful backlash<sup>234</sup> by opposing movements. In one

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<sup>231</sup> McCann, "Law and Social Movements: Contemporary Perspectives"; Scheingold, *The Politics of Rights: Lawyers, Public Policy, and Political Change*.

<sup>232</sup> Douglas NeJaime, "Winning Through Losing," *Iowa Law Review* 96 (2011): 941–1012.

<sup>233</sup> Reva B. Siegel, "Constitutional Culture, Social Movement Conflict and Constitutional Change: The Case of the De Facto Era. 2005-06 Brennan Center Symposium Lecture," *California Law Review* 94, no. 5 (2006): 40–41.

<sup>234</sup> Michael J. Klarman, *From the Closet to the Altar: Courts, Backlash, and the Struggle for the Same-Sex Marriage* (New York: Oxford University Press, 2013); Michael J. Klarman, "How Brown Changed Race Relations: The Backlash Thesis," *The Journal of American History* 81, no. 1 (1994): 81–118.

extreme, a backlash does not generate considerable opposition at all, or such opposition fades away over time, in particular when general public opinion no longer supports opponents of a social movement's legal victory (e.g. rapid social acceptance of decriminalization of sodomy and consequently the demobilization of those who support it). In another extreme, backlash takes the form of a contrary social movement with its own set of political and legal strategies, resources, and shared ideas, which acts in opposition to an existing social movement. In the latter case, we are witnessing the emergence of a *countermovement*.

### 2.1. Why Countermovements?: Analytical advantages and limitations

The study of movements-countermovements' dynamics has been an emerging, but underrepresented part of the literature on law and social movements. According to Michael McCann in a 2008 major review of the field, "the most recent innovative development in research on reform group legal mobilization has concerned the politics of 'counter-mobilization', backlash, and group-based resistances".<sup>235</sup> The origin of the study of social movements-countermovements dynamics in the social science literature dates back to the 1970s, when prominent US sociologists were puzzled by the rise of conservative movements – such as “the antiabortion movement, the pro-family movement, the antibusing movement, the rise of Moral Majority”<sup>236</sup> – and then turned to the study of those movements in a systematic way. One of the most prominent early examples of this scholarship is Seymour Martin Lipset and Earl Raab's “*The Politics*

<sup>235</sup> Michael McCann, “Litigation and Legal Mobilization,” in *The Oxford Handbook of Law and Politics*, ed. Gregory A. Caldeira, R. Daniel Kelemen, and Keith E. Whittington (Oxford: Oxford University Press, 2008), 534.

<sup>236</sup> Mayer N. Zald and Bert Useem, “Movement and Countermovement Interaction: Mobilization, Tactics, and State Involvement,” in *Social Movements in an Organizational Society*, ed. Mayer N. Zald and John D. McCarthy, vol. 271 (New Brunswick (USA) and London (UK): Transaction Publishers, 1987), 247.

of *Unreason: Right-Wing Extremism in America, 1790-1970*, ”<sup>237</sup> a 1970 historical treatise on right-wing political extremism in the US.<sup>238</sup>

More recently, several studies have taken up the task of analyzing the phenomenon of conservative legal mobilization, i.e. the increasing use of courts by conservative groups to advance their claims, inspired by the strategies of left-leaning reform groups.<sup>239</sup> More specifically, the social movements-counter-movements framework itself has proved to be a powerful tool for understanding how constitutional change occurs in the realm of racial and sexual equality. Accordingly, recent literature has employed a counter-movements’ framework to understand how religious groups have pressured for non-textual constitutional change in favor of religious objection motivated by the recognition of same-sex marriage in South Africa<sup>240</sup> and the US,<sup>241</sup> as well as in the white counter-movement against racial desegregation of schools<sup>242</sup> and affirmative action<sup>243</sup> in the US. In contrast, in Brazil, counter-movements have mostly turned to legislative and administrative bodies because of the relatively progressive stance of the country’s federal judiciary on racial and sexual inequalities – thus, the literature has either focused on the few instances where counter-movements perceived a window of opportunity to litigate against same-sex marriage,<sup>244</sup> or on the

<sup>237</sup> Seymour Martin Lipset and Earl Raab, *The Politics of Unreason: Right-Wing Extremism in America, 1790-1970*. (New York: Harper & Row, 1970).

<sup>238</sup> Lipset and Raab, 5.

<sup>239</sup> Epstein, *Conservatives in Court*; John P Heinz, Anthony Paik, and Ann Southworth, “Lawyers for Conservative Causes: Clients, Ideology, and Social Distance,” *Law & Society Review* 37, no. 1 (2003): 5–50; Southworth, “Conservative Lawyers and the Contest over the Meaning of Public Interest Law.”

<sup>240</sup> Ryan Richard Thoreson, “Somewhere over the Rainbow Nation: Gay, Lesbian and Bisexual Activism in South Africa,” *Journal of Southern African Studies* 34, no. 3 (2008): 679–97.

<sup>241</sup> Dorf and Tarrow, “Strange Bedfellows: How an Anticipatory Counter-movement Brought Same-Sex Marriage into the Public Arena.” Fetner, *How the Religious Right Shaped Lesbian and Gay Activism*, 2008.

<sup>242</sup> Kenneth T. Andrews, “Movement-Counter-movement Dynamics and the Emergence of New Institutions: The Case of “White Flight” Schools in Mississippi,” *Social Forces* 80, no. 3 (2002): 911–36, <https://doi.org/10.1353/sof.2002.0001>.

<sup>243</sup> Paul Burstein, “‘Reverse Discrimination’ Cases in the Federal Courts: Legal Mobilization by a Counter-movement,” *The Sociological Quarterly* 32, no. 4 (1991): 511–28.

<sup>244</sup> Amparo, “Notes on Counter-movements and Conservative Lawyering: The Bumpy Road to Constitutional Marriage Equality in Brazil.”

countermovements' efforts on venues other than courts as in the case of affirmative action.<sup>245</sup> However, in the case of Brazil, a countermovement-angle might reveal what the existing conditions are in the country's constitutional architecture that fostered such a shift of legal battles from courts to other venues.

Overall, this dissertation seeks to account for the impact of movement-countermovement conflict on non-textual constitutional change: when, why and how has it happened, and ultimately, how has this phenomenon shaped constitutional meaning? Of course, social movements' legal gains have arguably always encountered some level of resistance. For instance, the anti-gay movement in the US – as Tina Fetner narrates it- dates back at least to the year 1977 when the Religious Right started to organize itself to advocate before the general public through the media and legislative and executive branches throughout the country against anti-discrimination measures favoring gays and lesbians, and later against same-sex couples' rights.<sup>246</sup> A similar kind of resistance – through primarily media and political branches – can be seen in issues of race and sexual orientation in the three countries analyzed.<sup>247</sup> Furthermore, as indicated already, the very constitution building processes in Brazil<sup>248</sup> and in South

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<sup>245</sup> Although without using the social movement-countermovement framework, Tanya Hernández narrates claims by opposing groups after adoption of affirmative action in universities in Brazil, see: Hernández, *Racial Subordination in Latin America: The Role of the State, Customary Law, and the New Civil Rights Response*, 148–70.

<sup>246</sup> Tina Fetner, *How the Religious Right Shaped Lesbian and Gay Activism*, vol. 31 (University of Minnesota Press, 2008), xii.

<sup>247</sup> Natividade and de Oliveira, “Sexualidades Ameaçadoras: Religião e Homofobia (s) Em Discursos Evangélicos Conservadores [Threatening Sexualities: Religion and Homophobia(s) in Conservative Evangelical Discourses]”; Vincent and Howell, “‘Unnatural’, ‘Un-African’ and ‘Ungodly’: Homophobic Discourse in Democratic South Africa”; Hernández, *Racial Subordination in Latin America: The Role of the State, Customary Law, and the New Civil Rights Response*; Graeme C Reid, “It Takes Faith to Make a Church: Gay and Lesbian Christian Proselyzing in South Africa,” *Emory International Law Review*, no. 2 (2000): 613, <http://search.ebscohost.com/login.aspx?direct=true&db=edshol&AN=hein.journals.emint14.23&site=eds-live>; Margaret M Russell, “Reopening the Emmett Till Case : Lessons and Challenges for Critical Race Practice” 73, no. 5 (2005).

<sup>248</sup> Rocha, “Genealogia Da Constituinte: Do Autoritarismo à Democratização [Genealogy of the Constituent: From Authoritarianism to Democratization].”

Africa<sup>249</sup> – and, if one goes that far, the US constitution building process<sup>250</sup> – were the result of conflicts between different social groups, although not necessarily a social movement and countermovement dynamics.

Thus, here, social conflict is not portrayed as a new phenomenon at all. The history of recognition of rights for vulnerable groups – through constitutional making and constitutional interpretation – is a history of social conflict. Yet, **what is distinctive about the particular phenomenon this dissertation is seeking to account for is the locus of countermovements’ legal mobilization for constitutional change: constitutional litigation.** By placing the three countries here in a comparative perspective, this study enquires: when countermovements use courts in equality-related cases how has this countermobilization shaped constitutional meaning?

While this work could have focused on other areas of law such as social rights or freedom of speech – just to name two – the present dissertation, as indicated in the Introduction, narrows down its analysis to equality jurisprudence. The primary reason for it is because much of the social movement-countermovement conflict has occurred in the field of racial and gay/lesbian equality in the three countries, enabling a thorough comparative analysis of this phenomenon. Nevertheless, the conflict between social movements and countermovements is not a privilege of equality jurisprudence, but rather of any kind of legal mobilization promoted by social movements successful enough to trigger constitutional change through litigation. Here, the conceptual framework will be structured in a way that could be plausibly applicable to other spheres of law, and not only to equality jurisprudence. Yet, as the dissertation moves

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<sup>249</sup> Heinz Klug, “South Africa’s Experience in Constitution-Building,” Univ. of Wisconsin Legal Studies Research Paper No. 1157, 2011.

<sup>250</sup> Larry D. Kramer, *The People Themselves: Popular Constitutionalism and Judicial Review* (Oxford: Oxford University Press, 2004).

to its case studies the debate will come closer and closer to the equality jurisprudence in the chosen jurisdictions.

## 2.2. Common Themes in Social Science Literature Regarding Social Movements – Countermovements Dynamics

The literature on countermovements reveals certain common themes, despite the above-mentioned theoretical differences,<sup>251</sup> in the form of propositions or hypotheses, which help this dissertation in defining its conceptual framework. **First, countermovements are largely motivated by their initial rival movements' successes in challenging or convincing state actors.** Often, being motivated amounts to reflecting to a certain extent the intensity of the tactics of the opposing movement, from institutional resistance to violence.<sup>252</sup> Furthermore, “partial victories (...) encourage movement growth by providing tactical opportunities and the hope of further success.”<sup>253</sup> Yet, as far as movement-countermovement dynamics go, a movements' success (e.g. a favorable Supreme Court decision) will likely foster greater countermobilization as long as this success is a middle ground between decisive and minor success, because both extremes will tend to demobilize countermovements' responses, while a significant but not yet decisive success by one movement will tend to foster more mobilization by its opposing group, unless a compromise is reached between them.

In light of the propositions presented in the beginning of this Chapter, apex courts can serve as a permanent space of contention if they are relatively open to

<sup>251</sup> For an overview of different social movements' theories, see: Stephen M Engel, *The Unfinished Revolution: Social Movement Theory and the Gay and Lesbian Movement* (Cambridge: Cambridge University Press, 2001), 167–87.

<sup>252</sup> According to Mottl: “Countermovement participants develop strategies (institutional resistance, nonviolent direct action, violence) for the overall conduct of the movement in reaction to the successes of the initial movement and to the amount of social control exerted against them.” Tahi L Mottl, “The Analysis of Countermovements,” *Social Problems*, 1980, 624.

<sup>253</sup> David S Meyer and Suzanne Staggenborg, “Movements, Countermovements, and the Structure of Political Opportunity,” *American Journal of Sociology*, 1996, 1644.



litigation by different opposing groups. Nevertheless, the intensity of the legal mobilization will partly depend on the extent of the opposing movement's legal victory – whether in one extreme, such a victory is or is not susceptible to further challenge on its merits, such as in equality cases, on what it means to be harmed in a constitutionally relevant manner.

Second, **countermovements' endurance assumes that a political and/or legal framework is available in which their claims can be plausibly presented in the public sphere.** Often, countermovements' survival in part depends on their ability to connect a particular cause to a claim that resonates more widely. Zald and Useem narrate that anti-abortion movement in the US in the 1970s only acquired considerable strength as a countermovement once it went from a narrow Catholic doctrine of life as sacred to a pro-family stance which – due to its comprehensiveness – was able to attract more supporters, beyond the walls of the Church.<sup>254</sup> A similar phenomenon can be seen in the context of opposition to same-sex marriage which ranged from an early disgust-based aversion to sexual practices of same-sex couples to later claims based on the lack of democratic legitimacy and religious freedom.<sup>255</sup>

If one accepts the proposition put forward in the previous paragraphs that countermovements (as much as social movements) will likely be more successful if they find *plausible* discursive frames for their claims, one is then led to recognize that - in a legal system where constitutional law has primacy over other legal and social norms and enjoy social backing provided by its longstanding history (US) or by its transitional nature (Brazil and South Africa) - **constitutional norms can be a precious**

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<sup>254</sup> Zald and Useem, "Movement and Countermovement Interaction: Mobilization, Tactics, and State Involvement," 255.

<sup>255</sup> For evolution of disgust-based arguments in constitutional law and sexual orientation, see: Martha C Nussbaum, *From Disgust to Humanity: Sexual Orientation and Constitutional Law* (Oxford: Oxford University Press, 2010).

**source for such plausible frames.** As Douglas NeJaime puts it, “[constitutional] law serves as a master frame within which the concepts of equality and inequality give meaning to otherwise complex and multidimensional ideas and events.”<sup>256</sup>

Accordingly, when it comes to constitutional change, countermovements are more likely to emerge and endure if they can find among the available constitutional norms a constitutional support for their claims (e.g. post-racialism or religious freedom) on the basis of which, or a modified version of which, their claims can be possibly made. As this dissertation will show, often this will occur by redefining the boundaries of what it means to be harmed in a constitutionally relevant manner – instances when constitutional change fostered by movement-countermovement dynamics before courts will help countermovements to endure.

**Third, countermovements generally have a special relationship with economic elite groups, unlike grassroots or disadvantaged groups that often compose social movements, which may (although not necessarily) draw attention from political elites.** Zald and Useem highlight – within their theory of resource mobilization - that such a special relationship with economic elites tends to mean access to more resources for mobilization. Thus, “[while, social] movements are launched by groups from ‘below’ and attack established interests [...] since they respond to these attacks, countermovements will often (not always) be linked to established interests and organizations.”<sup>257</sup> Meyer and Staggenborg – within their theory of political opportunity structure – recall that, of course, “both movements and countermovements generally need allies among elites”, yet from a countermovement perspective when

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<sup>256</sup> Douglas NeJaime, “Framing (in) Equality for Same-Sex Couples,” *UCLA L. Rev. Disc.* 60 (2013): n. 10.

<sup>257</sup> Zald and Useem, “Movement and Countermovement Interaction: Mobilization, Tactics, and State Involvement,” 255.

“elite generate or support an effective countermovement, such as the American antiabortion movement, the countermovement may prolong a conflict for many years rather than put an end to movement challenges.”<sup>258</sup> From the perspective of constitutional change, elite alignment is a key component to understand countermovements’ power of legal mobilization – if a movement has close ties with economic elites, it will likely have resources to prolong mobilization.

South Africa provides an interesting illustration, where there is support for social movements among political elites (via the African National Congress-ANC party, which dominates the post-apartheid legislature).<sup>259</sup> This political support has provided a solid ground for the sympathy of the Constitutional Court of South Africa towards litigation led by social movements, and, consequently, less sympathy towards the claims of countermovements, which generally lack resonance among the majority of political elites. The South African case of support for gay and lesbian rights is interesting because it shows that, on certain occasions, the elite alignment is more relevant for successful legal mobilization than the support of the general public. While homophobia is widespread in South African society, as shown by Thoreson, “in both the elite and the electorate, opposition to GLB rights is mitigated by a deep-seated respect for the institutions that defend and protect that unpopular agenda, especially emblems of the post-apartheid order such as the Constitution and the Constitutional Court.”<sup>260</sup>

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<sup>258</sup> Meyer and Staggenborg, “Movements, Countermovements, and the Structure of Political Opportunity,” 1996, 1643.

<sup>259</sup> Roux, *The Politics of Principle: The First South African Constitutional Court, 1995-2005*. For an analysis of the South African constitutional court as opposition to the ANC, see: Paremoer and Jung, “The Role of Social and Economic Rights in Supporting Opposition in Postapartheid South Africa,” 2011.

<sup>260</sup> Thoreson, “Somewhere over the Rainbow Nation: Gay, Lesbian and Bisexual Activism in South Africa,” 687.

Fourth, **social-movements-counter-movements dynamics are enabled by the existence of a multi-layered political and legal space, where ‘encounters’ between them can occur on multiple levels.** The more dispersed the political and judicial system, the more likely social movement–counter-movement dynamics will endure.

Encounters occur on multiple levels such as before a plethora of courts and within political institutions in different levels of a federal state. A federal system – with a multitude of legislative, judicial and administrative spaces for encounters between social movements and counter-movements – would fuel the contention between them even further, making counter-movements endure to the extent that they are able to challenge social movements’ claims at different levels (e.g. move to the legislature when a case is lost at the Supreme Court).

This fourth common theme speaks directly to the *contention proposition* mentioned earlier, where it was hypothesized that counter-movements will more likely endure if they manage to maintain their legal battles in different venues, especially when courts foreclose the possibility of their claims by decisive jurisprudence in favor of their opponents. Thus, one interesting related question, for the purposes of this research, is **to verify to which extent apex courts are able (and to certain degree willing) to serve as an open space for reiterated contention between opposing movements, or whether apex courts prefer on certain occasions to close the debate once and for all on certain issues (assuming they are institutionally able to do so).** Yet, while courts generally enjoy relative freedom in defining the contours of their jurisprudence, as reminded by Zald and Useem,<sup>261</sup> they provide the framework for a special kind of encounter between opposing movements, which is regulated by strict

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<sup>261</sup> Zald and Useem, “Movement and Counter-movement Interaction: Mobilization, Tactics, and State Involvement,” 259.

rules of interaction, where social movements and countermovements often meet each other in legal debates.

When gains are less likely to be obtained through the venue with which countermovements were previously engaged (e.g. from courts to legislature after an unfavorable decision by the Supreme Court), countermovements tend to shift - as social science literature shows<sup>262</sup> - to other venues. Similarly, countermovements will tend to persist in engaging with movements in a given forum when winning is likely in the future, assuming that other relevant factors such as organizational capacity and recourses remain constant. Thus, in the cycle of chances in the constitutional understanding of equality, it is key to observe how long courts constitute forums open to claims of countermovements, and how those countermovements react when courts decide to foreclose some, if not all, of their claims.

Consequently, when courts conducting constitutional review have the power, and show the willingness, to engage *resolutely* with particular issues in such multi-layered disagreements in favor of one movement or the other, it will become harder for a countermovement to maintain their legal mobilization before courts, given the argumentative restrictions of doing so. As Chapter 3 will show, this scenario will occur when courts issue decisions strongly in favor of one movement's claim. This is the case of race-based affirmative litigation in Brazil, where the apex court decided on the federal level unconditionally in favor of the constitutionality of racial quotas leaving virtually no room for opposing groups to make constitutional claims against it. Such scenario moved contentions regarding anti-affirmative action countermovements to other venues, such as university boards regarding the precise delimitation of the policy

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<sup>262</sup> Zald and Useem, 251.

at stake (e.g. criteria to be used in defining who is the beneficiary of race-based affirmative action).<sup>263</sup>

### 3. Eskridge on Countermovements

One of the major contributions on understanding countermovements' legal mobilization was offered by William Eskridge, a US scholar who wrote important studies in the 2000s in the field, defending his '*pluralism-facilitating theory*'<sup>264</sup> (named as such in reaction to Ely's 'representation-reinforcement theory'). In this section, Eskridge's theory will be used as the main reference point for the conceptual framework provided in this Chapter. Overall, it is argued here that while Eskridge's theory is the most important comprehensive theoretical take on countermovements and constitutional change, his model falls short of being able to explain both contemporary US jurisprudence as well as transformative frameworks in South Africa and in Brazil.

After a very extensive review of the history of what Eskridge calls "identity-based social movements"<sup>265</sup> (e.g. civil rights movement, women's rights movement, gay rights movement, and disability rights movement) in developing constitutional law in general and equal protection jurisprudence especially in the United States, he

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<sup>263</sup> According to Márcia Lima regarding race-based affirmative actions in Brazil: "(...) there are not federal or state laws compelling public universities to adopt affirmative action policies in their selection processes. As a result, the acceptance or not for this type of policy has been a decision that involves a strong debate not just within educational institutions but also in civil society as a whole." Márcia Lima, "Access to Higher Education in Brazil: Inequalities, Educational System and Affirmative Action Policies," *Institute for Employment Research, University of Warwick, Coventry*, 2011, 28.

<sup>264</sup> William N Eskridge Jr., "Pluralism and Distrust: How Courts Can Support Democracy by Lowering the Stakes of Politics," *The Yale Law Journal* 114, no. 6 (2005): p. 1294.

<sup>265</sup> Eskridge defines identity-based social movements as inextricably related to the legal status of their members (in the sense that their legal discrimination sparked the social movement). Eskridge writes that: "If an IBSM consists of persons and their allies who resist their stigmatization because of bad classifications, and requires concrete advances to attract members (as we shall see below), law is all but necessary for such a movement to exist". See: Eskridge Jr., "Channeling: Identity-Based Social Movements and Public Law," p. 436.

formulates a *four-tier classification* of social movements and countermovements' politics as illustrated by the **Figure 1** below.

**Figure 1: Eskridge's Four-Tier Politics of Social Movements and Countermovements in Non-Textual Constitutional Changes**



In Eskridge's four-tier classification of social movements and countermovements' involvement in non-textual constitutional changes, **four stages of constitutional politics** are relevant. It is important to bear in mind that his examples are derived from US constitutional development, thus limiting – as indicated earlier – its potential for comparative applicability. Firstly, there is the *politics of protection*, i.e. when movements tackle “state-sponsored threats to the life, liberty, and property of its members.”<sup>266</sup> As an example, at this stage, the US Civil Rights Movement and the sexual minorities' rights movement made use of freedom of speech and fair trial rights to tackle basic violations especially in terms of censorship and violations of criminal procedure. Secondly, there is the *politics of recognition*, i.e. when social movements “seeking to end legal discriminations and exclusions of group members and to establish

<sup>266</sup> Eskridge Jr., “Some Effects of Identity-Based Social Movements on Constitutional Law in the Twentieth Century,” p. 2065.

legal protections against private discrimination.”<sup>267</sup> For example, in this era, US civil rights movement tackled racial segregation, particularly in the realm of education, as well as the sexual minorities’ rights movement tackled discrimination in several fields, including employment, military and association rights.

Third, there is the *politics of remediation*, in order “to rectify material as well as stigmatic legacies of previous state discrimination,”<sup>268</sup> e.g. racial affirmative action cases in relation to the civil rights movement and debates on sodomy and same-sex marriage in relation to sexual minorities’ rights movement. Fourth, in all stages, but particularly once a certain movement has gained recognition from the apex court, there is the *politics of preservation*, when the battle between social movements and their countermovements (e.g. traditional values movements against sexual minorities’ rights movement) takes place before the apex courts. Importantly, at this fourth stage, countermovements often use *institutional arguments*, such as federalism and deference to political branches in their constitutional argumentation to preserve the status quo despite an emergence of new understandings of equality.

In addition, bearing in mind this pluralistic view of social movements’ politics, Eskridge proposes a ‘*political equilibrium*’<sup>269</sup> thesis as a solution to how the US Supreme Court ought to manage the contention over constitutional equality. For him, the key objective of an apex court then is to keep “the stakes of politics (...) reasonably

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<sup>267</sup> Eskridge Jr., 2065.

<sup>268</sup> Eskridge Jr., 2065.

<sup>269</sup> For Eskridge: “Political equilibrium theory suggests the following dynamics of constitutional evolution. So long as the minority is highly unpopular, judges will do little for that minority beyond ensuring that minimal rule of law guarantees are applied to its members. Once the minority organizes, however, judges realizing that the political situation is suddenly more fluid will be more careful and usually more protective in dealing with its members. But the judiciary will not stick out its collective neck unless the minority persuades the polity that its variation is at least tolerable. In that event, judges will tend to be more aggressive against laws penalizing the minority. (Their aggressiveness will be tempered if a countermovement calls the IBSM’s progress into question)” See: Eskridge Jr., “Channeling: Identity-Based Social Movements and Public Law,” p. 503.



low.”<sup>270</sup> For instance, Eskridge argues courts should repeal obsolete legislation that ‘raises the stake of politics’<sup>271</sup>, then strengthen a pluralist democracy (e.g. by demonizing one group, or by preventing the dissemination of ideas of a countermovement). Accordingly, his theory recurrently emphasizes two ways of keeping the stakes of politics low, while maintaining the pluralistic ideal of different groups coexisting: maintaining constantly open access to political branches (and supplementary access to judicial branch whenever the former is closed) and keeping the focus on the procedural nature of the constitution.

Firstly, Eskridge advocates for **access** to political channels. This is to ensure that – whenever pluralistic politics is not flowing – courts can step in, including removing obsolete discriminatory laws. Eskridge shares with Ely the view that political channels should be kept open, emphasizing that the judicial branch ought to ensure respect for the basic constitutional rules for all groups (e.g. free speech) as well as that prejudice-based laws ought to be repealed.

However, Eskridge believes that the *Carolene* model – focused on protecting “discrete and insular minorities” - does not make sense of an important aspect seen in US jurisprudence in the past five decades: cases over women’s and sexual minorities’ rights in the United States post-1969 reveal that “judges can help integrate successful new identity groups into the political process by clearing away obsolete laws that discriminate against these new partners assimilated into our multicultural pluralism.”<sup>272</sup>

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<sup>270</sup> Eskridge Jr., “Pluralism and Distrust: How Courts Can Support Democracy by Lowering the Stakes of Politics,” p. 1294.

<sup>271</sup> For Eskridge, “Stakes get high when the system becomes embroiled in bitter disputes that drive salient, productive groups away from engagement in pluralist politics” Eskridge Jr., 1293.

<sup>272</sup> Ibid., p. 1283.

In this sense, Eskridge's theory is a normative defense of the value of pluralism in constitutional politics.

Secondly, Eskridge allows such a pluralistic constitutional politics to keep on – i.e. different groups making claims and turning courts into contentious spaces – because his theory- like Ely's theory - holds that the US Constitution is primarily a **procedural document**, and therefore apex courts ought not to impose substantive values that should be accommodated by the political process. As much as Ely's theory sought to provide democratic legitimacy for the race jurisprudence of the Warren Court on the procedural grounds that prejudice-based laws against discrete and insular minorities ought to be repealed, Eskridge's theory seeks to grant democratic legitimacy (also on procedural grounds) for decisions on sexual orientation like *Lawrence v. Texas*<sup>273</sup> (in particular, the equality reasoning of Justice O'Connor, concurring in that case), where a sodomy law was considered unconstitutional, on the grounds that the repeal of obsolete laws reduces the stakes of politics.

In a nutshell, the major contribution of Eskridge's theory is to provide a more complex view, from a pluralist standpoint, than the idea that the apex courts – in controversial rights' cases - are there only to protect disadvantaged minorities. Eskridge pays tribute to the influence by social movements, such as civil rights movement, women's movement and gay and lesbian movement, to the development of constitutional equality. Furthermore, he recognizes the existence of countermovements in constitutional litigation, putting – unlike most scholars – those countermovements at the center of the analysis.

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<sup>273</sup> THE UNITED STATES, US Supreme Court, *Lawrence v. Texas*, 539 U.S. 558 (2003).

**There are several questions surrounding Eskridge’s four-tier conceptual approach** to countermovements and constitutional change. Firstly, there are more recent developments in US constitutional jurisprudence, where countermovements have successfully presented novel arguments before courts that go beyond the politics of preservation. These instances undermine the explanatory power of Eskridge’s model for contemporary jurisprudence, focused on preservation of status quo as the last stage of constitutional change. As seen in particular in Chapters 5, this is made clear by the current equality jurisprudence in the US that, to a certain extent, endorses complicity-based claims of religious objection.<sup>274</sup> and also that it has been more sympathetic towards color-blind arguments under a novel idea of innocent whiteness.<sup>275</sup> As shown in this dissertation, these arguments transcend the politics of preservation – the final stage of Eskridge’s model – and one more reason why countermovements are not defined here merely as groups resisting change.

Secondly, Eskridge’s approach assumes that – to use social science terminology on social movements – the Constitution provides a legal framing for countermovements to mobilize around it. As mentioned above, in the context of Brazil and South Africa, where social movements left their footprint in the constitutional text by participating actively in its drafting as shown in Chapter 1, the constitutions offer little room for countermovements’ legal framings. In this sense, propositions of countermovements in such contexts can either amount to odd arguments such as a “right to discriminate”,<sup>276</sup>

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<sup>274</sup> Douglas NeJaime and Reva Siegel, “Conscience Wars: Complicity-Based Conscience Claims in Religion and Politics,” *Yale Law Journal* 124 (2015): 2516–91; Douglas Laycock, Anthony R Picarello Jr, and Robin Fretwell Wilson, *Same-Sex Marriage and Religious Liberty: Emerging Conflicts* (Rowman & Littlefield Publishers, 2008).

<sup>275</sup> Siegel, “Foreword: Equality Divided”; Thomas Ross, “Innocence and Affirmative Action,” *Vand. L. Rev.* 43 (1990): 297.

<sup>276</sup> Patrick Lenta, “Right of Religious Associations to Discriminate,” *S. Afr. J. on Hum. Rts.* 28 (2012): 231–57.

or be focused on merely institutional grounds such as separation of powers for lack of more substantial arguments.<sup>277</sup>

#### 4. Towards a New Framework

The **turning point in the countermovements' literature occurred when scholars started to draw a more dynamic picture of the relation between social movements and countermovements**: not only placing conservative movements *per se* as the object of study, but rather studies which put the very dynamics between social movements and countermovements at the core of their scholarship.<sup>278</sup> This section will look more closely to this literature on countermovements and their use of law to promote their cause – what we have referred here as legal mobilization.

##### 4.1. Working Definition of Countermovements

**What makes an opposing group a countermovement** is not merely the existence of individual and organizations against a certain issue advocated by a social movement, but rather its behavior – expressed in tactics, language and spaces of action – which opposes a social movement's legal mobilization, particularly for the purposes of this dissertation, by seeking to influence constitutional change. For example, legal victories of the Civil Rights Movement determining the desegregation of schools in the US since the 1950s have sparked anti-busing countermovements – anchored in neighborhood groups seeking to resist the busing of children to mixed schools.<sup>279</sup> Another example of

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<sup>277</sup> Amparo, "Notes on Countermovements and Conservative Lawyering: The Bumpy Road to Constitutional Marriage Equality in Brazil."

<sup>278</sup> Zald and Useem calls this approach 'interactional', in the sense that: "Most students of conservative movements search for their social bases, leading organizations, and actors. They do for countermovements what others have done for movements. But our interests are more interactional. We are interested in how movements generate countermovements, and how they engage in a sometimes loosely coupled tango of mobilization and demobilization." Zald and Useem, "Movement and Countermovement Interaction: Mobilization, Tactics, and State Involvement," 247.

<sup>279</sup> Clarence Y. H. Lo, "Countermovements and Conservative Movements in the Contemporary U.S.," *Annual Review of Sociology* 8, no. 1 (1982): 107–34.

countermovement can be noted in the context of the recognition of same-sex marriage by the apex courts of South Africa,<sup>280</sup> United States<sup>281</sup> and Brazil,<sup>282</sup> which triggered the response from Christian movements against same-sex marriage – composed of a network of NGOs, religious communities, individual activities and conservative political parties – seeking to resist the implementation nationwide of the newly established right to marry for same-sex couples and the recognition of religious objections.

Countermovements are social movements on their own, and not merely derivative movements – yet they function in response to an existing social movement:

*“Countermovements are not ‘spin-offs’ of their opponents, but they are a case of mobilization that is generated or intensified by another movement. Unlike spin-off movements, however, they emerge not because they are supported by the other movement’s organizational infrastructure, but in response to its gains.”*<sup>283</sup>

For the purposes of this dissertation, ***countermovements are understood as social movements, in and of themselves, composed of actors whose shared language, repertoire of tactics, opportunities and threats are defined primarily (1) in opposition to an existing social movement (2) whose collective action is in a dialogue with state authorities as a challenger and/or ally.***

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<sup>280</sup> Lenta, “Right of Religious Associations to Discriminate.”

<sup>281</sup> Martha Minow, “Should Religious Groups Be Exempt from Civil Rights Laws?,” *Boston College Law Review* 48 (n.d.): 781–849; NeJaime and Siegel, “Conscience Wars: Complicity-Based Conscience Claims in Religion and Politics.”

<sup>282</sup> Amparo, “Notes on Countermovements and Conservative Lawyering: The Bumpy Road to Constitutional Marriage Equality in Brazil”; Bahia and Vecchiatti, “ADIN. 4.277 – Constitutionality and Relevance of the Decision on Same-Sex Union: The Supreme Court as a Countermajoritarian Institution in the Recognition of a Plural Conception of Family.”

<sup>283</sup> Nancy Whittier, “The Consequences of Social Movements for Each Other,” in *The Blackwell Companion to Social Movements*, ed. David A. Snow, Sarah A. Soule, and Hanspeter Kriesi (Oxford: Blackwell Publishing Ltd, 2004), 535.

Without having the intention to provide a comprehensive definition, which would work in any analysis of countermovements, the concept proposed here also suits well the objective of the present dissertation, namely: to analyze instances of countermovements' legal mobilization<sup>284</sup> in a constitutional arena, and its impact on constitutional change. The proposed definition has the advantage of emphasizing that countermovements' contours are structured *in opposition* to a social movement (thus, allowing an adversarial analysis of the interaction between those groups before courts). In addition, the definition conceives authorities as challengers and/or allies – which is often the case when different authorities at various levels of governments (federal, state, local) or different branches (executive, legislative, judiciary) interact in a movement – countermovement conflict. Finally, the definition is ideologically neutral, not equalizing countermovements with conservative movements (although in certain cases those two categories overlap each other). It enables a complex analysis of the nuances and, in some occasions, internally contradictory positions of different opposing movements as well as within each movement itself.

Similarly to social movements, countermovements are also composed of diverse actors – from non-governmental organizations to individuals, community groups and social basis of political parties – opposing to a social movement. What is distinctive about the countermovements in the US, South Africa and Brazil analyzed in this dissertation is their attempt – with varying degrees of success – in making use of constitutional litigation to advance their claims – turning what before was primarily a political resistance towards social movements into organized movements present in

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<sup>284</sup> By legal mobilization, we refer hereafter to “those instances when social movements explicitly employ rights strategies and tactics in their interactions with the State and other opponents.” Madlingozi, “Post-Apartheid Social Movements and Legal Mobilisation,” 92. The same is valid for countermovements. We specially focus on instances where social movements and countermovements make use of legal mobilization before courts conducting constitutional review.

courtrooms. This dissertation focuses precisely on instances when countermovements take to the courts to challenge the position of social movements, addressing authorities as challengers and/or allies; or instances where countermovements resort to contestation outside courts precisely because of a strategic decision on the basis of the existing judicial standards on a given issue in order to trigger constitutional change..

In the literature definitions of countermovements differ in important ways.<sup>285</sup> Some definitions privilege a chronological view of countermovements as subsequent social movements, while others define countermovements as opposing social change, rather than subsequent movements, which leaves room for instances where countermobilization occurs at an early stage under the prediction of how successful or dangerous a certain social movement's mobilization will be. One example, already mentioned in the previous Chapter, is the anticipatory efforts by the religious right countermovement to challenge same-sex marriage even before the gay and lesbian movement took up marriage as essential part of their agenda.<sup>286</sup>

In a related manner, while some definitions of countermovements focus on resistance to change, other analyses show that countermovements not only resist change, but also *promote* changes in their own terms. In addition, as mentioned before, while some definitions focus on the ideology of the group at stake – often considered conservative in the case of countermovements, other authors refrain from explicitly associating countermovements with a specific ideology, given the diversity of what would count as conservative or progressive, thus giving preference to ideologically

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<sup>285</sup> See for instance: Mottl, "The Analysis of Countermovements"; Zald and Useem, "Movement and Countermovement Interaction: Mobilization, Tactics, and State Involvement"; Dorf and Tarrow, "Strange Bedfellows: How an Anticipatory Countermovement Brought Same-Sex Marriage into the Public Arena"; Lo, "Countermovements and Conservative Movements in the Contemporary U.S."; Thoreson, "Somewhere over the Rainbow Nation: Gay, Lesbian and Bisexual Activism in South Africa."

<sup>286</sup> Dorf and Tarrow, "Strange Bedfellows: How an Anticipatory Countermovement Brought Same-Sex Marriage into the Public Arena."

neutral definitions. The present section does not seek to resolve all those issues, but rather intends to expose the origins of the main features of the definition employed here, highlighting why each of them makes sense for the legal mobilization phenomenon this dissertation is seeking to account for. The main features of the definition adopted here are as follows:

***In opposition to a social movement.*** First and foremost, countermovements are social movements in and of themselves defined *in opposition* to a social movement, where authorities are seen as challengers/allies in the movement-countermovement conflict. In this sense, a simplified version of movement-countermovement conflict is triangular, having a certain authority as a challenger/ally and the opposing social movement as the main point of dialogue. It means therefore that by having movements placing themselves in opposition to each other, contention emerges. When such contention occurs within the frames of constitutional litigation, it means that constitutional change may occur within a context marked by contentious politics.

In contrast, some definitions of countermovements put forward by early writings on the topic are inappropriate because they define countermovements by their aversion to social change itself, rather than to a social movement. Consider, for instance, Tahi L. Mottl's definition of "countermovement as a conscious, collective, organized attempt to resist or to reverse social change."<sup>287</sup> Or, equally, note Zald and McCarthy's view that a "countermovement is the mobilization of sentiments initiated to some degree in opposition to a movement. It follows in time a mobilization to change society."<sup>288</sup>

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<sup>287</sup> Mottl, "The Analysis of Countermovements," 620.

<sup>288</sup> Zald and Useem, "Movement and Countermovement Interaction: Mobilization, Tactics, and State Involvement," 249.



Even those who more recently use such definition based on aversion to change agree with its imprecision. For instance, Dorf and Tarrow reflect on the imprecision of the definition in the following terms:

“what was the ‘movement’ and what was the ‘countermovement’? Along with most scholars of contentious politics, we define a movement as a group of actors who seek to change the legal and/or social status quo and a countermovement as those who seek to preserve the status quo or to roll back recent changes to the status quo (...). To be sure, movements and countermovements exist in a dialectical relationship and thus in some sense the actors who initiate any particular cycle of contention may be understood as the ‘movement,’ while those who respond may be cast in the role of ‘countermovement.’”

The authors then follow-up by stating clearly that they

“recognize an inevitable imprecision in these definitions. Since Heraclitus, philosophers and others have known that there is no truly stable status quo, and thus, ultimately, there can be no preservation of the status quo. Moreover, some nominally reactionary movements aim to ‘return’ to a fictive past. Nonetheless, we regard the distinction between those who seek change and those who oppose it as important, in the context of same-sex marriage and other movements for legal and social reform.”<sup>289</sup>

This dissertation does not adopt Dorf and Tarrow’s definition focused on resistance to change, because resistance and innovation are often a grey area. Nonetheless, their

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<sup>289</sup> Dorf and Tarrow, “Strange Bedfellows: How an Anticipatory Countermovement Brought Same-Sex Marriage into the Public Arena,” 450–51.

point about preserving the status quo is crucial for properly understanding countermovements and thus it should be kept in mind throughout the present analysis. As it will be seen in the case studies' part, countermovements often seek to preserve the status quo under new headings such as complicity-based arguments against same-sex marriage, or tend to anticipate certain countermobilization foreseeing the impact of a social movement's victory in court.

*Ideologically neutral and relational.* When talking about equality jurisprudence, particularly in constitutional struggles of gay and lesbian movements as well as black movements, it is tempting to reduce the opposing group – what here is called countermovements – to conservative groups. If this would be the case, Clarence Y.H. Lo's definition of conservative movements in the US in the 1980s as social movements seeking to resist social change would be more appropriate here than a concept of countermovements.<sup>290</sup>

Clarence Y.H. Lo, herself recognizing those conceptual problems regarding ideological neutrality, suggests a simpler, narrower definition of countermovements – “as a movement mobilized against another social movement.”<sup>291</sup> At once, defining **countermovements by the operative words “against” or “opposing” is both ideologically neutral as well as relational.** Its simplicity serves well the present dissertation. Y. H. Lo's definition thus plants the seeds of a dynamic view of

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<sup>290</sup> For 's Y.H. Lo, “right-wing movements as social movements whose stated goals are to maintain structures of order, status, honor, or traditional social differences or values. Right-wing movements sometimes directly advocate, and usually cause, the perpetuation or increase of economic or political inequalities. The right may be contrasted with the left, which seeks greater equality or political participation.” Lo, “Countermovements and Conservative Movements in the Contemporary U.S.,” 108.

<sup>291</sup> For her, “Mottl (1980: 620) and Zald (1979) define countermovement as opposing not another movement, but rather social change. But actually, like most social movements, countermovements both resist and advocate change. Counter- movements such as tax protest movements (Kuttner 1980) react against social changes (higher taxes) but also advocate changes (such as new procedures to make tax increases more difficult). If countermovements are defined merely as movements that resist change, the concept becomes too broad, embracing ecological movements opposing pollution, antiwar movements opposing government-initiated policies, and labor movements opposing changes caused by economic development.” (Lo, 118.)

countermovements, with which this dissertation agrees. Dynamic, that is, because this view assumes that what defines a countermovement is not its right or left wing ideology, its progressive or conservative inclination, but rather the fact that its emergence and endurance are directly linked to its opposition to another group, with which the countermovement dialogues - in terms of the language used as well as tactics employed and spaces occupied - in their collective action where the state plays the role of challengers/allies in a triangular relationship.<sup>292</sup>

The present dissertation privileges an ideologically neutral concept of countermovements over one linked to conservative ideologies. The problem of equalizing contemporary countermovements with conservative movements is that, first, it reduces the former to defenders of an oversimplified notion of right-wing ideologies while those countermovements, more often than not, use other languages to frame their claims or even disagree among themselves on which language to use, going beyond right-left politics. The diversity of arguments of religious organizations over the course of the latest same-sex marriage litigation before the US Supreme Court in 2015, ranging from opposition to same-sex marriage<sup>293</sup> to a more moderate acceptance<sup>294</sup> illustrates this point, mirroring the complexity of the claims made by the multiple voices of gay and lesbian movement themselves.<sup>295</sup>

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<sup>292</sup> Collective action is the most general term in social movements' literature, defined as "any goal-oriented activity engaged in jointly by two or more individuals. It entails the pursuit of a common objective through joint action – that is, people working together in some fashion for a variety of reasons, including the belief that doing so enhances the prospect of achieving the objective." Snow, Soule, and Kriesi, *Blackwell Companion to Soc. Movements*, 6.

<sup>293</sup> Brief of Douglas Laycock et al. in Support of the Petitioners, available at: [http://www.supremecourt.gov/ObergefellHodges/AmicusBriefs/14-556\\_Douglas\\_Laycock.pdf](http://www.supremecourt.gov/ObergefellHodges/AmicusBriefs/14-556_Douglas_Laycock.pdf). Last accessed on: 15 April, 2016.

<sup>294</sup> Brief of Amici Curiae Anti-Defamation League et al. in Support of Petitioners, available at: [http://www.supremecourt.gov/ObergefellHodges/AmicusBriefs/14-556\\_Anti-Defamation\\_League.pdf](http://www.supremecourt.gov/ObergefellHodges/AmicusBriefs/14-556_Anti-Defamation_League.pdf). Last accessed on: 15 April, 2016.

<sup>295</sup> NeJaime, "Marriage, Cruising, and Life in Between: Clarifying Organizational Positionalities in Pursuit of Polyvocal Gay-Based Advocacy."

Second, equalizing countermovements with conservative movements diminishes the complexity of countermovements' claims by defining them simply by their ideological-political affiliation or resistance to social change. Nevertheless, countermovements often come up with novel political and constitutional claims which go beyond a merely reactionary stance, e.g. defining conscientious objections to same-sex marriage as complicity-based claims in the US<sup>296</sup> or as an associational right to discriminate as in South Africa,<sup>297</sup> or structuring opposition to affirmative action measures as a colorblind notion of racial democracy in Brazil<sup>298</sup> or as non-racialism in South Africa.<sup>299</sup> Such claims define the contours of constitutional change in the above-mentioned countries by proposing new ways of understanding equality – a phenomenon that can hardly be reduced merely to resistance to change.

***Collectivity, not a single organization.*** Finally, in this dissertation, the definition of social movements and countermovements is not reduced to the specific pressure groups<sup>300</sup> that litigate, although countermovements can certainly have the

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<sup>296</sup> Douglas Laycock, "Religious Liberty for Politically Active Minority Groups: A Response to NeJaime and Siegel," *The Yale Law Journal Forum* 125 (2016): 369. This article is a response to: Douglas NeJaime and Reva Siegel, "Conscience Wars: Complicity-Based Conscience Claims in Religion and Politics," *Yale Law Journal* 124 (2015): 2516–91. For a more comprehensive view of Laycock's perspective on religion and same-sex marriage, see: Laycock, Picarello Jr, and Wilson, *Same-Sex Marriage and Religious Liberty: Emerging Conflicts*.

<sup>297</sup> Kruuse, "Conscientious Objection to Performing Same-Sex Marriage in South Africa"; Lenta, "Right of Religious Associations to Discriminate"; Lenta, "In Defence of the Right of Religious Associations to Discriminate: A Reply to Bilchitz and De Freitas."

<sup>298</sup> Antonio Sérgio Alfredo Guimarães, *Racismo e Anti-Racismo No Brasil [Racism and Antiracism in Brazil]*, 3rd ed. (São Paulo: Editora 34, 2009); Andreas Hofbauer, "Ações Afirmativas e o Debate Sobre Racismo No Brasil," *Lua Nova*, 2006, 9–56.

<sup>299</sup> Deborah Posel, "Whither 'Non-Racialism': The 'New' South Africa Turns Twenty-One," *Ethnic and Racial Studies* 38, no. 13 (2015): 2167–74.

<sup>300</sup> As Zald and Useem puts it: "The difference between social movements and pressure groups is not often explicitly discussed, but there are at least three key differences. First, pressures groups are ordinarily part of the polity, the set of groups that can routinely influence government decisions and can insure that their interests are normally recognized in the decision-making process. In contrast, social movements are launched by groups without access to government power, and whose interest are normally recognized in government policymaking. Second, when pressure groups take actions to influence the government, they rely on previously mobilized constituencies. Social movements attempt to mobilize constituencies for the first time. Third, social movements tend to use noninstitutionalized tactics, channels of influence, and organizational form. Pressure groups, on the other hand, employ a political system's conventional form of collective action." Zald and McCarthy, *Social Movements in an Organizational Society: Collected Essays*, 273. See also:

institutional backing of those pressure groups in their legal battles.<sup>301</sup> Examples of those pressure groups are, for instance, the National Coalition for the Advancement of Colored People (NAACP),<sup>302</sup> or National Coalition for Gay and Lesbian Equality in South Africa,<sup>303</sup> for racial equality and LGBT rights respectively; or the Becket Fund for Religious Liberty<sup>304</sup> in the US and Solidarity<sup>305</sup> in South Africa, for religious liberty and against affirmative action, correspondingly. Interest groups are often organizations that have a narrow policy target – i.e. adopting a law, overturning a specific decision – and work primarily within institutionalized means.<sup>306</sup> Of course, while acknowledging that those organizations<sup>307</sup> can be part of larger social movements and countermovements – e.g. as much as NAACP is part of the larger Civil Rights Movement in the US – this dissertation looks at how countermovements promote constitutional change, rather than narrating the specific history of individual organizations through litigation.

Countermovements that work in opposition to social movements have used legal mobilization before courts conducting constitutional review – from resistance to affirmative action<sup>308</sup> to opposition to same-sex marriage<sup>309</sup> and abortion.<sup>310</sup> Yet, historically, one should not take for granted that countermovements use courts, let alone

<sup>301</sup> Charles R. Epp, “External Pressure and the Supreme Court’s Agenda,” in *Supreme Court Decision-Making: New Institutional Approaches*, ed. Cornell W. Clayton and Howard Gillman (Chicago and London: The University of Chicago Press, 1999), 255–79.

<sup>302</sup> Tushnet, *The NAACP’s Legal Strategy against Segregated Education, 1925-1950*.

<sup>303</sup> Pierre De Vos, “Inevitability of Same-Sex Marriage in South Africa’s Post-Apartheid State, The,” *South African Journal on Human Rights*, no. 3 (2007): 432.

<sup>304</sup> See more at: <http://www.becketfund.org>, last accessed on: 25 April 2016.

<sup>305</sup> See more at: <https://solidariteit.co.za>, last accessed on: 25 April 2016.

<sup>306</sup> Snow, Soule, and Kriesi, *Blackwell Companion to Soc. Movements*, 7.

<sup>307</sup> McCarthy and Zald, “Resource Mobilization and Social Movements: A Partial Theory,” 1218.

<sup>308</sup> Burstein, “‘Reverse Discrimination’ Cases in the Federal Courts: Legal Mobilization by a Countermovement.”

<sup>309</sup> NeJaime and Siegel, “Conscience Wars: Complicity-Based Conscience Claims in Religion and Politics.”

<sup>310</sup> David S. Meyer and Suzanne Staggenborg, “Opposing Movement Strategies in U.S. Abortion Politics,” *Research in Social Movements, Conflicts and Change* 28, no. 08 (2008): 207–38, [https://doi.org/10.1016/S0163-786X\(08\)28007-9](https://doi.org/10.1016/S0163-786X(08)28007-9).

apex ones to oppose social movements' legal claims. It is a relatively recent phenomenon in the US,<sup>311</sup> and one still emerging in Brazil<sup>312</sup> and South Africa.<sup>313</sup> Steven Teles shows that in the U.S. conservative lawyers started to access courts in strategic litigation lawsuits in the 1970s - but in a disorganized and unsuccessful way, mostly focused on protection of businesses from regulation, given the countermovements' ties with local businessmen.<sup>314</sup> In the 1990s, in a second generation of conservative law firms, conservative lawyers acquired the expertise, the level of organization and the allies necessary to obtain important victories before the country's apex court.<sup>315</sup> They mirrored the structure and strategies of well-developed public interest litigation, popular among social movements and civil society organizations already existing back in the 1930s-1950s.<sup>316</sup>

## 4.2. From Political to Legal Opportunity Structures

### 4.2.1. Theorizing interactions between opposing movements

There is a difficulty in theorizing countermovements – social movements interactions because they are often multi-actor and multi-forum interactions, where oppositions often do not form linear trajectories when analyzed over time. The foundations of the literature on the dynamics between social movements and countermovements are located in the early writings by Mayer N. Zald, Bert Useem and Tahi L. Mottl<sup>317</sup> on

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<sup>311</sup> Southworth, *Lawyers of the Right: Professionalizing the Conservative Coalition*.

<sup>312</sup> Amparo, "Notes on Countermovements and Conservative Lawyering: The Bumpy Road to Constitutional Marriage Equality in Brazil."

<sup>313</sup> Thoreson, "Somewhere over the Rainbow Nation: Gay, Lesbian and Bisexual Activism in South Africa."

<sup>314</sup> Teles, *The Rise of the Conservative Legal Movement: The Battle for Control of the Law*, chap. 3.

<sup>315</sup> Teles, chap. 7.

<sup>316</sup> Charles R. Epp, *The Rights Revolution* (Chicago and London: The University of Chicago Press, 1998).

<sup>317</sup> For a compilation of their essays in those two decades, see: Zald and McCarthy, *Social Movements in an Organizational Society: Collected Essays*.

movement and countermovement interactions in the 1960s-1980s, as well as more recently in writings by David Meyer and Suzanne Staggenborg on the structure of political opportunity and countermovements.<sup>318</sup> This section will draw from those key works, in order to craft a conceptual framework for analyzing constitutional change.

David Meyer and Suzanne Staggenborg define countermovements in a dynamic way: “individuals and organizations that share many of the same objects of concern as the social movements that they oppose. They make competing claims on the government on matters of policy and politics (...) and vie for attention from the mass media and the broader public.”<sup>319</sup> Meyer and Staggenborg’s definition goes even beyond the triangular model, since it leaves room for a diversity of opposing movements, including their internal fractions, portraying movement-countermovement as a more complex picture than just *them against us*.

For Zald and Useem, countermovements emerge as a reaction to social movements, both movements aiming at convincing authorities of their claims. In their model, the interaction involves three elements: movement/countermovement/authority.<sup>320</sup> Importantly, while often resembling a “loosely coupled conflict”,<sup>321</sup> Zald and Useem remind: “wars are more like fights or games, while social [movement and countermovement] interactions are more like

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<sup>318</sup> Meyer and Staggenborg, “Movements, Countermovements, and the Structure of Political Opportunity,” 1996; David S. Meyer and Suzanne Staggenborg, “Opposing Movement Strategies in U.S. Abortion Politics,” *Research in Social Movements, Conflicts and Change* 28 (2008): 207–38.

<sup>319</sup> Meyer and Staggenborg, “Movements, Countermovements, and the Structure of Political Opportunity,” 1996, 1632.

<sup>320</sup> Zald and Useem, “Movement and Countermovement Interaction: Mobilization, Tactics, and State Involvement,” 266.

<sup>321</sup> Mayer N Zald and Bert Useem, “Movement and Countermovement: Loosely Coupled Conflict,” 1982.

debates. (...) Debates rely on persuasion to convince and convert opponents and authorities.”<sup>322</sup>

In contrast, Meyer and Staggenborg propose a model that, in their words, is less ‘linear’<sup>323</sup> than the one put forward by Zald and Useem, because they consider **countermovements as networks of individuals and organizations which are composed of a complex web of interactions with each other, not necessarily as triangular as the former authors arguably assume.** Meyer and Staggenborg maintain that, when a conflict between social movements and countermovements is prolonged over time, it makes more sense of seeing them as various opposing movements, rather than just parallel movements, that influence each other’s stature and become a key part of the political structure of one another.

The primary advantage of Meyer and Staggenborg’s focus on political (and legal) opportunities and constraints – successfully used e.g. by Tina Fetner<sup>324</sup> in her account of the religious right countermovement - is that it allows for a more nuanced view of social movements–countermovements dynamics, especially regarding how choices of languages, tactics and spaces are mutually dependent. Within this model, what matters is not which movement came first (including given the possibility of “anticipatory countermobilization”<sup>325</sup>), but how social movements and countermovements shape existing political opportunity structures – i.e. the set of “stable aspects of governmental structures that explain the differential outcomes of

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<sup>322</sup> Zald and Useem, “Movement and Countermovement Interaction: Mobilization, Tactics, and State Involvement,” 251–52.

<sup>323</sup> Meyer and Staggenborg, “Movements, Countermovements, and the Structure of Political Opportunity,” 1996, 1632.

<sup>324</sup> Fetner, *How the Religious Right Shaped Lesbian and Gay Activism*, 2008, xvi–xvii.

<sup>325</sup> Dorf and Tarrow, “Strange Bedfellows: How an Anticipatory Countermovement Brought Same-Sex Marriage into the Public Arena.”



social movements across nations,”<sup>326</sup> which includes courts conducting constitutional review.

Each of those perspectives on countermovements is embedded in sharply distinctive, yet somehow complementary broader theories. Zald and Useem, as well as Meyer and Staggenborg, distance themselves from a classic view of social movements, as Douglas McAdam calls it in his influential work on the black insurgency between 1930-1970 in the US.<sup>327</sup> By focusing primarily on the structural aspects of the emergence of social movements – such as resources available and political structures – those authors differ from a classic perspective that understands social movements as a set of psychologically distressed individuals. McAdam argues that this classic perspective – insufficient due to its lack of consideration for contextual elements<sup>328</sup> – is derived from a pluralist view of society, one in which different groups seek to advance their claims but where power is dispersed.

Departing from the classic model, Zald put forward a theory focused on resources, whereas Meyer and Staggenborg focused more broadly on political opportunity structure or political process (both terms used interchangeably here). Within the **resource mobilization model** the emphasis is not on particular grievances as a feature of social movements, but rather on the resources available to social movements (e.g. money and organizational support).<sup>329</sup> Thus, for resource mobilization, social movements would be groups constituted for a political goal with

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<sup>326</sup> Meyer and Staggenborg, “Movements, Countermovements, and the Structure of Political Opportunity,” 1996, 1633. For a recent review of the concept of political opportunity structure, see: David S Meyer, “Protest and Political Opportunities” *Annual Review of Sociology* 30 (2004): 125–45, <http://www.jstor.org/stable/29737688>.

<sup>327</sup> McAdam, *Political Process and the Development of Black Insurgency*, chap. 1.

<sup>328</sup> For McAdam, “what is missing in the classical model is any discussion of the larger political context in which social insurgency occurs. Movements do not emerge in a vacuum. Rather, they are profoundly shaped by a wide range of environmental factors that condition both the objective possibilities for successful protest as well as the popular perception of insurgent prospects.” McAdam, 11.

<sup>329</sup> McCarthy and Zald, “Resource Mobilization and Social Movements: A Partial Theory,” 1216.

access to resources employed for that goal. While a certain level of individual distress is likely to exist, what determines the emergence and sustainability of movements and countermovements would be the resources they are able to gather. From a constitutional change perspective, Charles Epp famously used the resource mobilization angle by looking at the support structure – e.g. the existence of organizational litigators, government funds as well as private foundations’ support – in order to understand how rights’ revolutions occurred in certain jurisdictions under the pressure of social movements. While Epp’s focus is not on countermovements, his theory serves as an example of a resource mobilization model applied to constitutional change, portrayed as a better explanation for the drastic expansion of rights than the existence of constitutional guarantees, judicial leadership, or increasing rights consciousness.<sup>330</sup>

From the three-tier conceptual framework presented in the beginning of this Chapter, it becomes clear that resources for countermovements’ litigation are a key component of the present analysis. Often, as the social science literature reveals, countermovements draw their resources from economic elite groups, as opposed to social movements that are generally (yet, not always) composed of grassroots groups. The conceptual framework proposed here assumes that social movements and their countermovements would have access to resources to keep legal battles going on. Where resources come from matters for the durability of a countermovement over time and for the kind of claims they present. If all other favorable conditions for legal mobilization remain the same, opposing movements would then be able to prolong the contention endlessly before the courts.

#### **4.2.2. Political opportunity model**

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<sup>330</sup> Epp, *The Rights Revolution*, 18.

Resources, although important, are not the primary factor for other theories that take into consideration the overall structure of political opportunities. Resources are part of such structures, thus the complementary nature of those theories. David Meyer and Suzanne Staggenborg's **political opportunity model** is closer to the theory of political process as described in McAdam's work, and inspired the legal opportunity structure above. McAdam explicitly contrasts his political process theory both with the classic model of social movements (focused on psychological and subjective aspect of individuals as a motor for emergence of social movements)<sup>331</sup> and with the resource mobilization theory of social movements (too vague regarding what resources mean).<sup>332</sup>

**McAdam's political opportunity model rests on four factors**<sup>333</sup> relevant for a movement's development and endurance:

- *The relative openness or closure of the institutionalized political system;*
- *The stability or instability of that broad set of elite alignments that typically undergird a polity;*
- *The presence or absence of elite allies;*
- *The state's capacity and propensity for repression.*

The political process theory then states – as Tarrow puts it – that “contentious politics emerges in response to changes in political opportunities and threats when participants perceive and respond to a variety of incentives: material and ideological, partisan and group-based, long-standing and episodic.”<sup>334</sup> Thus, social movements and countermovements do not emerge and endure primarily due to psychological distress

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<sup>331</sup> McAdam, *Political Process and the Development of Black Insurgency*, chap. 1.

<sup>332</sup> McAdam, 34–35.

<sup>333</sup> Doug McAdam, “Conceptual Origins, Current Problems, Future Directions,” in *Comparative Perspectives on Social Movements: Political Opportunities, Mobilizing Structures, and Cultural Framings*, ed. Doug McAdam, John D McCarthy, and Mayer N Zald (Cambridge University Press, 1996), 27.

<sup>334</sup> Tarrow, *Power in Movement: Social Movements and Contentious Politics*, 16.

of their members (classic view) or due to resources (resource mobilization view), but rather they function *in response to* a series of political opportunities, also determined by access to political institutions, strength of opponents, shared language of movements' claims and level of organization.<sup>335</sup> Due to its comprehensiveness, and its attention to opposing groups, the analysis in this dissertation is closer to the political process model, given that the legal opportunity structure model – which inspired the present conceptual framework - is derived from the political process model.

The greatest weakness of theories of political opportunity structure is their conceptual vagueness. In one of the harshest criticisms to this model, Jeff Goodwin, James M Jasper and Jaswinder Khattri<sup>336</sup> point out that the concept of political opportunity is so vague as to allow the inclusion of all sorts of elements into the concept – depending on the object of the study by a given author. Generally, they argue, this vague concept is applied by social scientists with a *structural bias*, i.e. focusing on macro elements of institutions such as access to institutions, neglecting important cultural elements of social movements, such as language of the movement' claims, and finally considering volatile conditions such as elite alignment as structural elements.

This criticism serves an additional reason for the present dissertation to focus on the *legal opportunity structure* because – as shown above – it does place considerable emphasis on non-institutional or structural elements, particularly on the legal language which opposing movements rest their claims on. In this sense, as social theorists Meyer and Staggenborg propose, “using a dynamic and interactionist model of political opportunity, we can view opposing movements as rival contenders not only

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<sup>335</sup> McAdam, *Political Process and the Development of Black Insurgency*, 59.

<sup>336</sup> Jeff Goodwin, James M Jasper, and Jaswinder Khattri, “Caught in a Winding, Snarling Vine: The Structural Bias of Political Process Theory,” *Sociological Forum* 14, no. 1 (1999): 11.

for power and influence, but also for primacy in identifying the relevant issues and actors in a given political struggle.”<sup>337</sup> Here, the incorporation of cultural/legal elements – as Andersen puts them – is inevitable given the present dissertation focused on constitutional change and the ways in which courts reformulate constitutional parameters throughout the time.

#### 4.2.3. *Legal opportunity model*

Legal mobilization is a heavy concept that needs to be unpacked to allow the development of the conceptual framework for the present thesis. For the sake of clarity, the concept of *legal opportunity structure* will be used here as defined by Ellen Ann Andersen in her influential study on LGBT movement and use of courts in the United States.<sup>338</sup> The advantage of Andersen’s concept is that, focusing on social mobilization before courts, it merges key insights of social science literature on structures of political opportunity (first three elements) and adds to them a cultural element (fourth) specifically relevant to constitutional litigation. In other words, Andersen’s interdisciplinary perspective fits nicely into the present thesis’s focus on legal mobilization of countermovements. In this model, legal opportunity structure is synthesized as a combination of the following four elements:<sup>339</sup>

- ***Access to the formal institutional structure:*** “mechanics of the judicial process shape access in a number of important ways, including what may be litigated, who may litigate, and where such litigation may occur.”<sup>340</sup>

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<sup>337</sup> Meyer and Staggenborg, “Movements, Countermovements, and the Structure of Political Opportunity,” 1996, 1635.

<sup>338</sup> Ellen Ann Andersen, *Out of the Closets and into the Courts: Legal Opportunity Structure and Gay Rights Litigation* (Ann Arbor: The University of Michigan Press, 2005), 7.

<sup>339</sup> Andersen, 7.

<sup>340</sup> Andersen, 9.

- *Availability of allies*, primarily judges, with special attention to the disagreements they present and how this affects social mobilization.
- *Configuration of power with respect to relevant issues/challengers*, including opposing movements.
- *Cultural and legal frames*: the ways in which law and culture define the kinds of claims and the facts to be considered relevant.

Legal opportunity structure, thus defined, proves itself useful for analyzing movement-counter movement dynamics in triggering non-textual constitutional change:

- The first element of access is translated into the conceptual framework as **institutional openness**,
- while the availability of elites and configuration of power set the context for the **contestation proposition**, especially when movements enter other avenues of action besides courts,
- and the last element speaks directly to the **harm proposition**, since it is related to how law frames claims, i.e. how law provides a limited rapport from which movements draw to develop their statements.

#### 4.3. Constitutional Harm

Counter movements have played a prominent role: they have pressured apex courts to rethink the pillars of constitutional equality jurisprudence and their role in redefining the contours of the change of the meanings of equality. In order to best understand the prominent role of counter movements, this dissertation offers an alternative three-tier conceptual framework presented below, based on the notions of **institutional openness, contestation, and harm-management** as roles of courts conducting constitutional review of equality in light of counter mobilization. Eskridge's theory is

the closest to the one presented here, for its emphasis on countermovements' legal mobilization and its focus on the role of courts in an plural environment with opposing movements making constitutional claims.

Firstly, apex courts define in their jurisprudence the boundaries of powerlessness, which traditionally has been associated with the judicial role of correcting the representation of functional minorities vis-à-vis political branches and, increasingly, has been more loosely defined as being an individual victim of discrimination (*institutional openness*). Secondly, apex courts play the role of setting the boundaries of the space for social movements in constitutional litigation, often allowing mobilization to take place in other venues (*contestation role*). In a related manner, apex courts play their role of accommodation of competing claims through porous constitutional standards on what amounts to constitutional harm worthy of judicial remedy and what does not (*harm-management role*).

**Institutional openness (Chapter 3).** Apex courts give social movements and countermovements entry into processes of constitutional litigation on equality to a certain extent powerless groups, thus recognizing them as interlocutors in equality terms.<sup>341</sup> Accordingly, in order to justify giving entry to those movements in constitutional equality litigation, apex courts traditionally apply – sometimes implicitly - what in the US is called the “political-process doctrine”<sup>342</sup> – the principle by which courts step in to correct “malfunctions”<sup>343</sup> of the politically representative branches

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<sup>341</sup> Of course, this initial step assumes that social movements and countermovements are willing to take up cases to the apex courts in the first place – an analysis of the instances where and underlying reasons why those SMCs are not willing to do so, what here I call “plugging out of the court-driven constitutional change” – are analyzed in the final Chapter 5, in light of the case law and the litigation strategies revised in Chapters 3-4.

<sup>342</sup> Political process theory is “the idea that a court's ability to override a legislative judgment ought to be calibrated based on the fairness of the political process that produced the judgment.” For political process doctrine, see: US Supreme Court, *Washington v. Seattle School Dist. No. 1*, 458 U. S. 457 (1982), *Hunter v. Erickson*, 393 U. S. 385 (1969), and more recently *Schuette v. Coalition to Defend Affirmative Action*, 572 U.S. \_\_ (2014).

<sup>343</sup> For John Hart Ely, “malfunction occurs when the process is underserving of trust, when (1) the ins are choking off the channels of political change to ensure that they will stay in and the outs will stay out; or (2) (...) effective

(Legislative/Executive) – particularly in relation to how they treat minorities, i.e. groups underrepresented to a certain extent and, thus, reasonably powerless in the political representative branches.

However, putting the present debate in terms of courts improving the political processes from outside misses an important aspect of the reality of the current constitutional discourse: courts conducting constitutional review are accessed by opposing movements that are not *prima facie* part of a minority and, in fact, enjoy considerable political power, such as Christian religious groups or white applicants in the US. The interest of the present dissertation lies exactly in analyzing cases of that sort when apex courts are pushed to redefine harm beyond a concept grounded on historical discrimination.

This *dissertation hypothesizes, accordingly, that institutional openness of courts to redefinitions of harm enables the dynamic engagement of social movements with countermovements, and turns courts into a permanent forum for competing claims*. This first hypothesis also relates to social science literature on legal opportunity structures, since access to formal institutions is seen as pre-condition for contention. Yet, legal opportunity structures vary from country to country, thus the plural environment reflected in Eskridge’s work in relation to the US deserves a closer look by applying it to the cases of Brazil and South Africa. I call this the *institutional openness proposition*.

**Contestation (Chapter 4).** Secondly, in pluralistic societies, such as the three analyzed here, apex courts serve as referees for the claims made by opposing groups, in the dynamics developed between social movements and countermovements, e.g.

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majority are systematically disadvantaging some minority out of simple hostility.” Emily M. Calhoun, *Losing Twice: Harms of Indifference in the Supreme Court* (Oxford; New York: Oxford University Press, 2011).



those in favor and against same-sex marriage or race-based affirmative action. Beyond allowing a diverse range of groups accessing courts (in what is called institutional openness here) apex courts have also kept the flow of competitive and pluralistic politics, or, from the perspective of social science literature, they have kept the legal opportunity structures open. This phenomenon is what William Eskridge called a ‘*pluralism-facilitating*’<sup>344</sup> role in reaction to Ely’s ‘representation-reinforcement theory’. Eskridge’s model is useful as a starting point to analyze the involvement of countermovements in constitutional litigation in the countries analyzed, including verifying whether his model is applicable to South African and Brazilian legal systems (or even for the US one for that matter).

In the contestation part, this dissertation analyzes instances when courts conducting constitutional review resolutely address certain aspects of social movement-countermovement claims by deciding cases strongly in favor of one movement or another, and to which extent cases of closure of courts as venues for countermovements leads to further contestation before other venues. Here, the history of the Brazilian Supreme Court<sup>345</sup> and the South African Constitutional Court<sup>346</sup> in deciding certain controversial cases unanimously will be an interesting comparison vis-à-vis the nuanced, plural opinions often seen in controversial cases in the United States

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<sup>344</sup> William N Eskridge Jr., “Pluralism and Distrust: How Courts Can Support Democracy by Lowering the Stakes of Politics,” *The Yale Law Journal* 114, no. 6 (2005): p. 1294.

<sup>345</sup> For an institutional critique of the Brazilian Supreme Court, see: Virgílio Afonso da Silva, “Deciding without Deliberating,” *International Journal of Constitutional Law* 11, no. 3 (July 1, 2013): 557–84. For an overview of the same-sex union case, decided unanimously, by the Brazilian Supreme Court, see: Friedman and Thiago Amparo, “On Pluralism and Its Limits: The Constitutional Approach to Sexual Freedom in Brazil and the Way Ahead.” See also: Roger Raupp Rios, “Direitos Sexuais, União Homossexual e Decisão Do Supremo Tribunal Federal (ADPF 132 - RJ e ADI 4.277) [Sexual Rights, Homosexual Unions and the Supreme Federal Tribunal Decision],” in *Homossexualidade e Direitos Sexuais: Reflexões a Partir Da Decisão Do STF [Homosexuality and Sexual Rights: Reflections from the STF Decision]*, ed. Roger Raupp Rios, Célio Golin, and Paulo Gilberto Cogo Leivas (Editora Sulina, 2011), 69–124.

<sup>346</sup> For an institutional appraisal of the South African Constitutional Court, see: Roux, *The Politics of Principle: The First South African Constitutional Court, 1995-2005*. Furthermore, for one of the best overview of the South African jurisprudence, see: Karthy Govender, “A Cautionary Note Regarding Substantive Equality: A Reply to Cathi Albertyn & Beth Goldblatt,” in *Constitutional Conversations*, ed. Stu Woolman and Michael Bishop (Pretoria: Pretoria University Law Press, 2008), 255–63.

jurisprudence that have sparked sharp dissenting opinions including furious oral dissents.<sup>347</sup>

Accordingly, as far as contestation is concerned, the present dissertation postulates – that *whenever the configuration of power allows it, countermovements will sustain their legal mobilization outside courts, seeking to either contain social movements’ agenda before political branches, or counterstriking with the countermovements’ own agenda before those political branches*. Chapter 3 details those two strategies of countermovements in contestation outside courts, containment strategy and counterstrike strategy, respectively. As mentioned in the beginning of this Chapter, ‘other venues’ can range from bureaucratic bodies such as Brazil’s National Council of Justice, as well as executives and legislatures at national, state and local levels.

**Harm-management (Chapter 5).** Thirdly, and finally, when processing the merits of opposing movements’ claims, the apex courts ultimately decide which burdens or grievances (e.g. past discrimination) deserve being remedied as *constitutional harms*. In this situation, courts inevitably have to process the equality-related claims put forward by social movements and countermovements, thus providing a conceptual framework for those harms. What is gained and what is lost in the translation of opposing movements’ collective frames into legal-constitutional language<sup>348</sup> deserve closer attention in light of the case law on race and sexual orientation in the three jurisdictions herein analyzed.

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<sup>347</sup> Lani Guinier, “Foreword: Demosprudence Through Dissent,” *Harvard Law Review* 122, no. 1 (2008): 4–135.

<sup>348</sup> See, for instance, Scheingold, *The Politics of Rights: Lawyers, Public Policy, and Political Change*; NeJaime, “Framing (in) Equality for Same-Sex Couples.”

*The more porous the constitutional standard developed by courts conducting constitutional review, the more likely contestation between social movements and countermovements will turn constitutional equality into a game of tactical concessions on what it means to be harmed.* In other words, the key to understand equality-related constitutional change is to verify at last how courts define porous, accommodating standards that recognize at least in part the claims of social movements and countermovements.

When race and sexual orientation are put alongside each other, it becomes a challenge for courts to preserve their judicial coherence by designing constitutional standards of harm which makes sense of the diversity of social movements' and countermovements' claims in both grounds.

## 5. Conclusion

The present Chapter started by exposing the overall premise of this dissertation, namely: the increasing legal mobilization of countermovements – i.e. opposing social movements that struggle with their respective counterparts in defending/challenging state authorities. As shown here, this dissertation seeks to understand the phenomenon of non-textual constitutional change through the lens of movement-counter movement dynamics, particularly in equality jurisprudence, analyzed in detail in Chapters 3-5. It revealed that existing literature in law and social movements has struggled with the issue of countermovements and constitutional change, in a context of disharmonic constitutional text, plurality of actors in constitutional litigation and instances of anticipatory countermobilization.

Based on a review of social science literature on social movement – countermovement dynamics and of constitutional scholarship on countermovements –

in particular, Eskridge's model of constitutional change – this Chapter presents the conceptual framework of the present dissertation, based in three propositions, namely: contestation, institutional openness, and harm-management propositions. This conceptual framework – as argued here – serves as the best explanation for the phenomenon we are accounting for in this dissertation. Each of these propositions highlights three possible roles of courts conducting review in light of movement-counter-movement dynamics before courts: in restricting contention before courts and thus leading to mobilization in other venues, in serving as an open forum of contention, and in defining the contours of what it means to be harmed in a constitutional relevant manner.

## **PART 2: APPLYING THE CONCEPTUAL FRAMEWORK**



## CHAPTER 3 INSTITUTIONAL OPENNESS: REDEFINING POLITICAL POWERLESSNESS

In constitutional litigation of equality, apex courts traditionally enter into the picture when litigators seek a judicial remedy for a harm caused as a result of political processes (e.g. a legislation targeting a group on a prohibited ground). In this sense, apex courts are often confronted with claims of harm by litigators arguing they are powerless to seek remedy for such harms in places other than courts. This is a meat-and-potatoes' scenario in constitutional litigation of equality.

Yet, litigators – in this case countermovements – in some instances are able to convince apex courts in equality litigation that they are powerless not because they cannot claim harms before political branches. Rather, countermovements often argue it is the job of the courts to be open for their claims based on individualized harms. Then, apex courts become institutionally open to countermovements' claims of harm by way of redefining what it means to be powerless. This leads to detaching powerlessness from its historical-political foundations and opening the doors of courts to new ideas of harm, redefining what it means to be harmed in a constitutionally relevant way. It helps as well when apex courts start to insert into equality jurisprudence notions of personal dignity and/or liberty – such as the dignity of a white applicant in a race-based selection process for a job or the religious liberty of a service provider to discriminate against a gay couple. Those different concepts, when featured in equality jurisprudence, tend to detach such jurisprudence even more from its roots in powerlessness.

Consider the following passage by the South African Constitutional Court. “The doors of the courts must, of course, be equally open to all South Africans, independently of whether historically they have been privileged or oppressed. Indeed, minorities of

any kind are always potentially vulnerable.”<sup>349</sup> With those words, in the 1998 decision in the *Walker* case, Justice Langa JD of the South African Constitutional Court articulated the core theme of this Chapter, that runs across the jurisdictions and discrimination grounds analyzed in this dissertation. This Chapter is concerned with how redefining the notion of powerlessness makes courts conducting constitutional review more institutionally open to the claims by countermovements.

This Chapter looks more closely at the second element of the conceptual framework presented in Chapter 3, namely: institutional openness. Then, it was hypothesized *that the institutional openness of courts to redefinitions of powerlessness enables the dynamic engagement of social movements with countermovements, and turns courts into a permanent forum for competing claims*. One way of institutionally opening constitutional litigation and thus bringing competing claims into the courtroom is through a redefinition of what harm means through redefining what it means to be powerless. By analyzing changes in the concept of powerlessness, this Chapter discusses what it means to be powerless to seek a remedy for a constitutionally relevant harm in the political process.

The centrality of historical-political powerlessness in constitutional equality jurisprudence is not an accident. To talk about powerlessness in the context of constitutional equality litigation comes across as *intuitively* sound: one may expect courts to protect members of minority groups who cannot otherwise defend themselves politically, rather than simply reinforcing majoritarian opinions. Writing in another context – regarding theories of justice and moral reasoning, for instance - Elisabeth Anderson argues that the “point of equality” is, put simply, “to end oppression, which

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<sup>349</sup> SOUTH AFRICA, *City Council of Pretoria v Walker* (CCT8/97) [1998] ZACC 1; 1998 (2) SA 363; 1998 (3) BCLR 257 (17 February 1998), para. 123.



by definition is socially constructed.”<sup>350</sup> While there is strong empirical evidence indicating that apex courts tend to follow the trends of public opinion on the issues they decide,<sup>351</sup> or that judicial independence, ironically, relies at least partially on the support of the main political actors,<sup>352</sup> courts in constitutional litigation, at least discursively, have used the language of protecting the underprivileged as the source of their own legitimacy. This has helped them to overcome the counter-majoritarian difficulty, since they are in principle exercising primarily a corrective function in a representative democracy.

Given the central role played by powerlessness in equality litigation, the contours of the concept of powerlessness informs the boundaries of the institutional openness of courts conducting constitutional review. By institutional openness in equality litigation, this Chapter refers to the judicial acceptance of arguments based on powerlessness, which triggers the corrective function of courts in ameliorating malfunctions of political processes. These processes are said to not properly address powerlessness, and may even perpetuate it. As such, institutional openness refers to the accessibility of the constitutional equality framework to social movements and their countermovements in terms of claim-making, rather than the formal rules of access to the courts conducting constitutional review, although rules of standing (in particular when they require a preliminary analysis on the injury at stake) influence how open courts are to certain kinds of arguments.

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<sup>350</sup> Elizabeth S Anderson, “What Is the Point of Equality?\*,” *Ethics* 109, no. 2 (1999): 288. For a discussion on human rights, sentimentality and powerlessness, see: Richard Rorty, “Human Rights, Rationality, and Sentimentality,” in *On Human Rights: The Oxford Amnesty Lectures*, ed. Stephen Shute and Susan Hurley (Basic Books, 1993), 167–85.

<sup>351</sup> Michael C Dorf, “The Majoritarian Difficulty and Theories of Constitutional Decision Making,” *University of Pennsylvania Journal of Constitutional Law* 13 (2010): 283–304; Darren Lenard Hutchinson, “The Majoritarian Difficulty: Affirmative Action, Sodomy, and Supreme Court Politics,” *Law and Inequality: A Journal of Theory and Practice* 23 (2005): 1–93.

<sup>352</sup> Roux, *The Politics of Principle: The First South African Constitutional Court, 1995-2005*.

Research on the US jurisprudence for instance shows that white applicants claiming reverse discrimination in affirmative action programs have in fact been dispensed by the US Supreme Court from the need of showing that those programs affected them personally, which reveals that the US Supreme Court assumes White applicants have suffered a harm in light of those programs.<sup>353</sup> This Chapter privileges an analysis on institutional openness in terms of claim-making rather than in terms of standing also because it would not be possible to conduct a comparative analysis, given that – as pointed out in the Introduction of this dissertation - in Brazil standing rules differ widely from South Africa’s leave requirement and from the United States’ certiorari process.

To say that countermovements have sought to redefine the notion of powerlessness (and through it: harm) before courts – by calling judges’ attention, through orchestrated strategic litigation, to the harms their members have suffered – equals *neither* to say that social movements have had easy access to courts so far, *nor* that opposition to social movements’ claims before courts is itself a recent phenomenon. It *does* mean, however, that organized countermovements – often structured as networks of lawyers as much as civil rights lawyers have been before them – have increasingly driven constitutional change on redefining the concept of powerlessness not only as a reaction to consequences of constitutional equality jurisprudence favoring vulnerable groups, but to redefine what harm means in more general terms.

In the three jurisdictions, social movements have fought hard – both in the constitution building processes in South Africa and Brazil as well as in strategic

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<sup>353</sup> Elise C Boddie, “The Sins of Innocence in Standing Doctrine,” *Vand. L. Rev.* 68 (2015): 297.

litigation in these countries and in the US – to define the contours of equality as courts therein have understood it so far, and which countermovements have started to redefine. Therefore, studying the transformation of the concept of powerlessness is key to understanding the constitutional change the countermovements’ legal mobilization triggers in equality jurisprudence.

In jurisdictions analyzed here, countermovements have redefined powerlessness in at least two vital senses in order to open courts to their claims:

1. Countermovements have downplayed the importance of contextual factors associated with political powerlessness in constitutional litigation, such as statistical data and historical facts. I call this the *downplaying approach*;
2. Consequently, countermovements have at once questioned political powerlessness itself, and by shifting the focus to individualized harm, they have justified new forms of powerlessness. I call this the *individualization approach*.

The **objective** of this Chapter is two-fold: (i) to analyze how countermovements have sought to redefine harm through powerlessness in the realm of race and sexual orientation, turning it from a concept linked to remedying historical disadvantage into one based on individualized harms; and, (ii) to scrutinize the ways in which apex courts in the three jurisdictions conceptualize powerlessness as a trigger of exercising their corrective function of democratic political processes and as a result keeping their doors open for equality litigation.

This Chapter is structured as follows: in Section 1, it will present the idea of powerlessness as understood in the three countries’ equality jurisprudence. In Section 2, the Chapter will show cases where countermovements have sought to redefine what

it means to be powerless in the both the ways presented above. Overall, these redefinitions leave the doors of constitutional litigation open to countermovements.

## 1. Defining Political Powerlessness

Powerlessness is a fuzzy concept. It refers to the lack of self-determination or of authority over one's life. Iris Marion Young<sup>354</sup> included powerlessness as one of five categories of oppression, specially focused on economic injustice. In this more general sense, powerlessness is the result of structural domination, not primarily by law, but by economic and social forces in which legal systems plays a reduced role.

For the purposes of this project, however, powerlessness is conceived in a narrower sense, as a legal category. Powerlessness, as a constitutional concept in equality litigation, structures the way judicial authorities see their role of protecting disadvantaged members of social groups. Once a court understands that a given group is powerless in the legal sense, which varies according to the jurisdictions as seen below, it will look at ways to remedy inequalities inflicting members of such groups or find a compelling reason not to do so.

In this legal sense, political powerlessness as a concept used by courts to determine how institutional open they are to countermovements' claims speaks directly to the first element of the legal structure opportunity presented in the conceptual framework, namely: the **access to the formal institutional structure**. According to Andersen, the access to the formal institutional structure is related to how the "mechanics of the judicial process shape access in a number of important ways, including what may be litigated, who may litigate, and where such litigation may

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<sup>354</sup> An example of this broader concept can be found here: Iris Marion Young, *Justice and the Politics of Difference* (Princeton: Princeton University Press, 1990), chap. 2.

occur.”<sup>355</sup> It is argued here that it matters for constitutional change of equality whether countermovements are perceived or not by courts as representing powerless individuals. It is so because, if the courts perceive them that way, it would then mean that those courts would be more open to their claims as *equality* claims.

This section will focus on how courts conducting constitutional review in the United States, Brazil and South Africa conceptualize political powerlessness as a constitutional status that, once afforded to members of groups, gives them access to courts in the sense that judiciary will be inclined to correct the malfunctions of the political branches ill-treating those groups. Here, the focus is on the judicial approach to powerlessness as a constitutional concept in the three countries and the related corrective function of courts in the institutional sense it entails. In unpacking this concept of political powerlessness, this Section focuses on answering what the techniques of judicial appreciation of group-related powerlessness are in those countries as a basis for the remainder of the Chapter, which will reflect on the redefinition of political powerlessness.

Such redefinition opens the doors of apex courts to certain equality claims focusing on harms with an individualized impact, particularly claims presented by countermovements. At the same time, such redefinition closes the doors of the same courts to other claims linked with historical disadvantage and lack of political representation, which are mostly associated with litigation by social movements and political powerlessness in the strict sense.

This Section finishes with a comparative analysis of the three approaches to powerlessness. It concludes that the United States and Brazil represent two opposites:

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<sup>355</sup> Ellen Ann Andersen, *Out of the Closets and into the Courts: Legal Opportunity Structure and Gay Rights Litigation* (The University of Michigan Press, 2005), 9.

while in the US, political powerlessness as lack of political representation has been in decay leaving the door open to individualized harm as the key parameter in equality jurisprudence, and thus to countermovements' claims, the Brazilian case shows in contrast the strength of a jurisprudence grounded on group-related political powerlessness as historical disadvantage, and therefore more closed to countermovements' claims. In comparison, South Africa represents a middle ground case, by incorporating individualized harm into the powerlessness analysis focused (like in Brazil) on historical disadvantage, thus leaving a partial, yet meaningful space to countermovements' claims in its otherwise transformative equality jurisprudence.

### **1.1. Brazil: Climax of Political Powerlessness and Institutional Closure of Courts to Countermovements**

Brazilian equality jurisprudence combines a strong emphasis – textually and jurisprudentially – on political powerlessness as historical disadvantage with the rhetoric of transformative constitutionalism aimed at addressing structural inequality. As a result, the case of Brazil offers a constitutional jurisdiction less open to attempts by countermovements to redefine powerlessness in comparison with the US one. In the opposite direct, as seen in the next section, the US case constitutes an example of jurisprudence marked by the fading explanatory power of political powerlessness and an increasing concern for individual harm as presented by countermovements. South Africa, like Brazil, focuses on political powerlessness as historical disadvantage, rather than lack of political representation, while like the US it has incorporated part of the individualization of powerlessness by focusing its equality jurisprudence on dignity.

#### **1.1.1. Climax of Political Powerlessness as Guiding Principle in Equality Framework**

In Brazil, powerlessness is understood primarily from the perspective of historical

disadvantage. The lack of representation before political decision-making bodies appears incidentally in Brazilian equality jurisprudence when the STF – in cases such as the one recognizing same-sex unions<sup>356</sup> – refers to the omission of the political branches in fulfilling the constitutional mandate of protecting those groups, a state of affairs that would then require the judiciary to intervene.

Yet, the foundation of political powerlessness in Brazil's jurisprudence is historical discrimination, more than the lack of political representation in democratic institutions. In fact, historical discrimination has been the basis of strong rights declarations by the country's apex court on the grounds of sexual orientation and race. The origins of the emphasis on political powerlessness can be traced back to the constitution building process in Brazil and the resulting text. It can also be related to the way the jurisprudence in the country has been developed around the idea of anti-subordination. This subsection will explain each of those factors in this order.

First of all, in Brazil, it is clear from the constitutional text – contrary to its US counterpart – that remedying group-related powerlessness is part of the constitutional spirit, this constitutional mandate is expressed in general terms. Powerlessness as remedying historical injustice is all over the Brazilian Constitution. Whether the extensive range of constitutional rights is criticized as “favours from [the] government”<sup>357</sup> or praised as “a reserve of [constitutional] justice”,<sup>358</sup> the Brazilian Constitution explicitly sets in its Article 3 the aim of “build[ing] a free, just and solidary society”, as well as of “eradicat[ing] poverty and substandard living conditions and to

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<sup>356</sup> BRAZIL, Supreme Federal Tribunal (STF), the Claim of Fundamental Principle Violation (ADPF) 132 and the Direct Action on Unconstitutionality (ADI) 4277, jointly decided on May 5<sup>th</sup> 2011, p. 871.

<sup>357</sup> Augusto Zimmermann, “Subsidiarity, Democracy and Individual Liberty in Brazil,” in *Global Perspectives on Subsidiarity*, ed. Michelle Evans and Augusto Zimmermann (New York; London: Springer, 2014), 95.

<sup>358</sup> Oscar Vilhena Vieira, *A Constituição e Sua Reserva de Justiça [The Constitution and Its Reserve of Justice]*, São Paulo: Malheiros (São Paulo: Malheiros, 1999).

reduce social and regional inequalities.”<sup>359</sup> These principles compose the basic structure of the constitution, its very core, which is supposed to be untouched even amid constant textual change in the constitution, as Chapter 1 pointed out.

Furthermore, the Constitution’s anti-discrimination clause sets the objective of providing the well-being of all people, without discrimination.<sup>360</sup> On top of the textual concern with social injustices, the Brazilian constitutional system – as established in the preamble of the 1988 Constitution - is qualified as a “fraternal”<sup>361</sup> one, since it seeks to contribute to the establishment of “a fraternal, pluralist and unprejudiced society, founded on social harmony”,<sup>362</sup> in the words of its preamble. Unlike the LGBT movement – which attempted but failed to include sexual orientation and gender identity in the Constitution - the Afro-Brazilian movement<sup>363</sup> managed to include in the 1988 Constitution racism as a “non-bailable crime, with no limitation, subject to the penalty of confinement”<sup>364</sup> as well as guaranteeing the recognition of the traditional lands of the communities of former slaves (so-called, *quilombolas*).<sup>365</sup>

Despite all the poetic constitutional language, the Brazilian Constitution does not contain a general clause allowing remedial or affirmative action policies (unlike South Africa’s equality clause, as seen below). Instead, the Brazilian Constitution does

<sup>359</sup> BRAZIL, Federal Constitution of 1988, Article 3.

<sup>360</sup> “To promote the well-being of all, without prejudice as to origin, race, sex, colour, age and any other forms of discrimination.” (BRAZIL, Federal Constitution of 1988, Article 3, IV).

<sup>361</sup> Francisco Lopes, “O Constitucionalismo Fraternal e Sua Consistência Enquanto Proposição Lógica-Argumentativa [The Fraternal Constitutionalism and Its Consistency as a Logical Argument Proposition],” *Revista Da AGU* 16, no. 01 (2017): 127–60.

<sup>362</sup> BRAZIL, Federal Constitution of 1988, Preamble.

<sup>363</sup> Verena Alberti and Amílcar Araújo Pereira, “A Defesa Das Cotas Como Estratégia Política Do Movimento Negro Contemporâneo [The Defense of Quotas as Part of the Political Strategy of the Contemporary Black Movement],” *Revista Estudos Históricos* 1, no. 37 (2006): 150, <http://bibliotecadigital.fgv.br/ojs/index.php/reh/article/view/2249>.

<sup>364</sup> BRAZIL, Federal Constitution of 1988, Article 5, XLII.

<sup>365</sup> BRAZIL, Transitional Constitutional Provisions Act, 1988, Article 68: “Final title shall be recognized for the remaining members of the former fugitive slave communities who are occupying their lands, and the State shall grant them the respective deeds.” As translated in: <http://oxcon.oup.com/view/10.1093/law-ocw-law-ocw-cd341.regGroup.1/law-ocw-cd341>. Last accessed on: 28 June 2016.



contain a series of specific clauses establishing affirmative action programs in different contexts – such as quotas for persons with disabilities in public procurement (Article 37, VIII) and preference for small businesses in the countries’ economic policy (Article 170, IX), but it falls short of an overreaching affirmative action clause that would allow a race conscious affirmative action programs in universities. In fact, the education clause in the Brazilian Constitution establishes “access to higher levels of education, research and artistic creation according to individual capacity” (Article 208, V).

Brazil’s STF equality jurisprudence has filled in such gaps in the constitutional text (lack of general affirmative action clause and omission of sexual orientation and gender identity of the antidiscrimination clause), by defining powerlessness as historical disadvantage, rather than lack of political representation. There are several **judicial strategies** through which STF has defined powerlessness as historical disadvantage.

First, STF has often referred to **social science data on social vulnerability** as an evidence of powerlessness defined as historical disadvantage. A case in point is the public toilet case,<sup>366</sup> where a transsexual person claims the right to use the bathroom of a shopping mall in accordance with her gender identity. While the case is still pending, some of the Justices’ opinions are already available and they make reference to statistics on trans people’s life expectancy and data on violence against trans people in order to reveal how powerlessness they are deserving of judicial protection. In this sense, for instance, Justice Luís Roberto Barroso’s opinion shows that Brazil is the world champion in terms of murder rates of trans people, concluding that trans people is one

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<sup>366</sup> BRAZIL, Supreme Federal Tribunal, *Extraordinary Appeal (REX) 845.779* (pending), public toilet case.

of the most marginalized minorities that needs judicial protection.<sup>367</sup> In light of this judicial strategy, if countermovements were ever to be successful in constitutional equality litigation, they would need to show social data on their vulnerability in order to convince their court they deserve judicial protection.

Second, STF has referred in equality cases to a **constitutional mandate to counterbalance the majoritarian legislative will**, whenever prejudice – a constitutionally salient harm in the Brazilian context - is involved. See for instance Justice Celso de Mello opinion in the same-sex union cases in Brazil<sup>368</sup> arguing on several pages that the STF position in the democratic rule of law system in Brazil is to exercise its countermajoritarian function whenever the Legislature acts or fails to act to protect minorities that have been subject to historical prejudice. According to this judicial reasoning, if countermovements were ever to be successful in constitutional equality litigation, they would need in principle to defend that they are themselves subject to historical prejudice from the political branches.

Third, the STF has understood the Federal Constitution as establishing a **preconceived notion of distributive justice** where different groups do not have equal claims on social resources because judges should consider their social status. In the words of Justice Ricardo Lewandowski, in the leading vote on the affirmative action in universities case:

*“the application of the principle of equality, from the point of view of distributive justice, considers the relative position of social groups*

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<sup>367</sup> BRAZIL, Supreme Federal Tribunal, *Extraordinary Appeal (REX) 845.779* (pending), public toilet case [Justice Luís Roberto Barroso’s opinion, para. 13., available at: <https://www.conjur.com.br/dl/voto-ministro-barroso-stf-questao.pdf>. Last accessed on: 19 May 2018].

<sup>368</sup> BRAZIL, Supreme Federal Tribunal (STF), the Claim of Fundamental Principle Violation (ADPF) 132 and the Direct Action on Unconstitutionality (ADI) 4277 and, jointly decided on May 5<sup>th</sup> 2011, hereafter called *same-sex union case 1* and *same-sex union case 2*, respectively.

*among themselves. But it is worth noting, in taking into account the inescapable reality of social stratification, that it is not limited to focusing on the category of whites, blacks, and browns. It consists of a technique of distribution of justice, which ultimately aims to promote the social inclusion of excluded or marginalized groups, especially those who have historically been compelled to live on the periphery of society.*”<sup>369</sup>

According to this judicial reasoning, if countermovements were ever to be successful in constitutional equality litigation, they would need to show that they are in an inferior social position in the case at stake, proving that they are powerless in the sense of having suffered a historical disadvantage that would put them into a position of a marginalized group.

In light of this, two reservations must be kept in mind. First, as mentioned before, the STF does not speak in one voice. In other words, Justices at the STF deliver individual opinions which rarely communicate with each other, making it harder to prove that those judicial reasonings mentioned above are the Courts’ view as a collective body because there is no such thing as a collective majority or unanimous decision at the STF.<sup>370</sup> Nevertheless, those judicial reasonings have been repeatedly seen in several individual opinions on equality cases. Second, while, of course, dignity – guaranteed in Brazil’s Federal Constitution in its Article 1, III as a foundation of the Republic – plays an important role in delimitating the contours of judicial reasoning on equality, dignity has been read in Brazil in line with the judicial view of powerlessness

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<sup>369</sup> BRAZIL, Supreme Federal Tribunal, *Claim of Fundamental Principle Violation (ADPF) 186*, decided on April 26<sup>th</sup> 2012, hereafter affirmative action in universities case, Justice Ricardo Lewandowski, p. 8.

<sup>370</sup> da Silva, “Deciding without Deliberating.”

as historical disadvantage rather than as an individualized notion apart from social context.

Unlike in the US, the concept of powerlessness in Brazil has not been reshaped by the judicialization of countermovements' claims. In the US, as seen below, an inconsistent judicial interpretation of powerlessness in equality jurisprudence is partly caused by judicial attempts to make sense of the numerous groups<sup>371</sup> seeking constitutional protection throughout time. More recently, countermovements added some pressure on the three-tier equality framework originally designed to address discrimination against African Americans in the US. In Brazil, in contrast, powerlessness derives from the transformative constitutional text itself, in which “to promote the well-being of all, without prejudice as to origin, race, sex, colour, age and any other forms of discrimination”<sup>372</sup> is a fundamental principle, and the apex court has read it in an expansive way as outlawing prejudice-based laws or even legislative omission such as in the case of same-sex union case.<sup>373</sup>

### 1.1.2. Institutional Closure to Countermovements' Definition of Powerlessness

Read in light of the above-mentioned judicial strategies, Brazil's constitutional equality framework leaves little room for countermovements to contest the foundational principles of constitutional equality jurisprudence, namely: political powerlessness as historical disadvantage in the realm of race and sexual orientation. In light of how institutionally open STF is to social movements' claims – despite the restrictive rules

<sup>371</sup> Eskridge Jr., “Channeling: Identity-Based Social Movements and Public Law”; Eskridge Jr., “Some Effects of Identity-Based Social Movements on Constitutional Law in the Twentieth Century.”

<sup>372</sup> BRAZIL, Federal Constitution 1988, Article 3, IV.

<sup>373</sup> BRAZIL, Supreme Federal Tribunal – STF, *Direct Action on Unconstitutionality (ADI) 4277*, decided on May 5<sup>th</sup> 2011 [2<sup>nd</sup> same-sex union case], para. 27.

of standing in Brazil as mentioned earlier – how do countermovements seek to redefine the principles of equal protection, including political powerlessness?

First, as one strategy, countermovements argue that, in spite of the STF's constitutional mandate to counterbalance the majoritarian legislative will, the **separation of powers doctrine** entails that the only body that can establish general and abstract rules is the legislative, not the Executive or the Judiciary. This is the core argument of the pending case<sup>374</sup> challenging the CNJ - National Council of Justice's administrative resolution<sup>375</sup> which made the same-sex marriage valid to the whole country. The case was presented by a Christian political party with ties to the anti-same-sex marriage countermovement. Similarly to the kind of neutral arguments seen in the case of the US – as shown by Eskridge – this line of argumentation seeks to bypass the question of political powerlessness by stressing a supposedly neutral issue: separation of powers. It is very unlikely that such argumentation based on separation of powers will prevail when the case challenging the CNJ gets to be decided in the future by the STF, because a similar argumentation was previously rejected in the same-sex union case given the historical legislative omission.

Second, another strategy pursued by countermovements in Brazil is to find, in the disharmonic text of the Federal Constitution (called so in Chapter 1), other **competing rights** that would influence the STF's view on the constitutional mandate of redistributive justice. A case in point here is the PROUNI case (acronym for the “Program University for All”).<sup>376</sup> PROUNI was a complex federal program aiming at

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<sup>374</sup> BRAZIL, Supreme Federal Tribunal, *Direct Action on Unconstitutionality (ADI) 4966*, hereafter challenge to same-sex marriage case.

<sup>375</sup> Resolution 175 from 14 May, 2013, available at: <http://www.cnj.jus.br/atos-administrativos/atos-da-presidencia/resolucoespresidencia/24675-resolucao-n-175-de-14-de-maio-de-2013>. Last accessed: 2 February, 2015.

<sup>376</sup> BRAZIL, Supreme Federal Tribunal, *Direct Action on Unconstitutionality (ADI) 3.330*, hereafter PROUNI case.

expanding the access to scholarships in private universities for students who attended public high schools or private high schools with scholarship. It is a voluntary program, based on tax exemption, and which included quotas for Afro-Brazilian and indigenous students as well in the scholarship scheme in private universities. PROUNI was responsible for a considerable expansion of the access to university in Brazil for socially vulnerable people.<sup>377</sup>

In this case, the anti-affirmative action countermovement, represented by the national confederation of private schools, challenged the PROUNI scheme by making use of the constitutional right of educational establishments to “free enterprise”, which is explicit in the constitutional text.<sup>378</sup> As a response, STF has mentioned that the Constitution itself already prioritized the pursuit of social justice over the right to free enterprise in the words of its Article 170. In complex and sometimes disharmonic constitutional texts such as the Brazilian one, it is often the case that both countermovements and social movements will find legal frames for their claims (last element for legal mobilization as presented in the conceptual framework), but in transformative constitutions, sometimes the hierarchy between those frames is explicit in the constitutional text itself.

All these elements presented above show that in Brazil – like in South Africa –

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<sup>377</sup> Márcia Lima, “Ações Afirmativas e Juventude Negra No Brasil,” *Cadernos Adenauer* xvi, no. 1 (2015).

<sup>378</sup> BRAZIL, Federal Constitution of 1988, Article 170:

“The economic order, founded on the appreciation of the value of human work and on free enterprise, is intended to ensure everyone a life with dignity, in accordance with the dictates of social justice, with due regard for the following principles: (CA No. 6, 1995; CA No. 42, 2003)

I – national sovereignty;

II – private property;

III – the social function of property; IV – free competition;

V – consumer protection;

vi – environment protection, which may include differentiated treatment in accordance with the environmental impact of goods and services and of their respective production and delivery processes;

VII – reduction of regional and social differences;

VIII – pursuit of full employment;

IX – preferential treatment for small enterprises organized under Brazilian laws and having their head-of ce and management in Brazil”.

political powerlessness is associated with historical disadvantage, which leaves little room for countermovements to dig a place for their attempts of redefining powerlessness before apex courts. Therefore, they seek to do so by overriding the judicial arena. The next sections will show more in detail how political powerlessness is defined in South Africa and in the United States.

## **1.2. United States: From Political Powerlessness to an Individualized Harm**

Different from Brazil's strong focus on political powerlessness as historical disadvantage and South Africa's consideration of both historical discrimination and dignity claims, powerlessness in the US is intrinsically connected with historical discrimination – both in terms of equal protection jurisprudence and political process doctrine, the US equality jurisprudence has shifted more steadily towards individualized harm.

Equal protection analysis in the US has evolved around a three-tier framework (rational basis standard, intermediary and strict scrutiny applicable to suspect classes) in a messy way in which the intensity of judicial scrutiny varies according to, among other factors, the history of discrimination against the group at stake and consequently their lack of representation in political bodies. In a comparable manner, the political process doctrine in the US has connected historical discrimination with the extent to which different groups historically have more difficulty than others to promote political change through representative bodies.

This section will show that, in spite of such basis on historical discrimination, more recently powerlessness in the US as a legal concept has been more associated with an individualized notion of harm rather than a history of discrimination. Assuming that countermovements have framed their legal arguments around individualized notions of

harm, the current trend in the US of downplaying historical discrimination in favor of a jurisprudence based on mediating conflicts of individual harms benefits countermovements by allowing them to make novel arguments in equal protection.

### 1.2.1. Foundations of Political Powerlessness in the US: Historical Discrimination and Representation-Reinforcement

Powerlessness as a legal concept in the US is intertwined with the history of slavery. Powerlessness can be traced back historically to the Bill of Rights drafted in 1789 and its concern with “protection of property-owning and religious minorities against oppressive measures sponsored by temporary ‘factions.’”<sup>379</sup> Since the Reconstruction Amendments (13<sup>th</sup>, 14<sup>th</sup> and 15<sup>th</sup> Amendments, adopted between 1865 and 1870), there is a constitutional recognition of the harms of slavery, composing an underlying theory of rights in the Constitution.<sup>380</sup>

Also in reference to slavery, as Eskridge chronicles, the legal concept of powerlessness can be related in an equal manner to the Fourteenth Amendment, adopted in 1868. The Equal Protection Clause of the 14<sup>th</sup> Amendment in the US – in its original intent - “was viewed as a means of safeguarding blacks from hostile state action,”<sup>381</sup> as writes Owen Fiss in the 1970s. As a history of ideas, as Howard N. Meyer points out, the 14<sup>th</sup> Amendment “drew upon the phrases so much used in thirty years of abolitionist agitation by orators who have attempted to vitalize the original Constitution to end slavery and protect human rights within the states,”<sup>382</sup> going beyond consolidating the freeing of former slaves.

<sup>379</sup> William N Eskridge Jr, “Is Political Powerlessness a Requirement for Heightened Equal Protection Scrutiny,” *JOUR, Washburn LJ* 50 (2010): p. 3.

<sup>380</sup> David A J Richards, *Conscience and the Constitution: History, Theory, and Law of the Reconstruction Amendments*, vol. 277 (Princeton University Press, 2014).

<sup>381</sup> Owen M Fiss, “Groups and the Equal Protection Clause,” *Philosophy & Public Affairs*, no. 2 (1976): 147.

<sup>382</sup> Howard N Meyer, *The Amendment That Refused to Die: Equality and Justice Deferred: The History of the Fourteenth Amendment* (Lanham, New York, Oxford: Madison Books, 2000), 58.



Grounding political powerlessness in evidence of historical discrimination and the intertwined lack of representation before political branches derives from the racial footprint of equality jurisprudence in light of the history of slavery and denial of the right to vote to Afro-Americans. This was later consolidated in the wordings of the famous Footnote 4 of the *Carolene Products* case.<sup>383</sup> For Eskridge,

*“The Carolene model suggested by the civil rights movement was a proceduralist approach that could be defended on both rule of law and institutional competence grounds. Carolene-based judicial review sought to (1) prevent deployment of the criminal justice system to brutalize minorities, (2) disrupt local political lock-ins, and (3) dismantle prejudice-based laws denying fundamental rights to minorities unrepresented in the political process. These were tasks well-suited to judges whose training and expertise were procedural.”*<sup>384</sup>

Powerlessness in the US was traditionally conceived as one of the justifications for the exercise of judicial review as in John Hart Ely’s classic work in the 1980s.<sup>385</sup> Thus, it assumes that those who have access to the courts are individual members of vulnerable groups, who have suffered a personal concrete injury likely to be judicially redressable, as standing rules in the US dictate,<sup>386</sup> often supported by a legal structure of movements lawyers with a strategy of change in mind. Yet, the blur of what it means to be powerless affects what personal concrete injury entails and thus affects courts’ institutional

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<sup>383</sup> US Supreme Court, *United States v. Carolene Products Co.*, footnote 4.

<sup>384</sup> Eskridge Jr., “Some Effects of Identity-Based Social Movements on Constitutional Law in the Twentieth Century,” p. 2378.

<sup>385</sup> Ely, *Democracy and Distrust: A Theory of Judicial Review*.

<sup>386</sup> See UNITED STATES, US Supreme Court, *Allen v. Wright*, 468 U.S. 738 (1984); *Lujan v. Defenders of Wildlife*, 504 US 555 (1992); *Hollingsworth v. Perry*, 570 US \_ (2013).

openness. In this new scenario, social movements are not the only ones accessing courts conducting constitutional review. As this dissertation reveals, countermovements' lawyers have also reached out to courts conducting constitutional review to advance the claims of the individuals they defend.

In the US, a group perspective of equal protection is closely linked to race, both in terms of the historical foundations of the Equal Protection Clause and in the further jurisprudential developments whereby other groups such as women and gays in many occasions have sought to be seen by US courts just 'like race' did, i.e. as triggering a higher, stricter standard of scrutiny.<sup>387</sup> In sum, to assess if it is the case of a suspect class, courts consider whether – in the words of Darren Hutchinson –

“(1) the class has endured a history of discrimination; (2) the class lacks political power; (3) members of the class share an obvious and immutable characteristic that renders them susceptible to discrimination; and (4) the trait that stigmatizes the class bears no relationship to its members' ability to contribute to or perform in society.”<sup>388</sup>

Ultimately, race in the US is the default protected ground. Such racial framing - or “like race”<sup>389</sup> argument - is at the core of decades of strategic litigation by other social movements<sup>390</sup> – e.g. the gay movement and women's movement in the US. The reason

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<sup>387</sup> The scale of scrutiny goes from rational basis standard, more lenient towards the state (e.g. sexual orientation), passing through an intermediary standard applicable. See generally Yoshino, “The New Equal Protection.”

<sup>388</sup> Darren Lenard Hutchinson, “‘Not Without Political Power’: Gays and Lesbians, Equal Protection, and the Suspect Class Doctrine,” *Alabama Law Review* 65 (2013): 978.

<sup>389</sup> Janet Halley offers a critique of “like race” arguments. She argues that “‘like race’ pictorialism (...) is bad for the development of equal protection theory, among judges and elsewhere, because it promotes the idea that the traits of subordinated groups, rather than the dynamics of subordination, are the normatively important thing to notice.” Janet E Halley, “‘Like Race’ Arguments,” in *What's Left of Theory: New Work on the Politics of Legal Theory*, ed. Judith Butler, John Guillory, and Kendall Thomas (New York: Routledge, 2000), 51. See also: Bruce Ackerman, “Beyond Carolene Products,” *Harvard Law Review* 98 (February 1, 1985): 713.

<sup>390</sup> Eskridge Jr., “Some Effects of Identity-Based Social Movements on Constitutional Law in the Twentieth Century.”

is first and foremost technical: such later movements sought to build on the litigation victories of the Civil Rights Movement, in particular aiming at securing similar scrutiny of protection for other traits like race does.<sup>391</sup> The (now Justice) Ruth Ginsburg's<sup>392</sup> briefs for the American Civil Liberty Union (ACLU) in the 1971 *Reed v. Reed*<sup>393</sup> and in the 1973 *Frontiero v. Richardson*<sup>394</sup> - concerning sex discrimination – as well as the early same-sex marriage litigation in the 1970s<sup>395</sup> until recent cases<sup>396</sup> reveal at least a partial reliance on 'like race' arguments. Indeed, 'like race' arguments are so central to other movements that even countermovements have used such rhetoric (e.g. opponents to LGBT rights to distance themselves from being compared to racists).<sup>397</sup>

### 1.2.2. Conceptual Tensions in Political Powerlessness

Political powerlessness – defined as historical disadvantage and lack of political representation – has increasingly lost its relevance in US equality jurisprudence. It has given way (or embraced, depended how one looks at it) to another sense of powerlessness, detached both from notions of historical discrimination and from political under-representation, and based on individualized harm. The contempt shown

<sup>391</sup> Nevertheless, sex is subjected to intermediary scrutiny (US Supreme Court, *Craig v. Boren*, 429 US 190 (1976)) and sexual orientation is still subjected to rational basis standard (US Supreme Court, *Romer v. Evans*, 517 U.S. 620 (1996)).

<sup>392</sup> Wendy W Williams, "Ruth Bader Ginsburg's Equal Protection Clause: 1970-80," *Columbia Journal of Gender and Law* 25 (2013): 41–49.

<sup>393</sup> THE UNITED STATES, US Supreme Court, *Reed v. Reed*, 404 U.S. 71 (1971).

<sup>394</sup> THE UNITED STATES, US Supreme Court, *Frontiero v. Richardson*, 411 U.S. 677 (1973).

<sup>395</sup> Craig Konnoth, "Created in Its Image: The Race Analogy, Gay Identity, and Gay Litigation in the 1950s-1970s," *Yale Law Journal* 119, no. 2 (2009): 363. See, in particular, the relationship between the same-sex marriage case *Baker et al. v. Nelson* (dismissed by the US Supreme Court in 1972 (*Baker et al. v. Nelson*, October 10, 1972, docket 71-1027) and the 1967 decision striking down anti-miscegenation marriage laws (*Loving v. Virginia*, 388 U.S. 1 (1967)).

<sup>396</sup> E.g. see: THE UNITED STATES, US Supreme Court, *Brief of Amicus Curiae, NAACP – Legal Defense and Educational Fund, Inc. and National Association for the Advancement of Colored People in Support of Petitioners*, *Obergefell v. Hodges* – extensively comparing race and sexual orientation in the case that ultimately led to a nationwide recognition of same-sex marriage (US Supreme Court, *Obergefell v. Hodges* (576 US \_ (2015)). Also, in the case striking down part of the Defense of Marriage Act (DOMA), the lower court as well as the petitioners and remarkably the government advocated for sexual orientation being included as strict scrutiny.

<sup>397</sup> Amy L Stone and Jane Ward, "From 'Black People Are Not a Homosexual Act' to 'Gay Is the New Black': Mapping White Uses of Blackness in Modern Gay Rights Campaigns in the United States," *Social Identities* 17, no. 5 (2011): 605–24.

by the US Supreme Courts towards remedying instances of group-related powerlessness (e.g. in affirmative action cases described in more detail in the next section) illustrates this change.

When social movements and countermovements argue before courts in equality cases, the debate often centers on what it means to lack power. And lacking power can be the result of historical discrimination, of a deficit in political representation, or – as more recently recognized in the US equality jurisprudence – of a constitutionally impermissible harm on one’s individual dignity.<sup>398</sup> Political powerlessness – based on the first two factors generally – has lost its explanatory power in relation to contemporary equality jurisprudence for several reasons.

The first reason is that the US Supreme Court itself is inconsistent in its application of the concept of powerlessness. Of course, when one reads statements by the US Supreme Court regarding powerlessness, at first they seem consistent with each other. Under rational basis review, when assessing a discriminatory constitutional amendment against lesbians and gays, the US Supreme Court recalled that the Equal Protection Clause has been about protecting disadvantaged groups, “preventing the desire to harm a politically unpopular group”,<sup>399</sup> as famously quoted in the 1996 case *Romer*, mentioned above. While the majority of the US Supreme Court in *Romer* found it sufficient – for rational basis purposes – that Colorado Amendment was driven by animus to harm, the question about political powerlessness arose clearly in Justice Scalia’s dissenting opinion, addressing a much discussed question of LGBT power: “[LGBTs] possess political power much greater than their numbers, both locally and

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<sup>398</sup> THE UNITED STATES, US Supreme Court, *United States v. Windsor*, 570 U.S. \_\_ (2013).

<sup>399</sup> THE UNITED STATES, US Supreme Court, *Department of Agriculture v. Moreno*, 413 U. S. 528, 534. Also, importantly, cited in *Romer v. Evans*, 517 U.S. 620 (1996), 634.

statewide. Quite understandably, they devote this political power to achieving not merely a grudging social toleration, but full social acceptance, of homosexuality.”<sup>400</sup>

In the 1973 *San Antonio Independent School District v. Rodriguez* case – rejecting the poor as a powerless class – the Court put the judicial question as one of whether a certain group was “relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process.”<sup>401</sup> In the 1985 *Cleburne* case – regarding discrimination against mentally disabled people – the US Supreme Court understood “politically powerless (...) in the sense that they [members of the group] have no ability to attract the attention of the lawmakers.”<sup>402</sup> In *Cleburne*, the Court took two factors into consideration in order to define whether people with mental disabilities were in a quasi-suspect class, assessing their powerlessness. First, the Court looked at the existence of laws at national and state levels protecting people with mental disabilities as a sign of political power of this group. Second, the Court found that the group is so “large and amorphous [that] it would be difficult to find a principled way to distinguish a variety of other groups who have perhaps immutable disabilities setting them off from others, who cannot themselves mandate the desired legislative responses, and who can claim some degree of prejudice from at least part of the public at large.”<sup>403</sup> This meant that as the legislative branch had addressed the issues regarding the rights of persons with disabilities, the Court would not do that with heightened scrutiny.

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<sup>400</sup> THE UNITED STATES, US Supreme Court, *Romer v. Evans*, 517 U.S. 620 (1996), 646.

<sup>401</sup> US Supreme Court, *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1, decided on March 21, 1973, p. 28.

<sup>402</sup> THE UNITED STATES, US Supreme Court, *Cleburne v. Cleburne Living Ctr.*, 473 U.S. 445 (1985), Justice White, Opinion of the Court. The extract continues by highlighting the conceptual lack of clarity as far as powerless is concerned: “Any minority can be said to be powerless to assert direct control over the legislature, but if that were a criterion for higher level scrutiny by the courts, much economic and social legislation would now be suspect.”

<sup>403</sup> THE UNITED STATES, US Supreme Court, *Cleburne v. Cleburne Living Ctr.*, 473 U.S. 445 (1985), p. 445.

*Cleburne* shows a clear case of confusion in the US Supreme Court understanding of powerlessness. If the group of people with mental disabilities are too diffuse group and if law – such as the regulation at stake – often reinforce prejudices, how can the court expect that the legislature programs will in fact make such group less powerless?

When looked at more carefully, the concept of political powerlessness suffers from deep internal inconsistencies. US scholars have pointed out its contradictions and some of them have even pointed out the current irrelevance of the concept altogether. Stephanopoulos has pointed out that courts have employed innumerable indicators of political power,<sup>404</sup> listing for example the large numerical size of the total population,<sup>405</sup> the possibility of exercising the right to vote,<sup>406</sup> a high level of participation in representative bodies;<sup>407</sup> as well as high income,<sup>408</sup> and finally, the existence of legislation protecting certain groups, which denotes the power of a group to draw the attention of lawmakers, as mentioned above.<sup>409</sup> Stephanopoulos argues that taken together those factors of power are inconsistent with each other – e.g. large numerical size does not mean necessarily high participation in representative bodies - which undermines its value.<sup>410</sup> The argument is not new: the oral arguments in *Frontiero*

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<sup>404</sup> Nicholas Stephanopoulos, “Political Powerlessness,” *New York University Law Review*, Forthcoming, 2015, 1537–42.

<sup>405</sup> THE UNITED STATES, US Supreme Court, *United States v. Virginia*, 518 U.S. 515, 575 (1996) (Scalia, J., dissenting).

<sup>406</sup> THE UNITED STATES, US Supreme Court, *Hampton v. Mow Sun Wong*, 426 U.S. 88, 102 (1976); *Foley v. Connelie*, 435 U.S. 291, 294 (1978).

<sup>407</sup> THE UNITED STATES, US Supreme Court, *Frontiero v. Richardson*, 411 U.S. 677, 686 n.17 (1973) (plurality opinion).

<sup>408</sup> THE UNITED STATES, US Supreme Court, *Romer v. Evans*, 517 U.S. 620, 645–46 (1996) (Scalia, J., dissenting).

<sup>409</sup> THE UNITED STATES, US Supreme Court, *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 444–45 (1985).

<sup>410</sup> “The crucial point about these definitions is that they are entirely inconsistent with one another. Gays may be a small and underrepresented minority frequently targeted by hostile legislation (implying powerlessness), but they also vote freely, enjoy reasonable affluence, and win some policy battles (implying power). Similarly, blacks seem weak if their population share and income are emphasized, but quite potent if the spotlight shifts to their access to the franchise, descriptive representation, and success in passing anti-discrimination and affirmative action laws.”

already signalize<sup>411</sup> that – while women are contextual minorities like Afro-Americans, the fact that they are often a numerical majority does not imply that the same women exercise significant political power.

The second reason is that political powerlessness “enjoys weak historical grounding”,<sup>412</sup> because – as suggested by the sociological literature on countermovements presented in Chapter 3 – groups must gather a considerable level of political capital to call the attention of lawmakers (even if it is for lawmakers to further marginalize them through discriminatory legislation), or in order to mobilize enough resources to take their battles to court. This is a well-documented paradox at the core of the concept of political powerlessness. For instance, Kenji Yoshino<sup>413</sup> and David Schraub<sup>414</sup> reveal that successful strategic litigation by the gay movement in the US, combined with changing attitudes of the public towards gay rights, leave the gay movement in a hard situation: if movement-building assumes that gathering significant political capital is part of mobilization itself, why should courts still consider them powerless?

### 1.2.3. *Towards individualization: from political powerlessness as a gatekeeper concept and individualization of harm as a way out*

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See: Stephanopoulos, “Political Powerlessness”, 1540.

<sup>411</sup> THE UNITED STATES, US Supreme Court, *Frontiero v. Richardson*, 411 U.S. 677, 686 n.17 (1973). Listen to the oral arguments here: <https://www.oyez.org/cases/1972/71-1694>. Available at: Sept. 30<sup>th</sup>, 2018.

<sup>412</sup> David Schraub, “The Price of Victory: Political Triumphs and Judicial Protection in the Gay Rights Movement,” *The University of Chicago Law Review* 77, no. 3 (2010): 1437.

<sup>413</sup> Kenji Yoshino, “The Gay Tipping Point,” *{UCLA} Law Review* 57 (June 2010): 1537, <http://search.ebscohost.com/login.aspx?direct=true&db=edslex&AN=edslex6C7AD44C&site=eds-live>.

<sup>414</sup> “...this paradigm leaves many minority groups in a perplexing paradox. Since truly powerless groups do not typically receive judicial protections, a vulnerable social group must show political power in order to gain the attention of the courts. But, by showing this power, vulnerable groups simultaneously give the judiciary a doctrinal excuse to reject their claims. The history of gay rights illustrates the problem.” See: Schraub, “The Price of Victory: Political Triumphs and Judicial Protection in the Gay Rights Movement,” 1437.

Political powerlessness has increasingly lost its explanatory power in contemporary equality jurisprudence in the US. As a legal concept, political powerlessness cannot elucidate why, on one hand, major developments in civil rights in the US such as the nationwide recognition of same-sex marriage in *Obergefell v. Hodges* in 2015<sup>415</sup> occurred the way they did (i.e. without reference to the level of scrutiny). On the other, they cannot explain why other major victories to countermovements, such as allowing states to ban racially-conscious affirmative action programs through state amendments, as the US Supreme Court did in *Schuetz* in 2014, occurred without much consideration of the role historical discrimination plays in determining powerlessness in the majority opinion.

From an institutional openness angle, jurisprudence has transformed political powerlessness into a gatekeeper concept. In other words, arguing political powerlessness before the US Supreme Court – e.g. by seeking the recognition of one’s group as a suspect class – might actually be counterproductive, in the sense that the US Supreme Court is alternatively more focused on looking at constitutional injuries from an individualized angle. One way of doing so is through framing powerlessness as individualized **liberty and/or dignity claims**.

First of all, in order to replace political powerlessness gradually by individualized claims of liberty or dignity, one must first replace group-related claims (e.g. claims on suspect classes) with concerns about *individual* harms. One clear example of this transition is the heavily worded debate between Chief Justice Roberts, writing for a plurality Court, and Justice Breyer and Justice Stevens, dissenters, in

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<sup>415</sup> UNITED STATES, US Supreme Court, *Obergefell v. Hodges*, 576 U.S. \_\_\_\_ (2015).



*Parents Involved*<sup>416</sup> over the meaning and legacy of *Brown v. Board of Education*. *Parents Involved* concerned with the constitutionality of affirmative action program, in particular the use of race as one of the main tiebreakers in assigning students to schools in order to maintain racial diversity. For Chief Justice Roberts,

“Before *Brown*, schoolchildren were told where they could and could not go to school based on the color of their skin. The school districts in these cases have not carried the heavy burden of demonstrating that we should allow this once again—even for very different reasons. For schools that never segregated on the basis of race, such as Seattle, or that have removed the vestiges of past segregation, such as Jefferson County, the way “to achieve a system of determining admission to the public schools on a nonracial basis,” *Brown II*, 349 U. S., at 300–301, is to stop assigning students on a racial basis. The way to stop discrimination on the basis of race is to stop discriminating on the basis of race.”<sup>417</sup>

In this view, both schools in *Brown* and in *Parents Involved* imposed harm on school children because they were assigned to the schools entirely or partly because of their race. Yet, this reading disregards however the difference that in *Brown* such racial component was used to segregate those children and in *Parents Involved* the racial component was used for racial diversity. As a reaction, Justice Breyer and Justice Stevens rejected equalizing the impact of the racial component in *Parents Involved* with

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<sup>416</sup> UNITED STATES, US Supreme Court, *Parents Involved in Community Schools v. Seattle School District No. 1*, 551 US 701 (2007), decided on Jun 28, 2007.

<sup>417</sup> THE UNITED STATES, US Supreme Court, *Parents Involved in Community Schools v. Seattle School District No. 1*, 551 US 701 (2007), p. 40. Available at: <https://www.supremecourt.gov/opinions/06pdf/05-908.pdf>. Last time accessed: Sept. 30<sup>th</sup>, 2018.

the racial segregation in *Brown*. Justice Stevens was clear in saying that “There is a cruel irony in The Chief Justice’s reliance on our decision in *Brown v. Board of Education*.”<sup>418</sup> The liberal Justice continued by saying that: “The Chief Justice fails to note that it was only black schoolchildren who were so ordered [assigned to schools according to their race]; indeed, the history books do not tell stories of white children struggling to attend black schools (...) In this and other ways, the Chief Justice rewrites the history of one of this Court’s most important decisions.”<sup>419</sup>

This debate over the legacy of *Brown* tells much about how the US Supreme Court struggles with balancing harms caused by historical discrimination (e.g. racial segregation against Black people in *Brown*) and individualized harms caused by remedial policies or even by policies seeking racial diversity (e.g. impact on individual White children who were not assigned to their preferred schools due to several factors including race in *Parents Involved*). Detaching individualized harms from their historical context allows for an individualization of harms that enable equalizing racial diversity with the evils of racial segregation.

Second, when the US Supreme Court becomes more concerned with individualized harm rather than *strict sensu* political powerlessness, arguments on individual harm started to be argued in terms of harm to liberty or dignity, rather than harm derived from lack of political power which was before translated as historical discrimination and/or lack of political representation.

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<sup>418</sup> THE UNITED STATES, US Supreme Court, *Parents Involved in Community Schools v. Seattle School District No. 1*, 551 US 701 (2007), p. 1 (Justice Stevens dissenting). Available at: <https://www.supremecourt.gov/opinions/06pdf/05-908.pdf>. Last time accessed: Sept. 30<sup>th</sup>, 2018.

<sup>419</sup> THE UNITED STATES, US Supreme Court, *Parents Involved in Community Schools v. Seattle School District No. 1*, 551 US 701 (2007), p. 2 (Justice Stevens dissenting). Available at: <https://www.supremecourt.gov/opinions/06pdf/05-908.pdf>. Last time accessed: Sept. 30<sup>th</sup>, 2018.

The history of recent LGBT litigation in the US tells a story of how individualized harms get recognized by the US Supreme Court in terms of liberty or dignity claims, and not in terms of political powerlessness. They compose a constitutional narrative recognizing institutional harm against LGBT people and restricting countermovements' claim of institutional harm. Those cases promoted constitutional change and ultimately limited countermovements' contestation outside courts by adding a new layer of meaning to the constitutional text in a gradual fashion: first rejecting institutional harm as a personal injury (*Perry*), then reinforcing the freedom to marry in state law (*Windsor*) based on individual dignity and, finally, extending such freedom nationwide on the basis of the institutional harm the exclusion of same-sex couples from marriage causes them (*Obergefell*) and preventing states from denying legal recognition to same-sex marriage and the children as part of them (*Pavan*).

Those cases were not argued at the level of the US Supreme Court in terms of LGBT people as a suspect class due to their political powerlessness, but rather on the individualized harm on one's dignity (e.g. equal dignity of marriage) or liberty (e.g. freedom to marry).

It is very much telling that in *Perry* – a case discussed in the previous Chapter – the US Supreme Court was silent on political powerlessness of LGBT people in fighting against a popular initiative that would make it harder to revert such legal change. This is specially telling because political powerlessness could apply to the case which in fact deals with political representation and sovereign rights of people in popular initiatives; issues that could have been connected with Ely's theory for one. The Ninth Circuit in *Perry* – while not applying the suspect class standard – “found that Proposition Eight failed to satisfy rational basis review. (...) (“[P]roposition 8 operates

with no apparent purpose but to impose on gays and lesbians, through the public law, a majority's private disapproval of them and their relationships, by taking away from them the official designation of 'marriage,' with its societally recognized status. Proposition 8 therefore violates the Equal Protection Clause.”<sup>420</sup> This line of argumentation – which, as mentioned earlier derived from *Romer*'s reasoning based on the desire to harm - addresses more clearly the issue of the desire to harm a group than actually discusses the political powerlessness due to which such group has repeatedly been discriminated.

In the *Windsor* majority opinion, Justice Kennedy made explicit the harm argument. After citing the key phrase in *Romer* about the impermissibility of desire to harm a unpopular group, Justice Kennedy noted that the main objective of DOMA was precisely to impose such harm on the dignity of the same-sex couples recognized as such by several state laws across the country. In his words, “ this is strong evidence of a law having the purpose and effect of disapproval of that class. The avowed purpose and practical effect of the law here in question are to impose a disadvantage, a separate status, and so a stigma upon all who enter into same-sex marriages made lawful by the unquestioned authority of the States.”<sup>421</sup> The economic harm of paying taxes – not applicable to different-sex couples - was incidental. The actual effect of the tax discrimination was a deeper one: the stigma imposed by DOMA itself on an entire class of people in the best tradition of *Romer*, according to the dignity-based rhetoric of Justice Kennedy, the harm imposed upon same-sex couples was a deeper one:

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<sup>420</sup> Hutchinson, “‘Not Without Political Power’: Gays and Lesbians, Equal Protection, and the Suspect Class Doctrine,” n. 19.

<sup>421</sup> THE UNITED STATES, US Supreme Court, *United States v. Windsor*, 570 US \_\_\_\_ (2013), pages 20-21. Available at: [https://www.supremecourt.gov/opinions/12pdf/12-307\\_6j37.pdf](https://www.supremecourt.gov/opinions/12pdf/12-307_6j37.pdf). Last time accessed: Sept. 30<sup>th</sup>, 2018.

With such harm-based judicial discourse in mind, the nationwide recognition of same-sex marriage in the US – through *Obergefell*<sup>422</sup> case decided in 2015 – seems logical, despite the controversy around it. *Obergefell*'s petitioners gathered several same-sex couples and two men whose partners were deceased, all under marriages not recognized by their home states. The majority opinion coined by Justice Kennedy recognizes the harm in being excluded from the institution of marriage beyond the economic harm it might cause. In his words:

“same-sex couples are denied the constellation of benefits that the States have linked to marriage. This harm results in more than just material burdens. Same-sex couples are consigned to an instability many opposite-sex couples would deem intolerable in their own lives. As the State itself makes marriage all the more precious by the significance it attaches to it, exclusion from that status has the effect of teaching that gays and lesbians are unequal in important respects. It demeans gays and lesbians for the State to lock them out of a central institution of the Nation’s society.”<sup>423</sup>

*Obergefell* read the history of discrimination against same-sex families as imposing harm on the dignity of the applicants, not as a result of group-related powerlessness which would call for strict scrutiny or any other kind of more heightened scrutiny for that matter. Justice Kennedy, who wrote the majority opinion, is silent about the applicable standard. Instead, Justice Kennedy focuses his writing on the fundamental

<sup>422</sup> THE UNITED STATES, US Supreme Court, *Obergefell v. Hodges*, 576 US \_\_\_\_ (2015). Available at: [https://www.supremecourt.gov/opinions/14pdf/14-556\\_3204.pdf](https://www.supremecourt.gov/opinions/14pdf/14-556_3204.pdf). Last time accessed: Sept. 30<sup>th</sup>, 2018.

<sup>423</sup> THE UNITED STATES, US Supreme Court, *Obergefell v. Hodges*, 576 US \_\_\_\_ (2015), page 17. Available at: [https://www.supremecourt.gov/opinions/14pdf/14-556\\_3204.pdf](https://www.supremecourt.gov/opinions/14pdf/14-556_3204.pdf). Last time accessed: Sept. 30<sup>th</sup>, 2018.

right to marry and the equal dignity of the different-sex and same-sex couples, rather than on the political powerlessness of LGBT people as individuals. Such framing is clear in Justice Kennedy's emphasis on marriage as a dignifying institution:

“No union is more profound than marriage, for it embodies the highest ideals of love, fidelity, devotion, sacrifice, and family. In forming a marital union, two people become something greater than once they were. As some of the petitioners in these cases demonstrate, marriage embodies a love that may endure even past death. It would misunderstand these men and women to say they disrespect the idea of marriage. Their plea is that they do respect it, respect it so deeply that they seek to find its fulfillment for themselves. Their hope is not to be condemned to live in loneliness, excluded from one of civilization's oldest institutions. They ask for equal dignity in the eyes of the law. The Constitution grants them that right.”<sup>424</sup>

One of the practical consequences of this focus on the immaterial benefits of marriage came in *Pavan* case.<sup>425</sup> There, a *per curiam* opinion of the majority of the Court ordered the state of Arkansas to follow *Obergefell*'s recognition of the right to same-sex marriage, ordering to include in the birth certificates the name of the female spouse of a woman who gave birth in Arkansas, even if the child is biologically the result of an artificial insemination. Interestingly, in *Pavan* the Court made clear that birth certificates are not only about a bureaucratic step in a marital relationship, but rather a

<sup>424</sup> THE UNITED STATES, US Supreme Court, *Obergefell v. Hodges*, 576 US \_\_\_\_ (2015), page 28. Available at: [https://www.supremecourt.gov/opinions/14pdf/14-556\\_3204.pdf](https://www.supremecourt.gov/opinions/14pdf/14-556_3204.pdf). Last time accessed: Sept. 30<sup>th</sup>, 2018.

<sup>425</sup> THE UNITED STATES, US Supreme Court, *Pavan v. Smith*, 582 US \_ (2017). Available at: <https://supreme.justia.com/cases/federal/us/582/16-992/case.pdf>. Last time accessed: Sept. 30<sup>th</sup>, 2018.

*form of legal recognition* that should be equally available, thus recognizing the institutional harms of laws that do not take marriage equality seriously. Furthermore, *Pavan* shows the willingness of the Court – for the sake of enforcing marriage equality recognized in *Obergefell* – to strike down laws that fall short from providing equal treatment to same-sex marriages in all aspects. In his dissenting opinion, Justice Gorsuch did not find the significance of including one’s married parents on the birth certificate, given that for him it is a ‘*biology based birth registration regime*’.<sup>426</sup>

This choice of judicial reasoning which privileges liberty and dignity claims over political powerlessness claims comes at a cost. Focusing on fundamental right to marry attaches LGBT rights not so much to the equal dignity of LGBT people as persons but rather as couple.<sup>427</sup> Thus, it does not translate so neatly to other potential cases that might reach the highest court of the land where discrimination against LGBT *persons* (and not couples) would be at stake. The recognition of LGBT individuals as a suspect class would have made it harder for those in favor of discrimination against LGBT people – e.g. Religious Right countermovement - simply because the judicial standard of strict scrutiny would be harder to meet than the amorphous standard of equal dignity of same-sex couples. While some scholars have read the equal dignity aspect of Justice Kennedy’s reasoning in *Obergefell* as implying that the US Supreme

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<sup>426</sup> THE UNITED STATES, US Supreme Court, *Pavan v. Smith*, 582 US \_\_ (2017), Justice Gorsuch dissenting, p. 2. Available at: <https://supreme.justia.com/cases/federal/us/582/16-992/case.pdf>. Last time accessed: Sept. 30<sup>th</sup>, 2018.

<sup>427</sup> Courtney G Joslin, “The Gay Rights Canon and the Right to Nonmarriage,” *BUL Rev.* 97 (2017): 425; Melissa Murray, “*Obergefell v. Hodges* and Nonmarriage Inequality,” *Cal. L. Rev.* 104 (2016): 1207. For additional reading with a critique of marriage-focused LGBT legal mobilization, see: Douglas Nejaime, “Before Marriage : The Unexplored History of Nonmarital Recognition and Its Relationship to Marriage” 1 (2014); NeJaime, “Marriage, Cruising, and Life in Between: Clarifying Organizational Positionalities in Pursuit of Polyvocal Gay-Based Advocacy.”

Court in fact agrees that LGBT people are a suspect class,<sup>428</sup> the decision simply does not say so, which other scholars emphatically regret.<sup>429</sup>

When dignity is used in an individualized frame, it can further harm historically discriminated people, even when they win. In relation to the US jurisprudence on sexual orientation Darren Lenard Hutchinson has recently mentioned:

“Court precedent that portrays dignity in liberal terms contradictorily preserves social inequality because the Court has carefully tailored these rulings to limit their reach. In particular, while the Court has utilized dignity to invalidate legislation that discriminates on the basis of sexual orientation, its rulings do not imply broad disruption of heteronormative state action. Precedent related to sexual orientation has limited reach because the Court has declined to consider whether LGBT persons constitute a suspect class.”<sup>430</sup>

Hutchinson makes the case that, through the use of dignity-based arguments, the US Supreme Court has failed to provide a legal framing through which substantial equality – racial and sexual – could be achieved. In his words:

“Although dignity-based claims look promising on the surface, a closer examination of Court doctrine reveals limitations. For example, the Court has invoked the dignity of whites and states to justify invalidation of race- based remedies and civil rights

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<sup>428</sup> Autumn L Bernhardt, “The Profound and Intimate Power of the Obergefell Decision: Equal Dignity as a Suspect Class,” *Tul. JL & Sexuality* 25 (2016): 1.

<sup>429</sup> Megan M Walls, “Obergefell v. Hodges: Right Idea, Wrong Analysis,” *Gonz. L. Rev.* 52 (2016): 133.

<sup>430</sup> Darren Lenard Hutchinson, “Undignified: The Supreme Court, Racial Justice, and Dignity Claims,” *Fla. L. Rev.* 69 (2017): 7.



measures. Furthermore, the Court's restrained equal protection analysis does not result from the lack of a good theory; instead, it reflects the conservative ideology of a majority of the Court. These Justices have created doctrines that mirror white majoritarian perspectives regarding race. Dignity-based claims cannot alter the Court's ideological balance.<sup>431</sup>

When scholars suggest that powerlessness is not relevant anymore to understanding equality jurisprudence because in the last decades US equality jurisprudence has been grounded in remedying individualized stigma,<sup>432</sup> what those scholars mean, as I argue in the terms of this dissertation, is that powerlessness has in fact embraced individualized harm. An equality jurisprudence focused on animus rather than historical disadvantage or lack of political representation opens the door of the courts to a myriad of claims by countermovements in which powerlessness is seem to embrace individualized dignity harm. The next section on redefinition of powerlessness will start from this point, linking it with the legal strategy of countermovements to both downplay the historical context and to individualize impact of remedial measures in equality jurisprudence.

### **1.3. South Africa: Balance by Incorporating Individualized Impact into Political Powerlessness and Courts' Partial Institutional Openness to Countermovements**

South Africa constitutes a middle ground between the United States departure from political powerlessness as the basis of equality claims and Brazilian jurisprudence at least rhetorically in favor of remedial measures. In South Africa, there is a strong focus

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<sup>431</sup> Hutchinson, 61.

<sup>432</sup> Eskridge Jr, "Is Political Powerlessness a Requirement for Heightened Equal Protection Scrutiny," 15. Susannah W Pollvogt, "Unconstitutional Animus," *Fordham Law Review* 81 (2012): 887–937.

on overcoming powerlessness through constitutional means. The path-dependence<sup>433</sup> of the South African legal system to the deep material and legal inequalities originating in the apartheid regime, aligned with the centrality of constitutionalism<sup>434</sup> as the chief proposed solution to address those inequalities led to a rhetoric of transformative constitutionalism in South Africa.

South African jurisprudence balances between the constitutional commitment to overcoming historical inequality and the risk of causing harm to the dignity of otherwise historically privileged individuals. Recent jurisprudence, especially cases dealing with the impact of affirmative action policies on privileged individuals, as shown below, makes this tension crystal clear. To the extent dignity arguments are presented by countermovements, what it also makes clear is that countermovements have found in dignity arguments (of individualized impact on dignity) a window of opportunity to make use of the equality claims, thus opening at least partially the doors of the courts in South Africa to countermovements' claims. The Constitutional Court of South Africa granted leave to hear a case in November 2018 on whether corporal punishment of children by their parents are unconstitutional.<sup>435</sup> This case was presented by a religious organization, Freedom of Religion South Africa, defending a parental right to corporally punish their children.<sup>436</sup> Depending on the Constitutional Court's view to be adopted in this case, it can open even more the door of the Court to

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<sup>433</sup> Jens Meierhenrich, *The Legacies of Law: Long-Run Consequences of Legal Development in South Africa, 1652-2000* (New York: Cambridge University Press, 2008).

<sup>434</sup> Martin Chanock, *The Making of South African Legal Culture 1902-1936: Fear, Favour and Prejudice* (New York: Cambridge University Press, 2004), 556; Klug, *Constituting Democracy: Law, Globalism and South Africa's Political Reconstruction*; Pierre Du Toit and Hennie Kotzé, *Liberal Democracy and Peace in South Africa: The Pursuit of Freedom as Dignity* (Palgrave Macmillan, 2011).

<sup>435</sup> SOUTH AFRICA, Constitutional Court, *Freedom of Religion South Africa vs. Minister of Justice and Constitutional Development, Minister of Social Development and National Director of Public Prosecutions*, YG, A263/2016, to be heard on 29 November 2018, see more here: <https://collections.concourt.org.za/handle/20.500.12144/36570>. Last accessed: September 2018.

<sup>436</sup> See more here: <https://forsa.org.za/issues/corporal-punishment/>. Last accessed: September 2018.

religion-based claims of harms by countermovements and legal organizations associated with them.

### 1.3.1. Balance Incorporating Individualized Impact into Political Powerlessness through Dignity

Dignity plays several roles in the South African constitutional order. Dignity is a fundamental value of the Republic (Section 1 (a)). Dignity is also a right in itself, a right to have one's dignity respected and protected (Section 10). Given the centrality of dignity for the constitutional order, political powerlessness in the South African equality framework is seen as a condition of unfair discrimination where harm to dignity is a primary concern.<sup>437</sup> In this equality analysis, thus, both historical discrimination and lack of political representation – two main factors in *strict sensu* political powerlessness - play a role but only in light of their impact on dignity.

Considering that dignity is the key frame applied by the South African Constitutional Court to balance competing conceptions of harm in equality jurisprudence, both social movements and countermovements use dignity as the basis of their claims whenever discrimination is argued. Discrimination is presumed<sup>438</sup> to be 'unfair' in the terms of Section 9(5) of the Constitution if the measure differentiates on one of the enumerated grounds of discrimination of Section 9(3), or – in the case of a non-enumerated ground - when the discrimination impairs the dignity of the person or category of persons at stake. In the 2000 *Harksen* case,<sup>439</sup> the Constitutional

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<sup>437</sup> Laurie Ackermann, *Human Dignity: Lodestar for Equality in South Africa* (Cape Town: Juta and Company Ltd, 2012).

<sup>438</sup> SOUTH AFRICA, *Final Constitution of 1996*, Section 9.5: "Discrimination on one or more of the grounds listed in subsection (3) is unfair unless it is established that the discrimination is fair." The interim constitution was clearer to affirm it is a matter of legal presumption in its equivalent Section 8(4): "Prima facie proof of discrimination on any of the grounds specified in subsection (2) shall be presumed to be sufficient proof of unfair discrimination as contemplated in that subsection, until the contrary is established." (SOUTH AFRICA, *Interim Constitution of 1994*, Section 8.4)

<sup>439</sup> "There will be discrimination on an unspecified ground if unspecified ground if it is based on attributes or characteristics which have the potential to impair the fundamental dignity of persons as human beings, or to affect

Court developed a three-tier test<sup>440</sup> to evaluate whether a certain situation amounts to unfair discrimination:

- step 1: the measure must pass a rationality test to a legitimate government interest;
- step 2: it must have its unfairness determined either by association to an enumerated ground or by impairing an individual's dignity;
- and, step 3: it cannot be justified as "reasonable" "in an open and democratic society based on freedom and equality".<sup>441</sup>

As dignity has become so central in equality jurisprudence in South Africa, a doctrinal and jurisprudential concern unfolded, particularly concerning the extent to which societal patterns of discrimination – often associated with group-related political powerlessness, such as historical inequality of black South Africans – are incorporated into such an individualized dignity-based test of equality. Cathi Albertyn and Beth Goldblatt heavily criticize the *Harksen* test for being narrowly individualistic and abstract.<sup>442</sup>

In more recent equality jurisprudence, the Constitutional Court of South Africa

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them adversely in a comparably serious manner." (SOUTH AFRICA, Constitutional Court, *Harksen v President of the Republic of South Africa and Others* (CCT 41/99) [2000] ZACC 29; 2000 (2) SA 825 (CC); 2000 (1) SACR 300; 2000 (5) BCLR 478 (30 March 2000), Justice Goldstone, para. 46).

<sup>440</sup> As summarized by the Court itself in: SOUTH AFRICA, Constitutional Court, *Harksen v President of the Republic of South Africa and Others* (CCT 41/99) [2000] ZACC 29; 2000 (2) SA 825 (CC); 2000 (1) SACR 300; 2000 (5) BCLR 478 (30 March 2000), Justice Goldstone, para. 53).

<sup>441</sup> The wordings are from the Interim Constitution's limitation clause, used as reference by the Court in *Harksen*. See: (SOUTH AFRICA, *Interim Constitution of 1994*, Section 33).

<sup>442</sup> "In both South African and Canadian jurisprudence, the use of 'dignity' in equality jurisprudence has been criticised for its indeterminism and for its potential to narrow the right. The narrow definition of dignity in '*Harksen v Lane*' — which turned on the way the applicant felt about the impugned law (did she feel less worthy of respect?) — generated concerns that the use of dignity might reinforce an individualised and abstract conception of equality divorced from actual social and economic disadvantage and the systemic nature of inequality. We would suggest that additional content be given to the value of equality in order to address structural disadvantage and inequalities." See: Albertyn and Goldblatt, "Towards a Substantive Right to Equality," 234.

has supplemented<sup>443</sup> the *Harksen* test,<sup>444</sup> with a more concise and closer to group-related powerlessness test in the 2004 *Van Heerden* case.<sup>445</sup> There, in recognizing the constitutionality of a pension fund scheme that favours as a remedial measure new members of the Parliament elected after the apartheid, Justice Moseneke reveals that, for the Court, the test is whether the persons at stake were subjected to unfair discrimination (step 1); whether the measure was protective of those persons (step 2); and whether the measure “promotes the achievement of equality”<sup>446</sup> (step 3).

The importance of this new approach is that it swings more clearly towards a substantive conception of equality focused on powerlessness by requiring that remedial measures overall advance equality, understood as overcoming historical under-privilege.<sup>447</sup> The impact of this new test is clear: the South African Constitutional Court used this new test in the 2005 *Fourie*<sup>448</sup> case, recognizing the constitutionality of same-sex marriages in the country, arguing for a contextual approach to equality that takes into consideration past discrimination, in line with the

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<sup>443</sup> Govender, “A Cautionary Note Regarding Substantive Equality: A Reply to Cathi Albertyn & Beth Goldblatt,” 255.

<sup>444</sup> SOUTH AFRICA, Constitutional Court, *Harksen v President of the Republic of South Africa and Others* (CCT 41/99) [2000] ZACC 29; 2000 (2) SA 825 (CC); 2000 (1) SACR 300; 2000 (5) BCLR 478 (30 March 2000), Justice Goldstone, para. 53).

<sup>445</sup> SOUTH AFRICA, Constitutional Court, *Minister of Finance and Other v Van Heerden* (CCT 63/03) [2004] ZACC 3; 2004 (6) SA 121 (CC); 2004 (11) BCLR 1125 (CC) ; [2004] 12 BLLR 1181 (CC) (29 July 2004).

<sup>446</sup> As summarized in: SOUTH AFRICA, Constitutional Court, *Minister of Finance and Other v Van Heerden* (CCT 63/03) [2004] ZACC 3; 2004 (6) SA 121 (CC); 2004 (11) BCLR 1125 (CC) ; [2004] 12 BLLR 1181 (CC) (29 July 2004), para. 37.

<sup>447</sup> As the Court in *Van Heerden* mentions: “(...) what is clear is that our Constitution and in particular section 9 thereof, read as a whole, embraces for good reason a substantive conception of equality inclusive of measures to redress existing inequality. Absent a positive commitment progressively to eradicate socially constructed barriers to equality and to root out systematic or institutionalised under-privilege, the constitutional promise of equality before the law and its equal protection and benefit must, in the context of our country, ring hollow.” SOUTH AFRICA, Constitutional Court, *Minister of Finance and Other v Van Heerden* (CCT 63/03) [2004] ZACC 3; 2004 (6) SA 121 (CC); 2004 (11) BCLR 1125 (CC) ; [2004] 12 BLLR 1181 (CC) (29 July 2004), para. 31.

<sup>448</sup> In the words of Justice Sachs – referring to *Van Heerden* – “It is precisely sensitivity to context and impact that suggest that equal treatment does not invariably require identical treatment. Thus corrective measures to overcome past and continuing discrimination may justify and may even require differential treatment.” See: SOUTH AFRICA, Constitutional Court, *Minister of Home Affairs and Another v Fourie and Another* (CCT 60/04) [2005] ZACC 19; 2006 (3) BCLR 355 (CC); 2006 (1) SA 524 (CC) (1 December 2005).

gradual case law of the Court in cases presented by the LGBT movement.<sup>449</sup>

In light of this, it is clear that in South African jurisprudence constitutional equality has been tightened up with the idea of substantially transforming power relations in society, taking into consideration the extent to which inequalities undermine dignity of individuals bearing in mind the historical inequalities they have suffered. The South African case – like Brazil – is curious in the sense that the notion of political powerlessness refers primarily to historical inequality in the social sphere, rather than to the lack of political power in representative institutions, largely dominated by the African National Congress, a party with close ties to anti-apartheid movements, including the gay and lesbian, and black movements. When it comes to cases of apartheid-era racist insults in the workplace, for instance, the South African Constitutional Court is loud and clear in remembering the country's “shameful and atrocious past”.<sup>450</sup> Overcoming past societal discrimination is the foundation of South African constitutionalism: the South African Constitution carries the expectations of a post-apartheid society where law in general, and constitutional law in particular, seeks to transform the power relations in force till then as seen in Chapter 1.

### 1.3.2. Courts' Partial Institutional Openness to Countermovements' Arguments

Bearing in mind these developments, where are the open doors for countermovements in the South African constitutional jurisprudence to present alternative equality claims detached from past discrimination? In other words, how does the current test cope with

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<sup>449</sup> SOUTH AFRICA, Constitutional Court, *National Coalition for Gay and Lesbian Equality and Another v Minister of Justice and Others* (CCT11/98) [1998] ZACC 15; 1999 (1) SA 6; 1998 (12) BCLR 1517 (9 October 1998) *National Coalition for Gay and Lesbian Equality and Others v Minister of Home Affairs and Others* (CCT10/99) [1999] ZACC 17; 2000 (2) SA 1; 2000 (1) BCLR 39 (2 December 1999).

<sup>450</sup> SOUTH AFRICA, Constitutional Court, *South African Revenue Service v Commission for Conciliation, Mediation and Arbitration and Others* (CCT19/16) [2016] ZACC 38; [2017] 1 BLLR 8 (CC); (2017) 38 ILJ 97 (CC); 2017 (1) SA 549 (CC); 2017 (2) BCLR 241 (CC) (8 November 2016), para. 2.

the proliferation of different competing claims on powerlessness in the South African constitutional equality, including the claims presented by countermovements? The answer is in the dignity dimension of equality analysis.

The tension between a group-related notion of political powerlessness and a concept of individualized harm to dignity starts with the very text of the Constitution. The South African Constitution uses the wording “persons or categories of persons” in its equality clause,<sup>451</sup> rather than groups. Laurie Ackermann, a former Justice from the South African Constitutional Court argues that this wording was “obviously chosen with great care” to confirm that “the idea of an incorporated group being the bearer of constitutional rights is a concept that has been rejected by the Constitution.”<sup>452</sup> Thus, in South Africa, while group-related powerlessness might come into the picture in equality cases via the challenged measure’s impact on individual dignity, the focus is on “persons or categories of persons”, rather than on groups.<sup>453</sup>

At the same time, textually, it is worth noting that South Africa’s Constitution – like Brazil’s - contains provisions related to protecting members of underprivileged groups as one of the fundamental goals of those transformative constitutional documents. The South African Final Constitution of 1996 explicitly refers to “advancement of equality” and “non-racialism and non-sexism” as foundations of the country’s constitutional order (Section 1.a and b.). The South African equality provision protects against ‘unfair’ discrimination on several grounds, including race

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<sup>451</sup> SOUTH AFRICA, *Final Constitution of 1996*, Section 9.2.

<sup>452</sup> Ackermann, *Human Dignity: Lodestar for Equality in South Africa*, 356–57.

<sup>453</sup> Ackermann, 357.

and sexual orientation<sup>454</sup> (Section 9.3).<sup>455</sup> Furthermore, unlike the sphere-by-sphere approach to affirmative action in the Brazilian Constitution, the South African Constitution contains a general clause authorizing remedial measures to protect disadvantaged people (Section 9.2).<sup>456</sup>

Thus, South African lawsuits against affirmative action shed light on how countermovements and their lawyers have sought redefinition of powerlessness. More specifically, recent cases against race-conscious affirmative action in the workplace, such as the *Barnard* case<sup>457</sup> and the *Solidarity v. DCS* case<sup>458</sup>, reveal attempts by countermovements - championed by the trade union Solidarity (*Solidariteit*, in Afrikaans)<sup>459</sup> as mentioned earlier – to make use of the South African constitutional framework to individualize harm detached from historical disadvantages, as mentioned in more detail in the next section.

*Barnard* dealt with the rejection of the South African Police National Commissioner to promote a white South African, Barnard, for a higher post, because doing so would not enhance the group representation within the department in light of the Employment Equity Act.<sup>460</sup> Thus, the issue there was whether Ms. Barnard was unfairly discriminated because of her race. There, the South African Constitutional

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<sup>454</sup> “Argumentation that discrimination on grounds of sexual orientation was similar to that on grounds of race successfully ensured support for the inclusion of sexual orientation in the equality clause.” David Bilchitz, “Constitutional Change and Participation of LGBTI Groups” (Stockholm, 2015), 16.

<sup>455</sup> SOUTH AFRICA, *Final Constitution of 1996*, Section 9.3: “The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.”

<sup>456</sup> SOUTH AFRICA, *Final Constitution of 1996*, Section 9.2: “Equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken.”

<sup>457</sup> SOUTH AFRICA, Constitutional Court, *South African Police Service v Solidarity obo Barnard* (CCT 01/14) [2014] ZACC 23; 2014 (6) SA 123 (CC); [2014] 11 BLLR 1025 (CC); 2014 (10) BCLR 1195 (CC); (2014) 35 ILJ 2981 (CC) (2 September 2014).

<sup>458</sup> SOUTH AFRICA, Constitutional Court, *Solidarity v Department of Correctional Services*, (CCT 78/15) [2016].

<sup>459</sup> Available at: <https://solidariteit.co.za/en/who-are-we/>.

<sup>460</sup> SOUTH AFRICA, Employment Equity Act, Section 42.



Court ruled that the National Commissioner could not appoint Barnard because, if he had done so, it “would have aggravated unacceptably the already significant overrepresentation of white women at level 9. In summary, the impact on her dignity is not excessively restrictive and indeed reasonably and justifiably outweighed by the goal of the affirmative measure.”<sup>461</sup>

*Solidarity*, on the other hand, dealt also with the application of the Employment Equity Act, but in the context of the Department of Correctional Services’ Employment Equity Plan (EEP), which used national demographics (rather than regional ones) to set the representativity goals along racial lines. This system created disparities in the application of redress measures because the demographics varied greatly between the regions where the Plan was implemented. All applicants in the case were Colored people, except one of them. They were not appointed by the Correctional Services because their race was already overrepresented according to the EEP. The Constitutional Court of South Africa found that the *Barnard* principle – according to which overrepresentation along racial lines can be a reason for not appointing a person to a position – also applies to non-White job applicants.<sup>462</sup> This would mean then that the primary goal of workplace quotas is to mirror the racial composition of South African society, rather than compensating at a higher scale past discrimination. Yet, in that case, the applicants won because the Department of Correctional Services should have used national and regional statistics, and not only national to determine the numerical goals.

These cases reveal how the South African constitutional framework, while

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<sup>461</sup> SOUTH AFRICA, Constitutional Court, *South African Police Service v Solidarity obo Barnard* (CCT 01/14) [2014] ZACC 23; 2014 (6) SA 123 (CC); [2014] 11 BLLR 1025 (CC); 2014 (10) BCLR 1195 (CC); (2014) 35 ILJ 2981 (CC) (2 September 2014), para. 183.

<sup>462</sup> SOUTH AFRICA, Constitutional Court, *South African Police Service v Solidarity obo Barnard*, para. 40.

being faithful to its transformative nature, is porous to litigation on the individual impact of affirmative action programs. Thus, the South African Constitutional Court has allowed for countermovements to have access to constitutional litigation in terms of having their day in court, on equality grounds, while not granting substantial success to countermovements' attempts of redefining harm. While *Solidarity* was a case predominately presented by Colored applicants, its underlying reason was to strategically challenge the workplace affirmative action program in place at the Department of Correctional Services.

The equality framework in South Africa, an individualized approach then opens the doors of the Constitutional Court to analyze equality claims based on harm to one's dignity that does not rely on historical group-related disadvantage. In other words, this leaves open the possibility for the Court to swing its jurisprudence – or opening its doors, to use expression from the *Walker*<sup>463</sup> case from the beginning of this Chapter – towards recognizing individual harms detached from group-related historical powerlessness. As an example of this individualization, in the *Walker* case, the South African Constitutional Court ruled in favor of a white applicant who claimed he was discriminated on the basis of race for being subjected to a costlier consumption-based system of electricity billing, as opposed to the flat rate system in force in predominantly black neighborhoods. There, the Court found harm to the petitioner's dignity, despite the background of black neighborhoods being historically impoverished, and non-payment being a generalized practice during apartheid.<sup>464</sup> The South African constitutional framework is partially open to the claims by countermovements, as they may be able to convince the Court of a redefined notion of

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<sup>463</sup> SOUTH AFRICA, *City Council of Pretoria v Walker* (CCT8/97) [1998] ZACC 1; 1998 (2) SA 363; 1998 (3) BCLR 257 (17 February 1998), para. 123

<sup>464</sup> Cite specific paragraph of the decision.

powerlessness attached to individualized harm to one's dignity, calling courts to intervene on their behalf.

Accordingly, the Constitutional Court's textual and jurisprudential focus on dignity as the pillar of constitutional equality has served as a *double-edged sword*. In certain constitutional cases, dignity has been read as incorporating contextual factors related to historical discrimination into equality analysis.<sup>465</sup> In other cases, however, dignity has opened the doors before an individualized analysis of discrimination claims benefiting historically privileged people,<sup>466</sup> which has been criticized by a part of the country's legal literature<sup>467</sup> for detaching equality from its historical context.

In these later cases, dignity has the potential to open the doors of the Constitutional Court in South Africa to claims by countermovements, particularly in challenging affirmative action measures as imposing harm to one's dignity.<sup>468</sup> With the key role that dignity plays in South African constitutional jurisprudence comes a strong emphasis on the negative impact (or, in this dissertation's terminology, harm) of discriminatory measures on individuals. In this context, therefore, contention between opposing movements in equality jurisprudence is translated into legal terms as a competition between those who claim to have suffered the greater harm to their dignity.

It is important to stress that the Constitutional Court of South Africa has been more open to countermovements' claims when there are multiple harms at stake, i.e.

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<sup>465</sup> SOUTH AFRICA, Constitutional Court, *Hoffmann v South African Airways* (CCT17/00) [2000] ZACC 17; 2001 (1) SA 1; 2000 (11) BCLR 1235 ; [2000] 12 BLLR 1365 (CC) (28 September 2000), para. 27.

<sup>466</sup> South African Constitutional Court, *City Council of Pretoria v Walker* (CCT8/97) [1998] ZACC 1; 1998 (2) SA 363; 1998 (3) BCLR 257 (17 February 1998).

<sup>467</sup> Albertyn and Goldblatt, "Towards a Substantive Right to Equality," 234.

<sup>468</sup> E.g. SOUTH AFRICA, Constitutional Court, *South African Police Service v Solidarity obo Barnard* (CCT 01/14) [2014] ZACC 23; 2014 (6) SA 123 (CC); [2014] 11 BLLR 1025 (CC); 2014 (10) BCLR 1195 (CC); (2014) 35 ILJ 2981 (CC) (2 September 2014).

claimed between people who are claiming to be more powerless than the opposing party. The *Barnard* and *Solidarity* cases show that line of questioning in the context of affirmative action. Meanwhile, in more straightforward cases where racism at the workplace is involved,<sup>469</sup> the Constitutional Court of South Africa has been clearer in its commitment to racial justice, rather than balancing between the competing claims presented by White and Black applicants. This is the case of *Rustenburg Platinum Mine v SAEWA obo Bester and Others*, decided in May 2018, where a White worker considered disproportional his dismissal because of a comment at his workplace perceived to be racist. There, the Court reinforced both the fight against racism and the non-racialist nature of the Constitution, which was spotted out in Chapter 1 as a key, disharmonic aspect of the South African Constitution, because it recognizes race as structural aspect of post-apartheid life while striving for a non-racial society. The Court here reinforced that as far as racism is concerned in South Africa, powerlessness swings towards protecting historical disadvantaged people in cases where the other parties do not have a constitutionally relevant harm to claim:

“The past may have institutionalised and legitimised racism but our Constitution constitutes a “radical and decisive break from that part of the past which is unacceptable”. Our Constitution rightly acknowledges that our past is one of deep societal divisions characterised by “strife, conflict, untold suffering and injustice”. Racism and racial prejudices have not disappeared overnight, and they stem, as demonstrated in our history, from a misconceived view that some are superior to others. These prejudices do not only manifest themselves with regards to race

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<sup>469</sup> SOUTH AFRICA, Constitutional Court, *Rustenburg Platinum Mine v SAEWA obo Bester and Others* (CCT127/17) [2018] ZACC 13 (17 May 2018).

but it can also be seen with reference to gender discrimination. In both instances, such prejudices are evident in the workplace where power relations have the ability “to create a work environment where the right to dignity of employees is impaired”. Gratuitous references to race can be seen in everyday life, and although such references may indicate a disproportionate focus on race, it may be that not every reference to race is a product or a manifestation of racism or evidence of racist intent that should attract a legal sanction.”<sup>470</sup>

In contexts where the contention is not about different groups making opposing equality claims, but rather a conflict between an equality claim and a claim of another nature (such as economic), the balance has also swung towards heavy consideration of historical group discrimination. A key example is the *Hoffman* case of 2000, contrasting an equality claim of a person living with HIV, an applicant for an airline cabin crew position, and the economic interests of the South African Airways in denying employment to persons living with HIV for safety reasons.

In *Hoffman*, the Constitutional Court addresses the question of political powerlessness: “Our Constitution protects the weak, the marginalised, the socially outcast, and the victims of prejudice and stereotyping. It is only when these groups are protected that we can be secure that our own rights are protected.”<sup>471</sup> The present dissertation, however, is concerned primarily with those harder cases of contention between opposing claims of equality, in particular involving countermovements, rather than with the easier cases such as *Hoffman*, where the conflict is between the

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<sup>470</sup> SOUTH AFRICA, Constitutional Court, *Rustenburg Platinum Mine v SAEWA obo Bester and Others*, para. 52-53.

<sup>471</sup> SOUTH AFRICA, Constitutional Court, *Hoffmann v South African Airways* (CCT17/00) [2000] ZACC 17; 2001 (1) SA 1; 2000 (11) BCLR 1235 ; [2000] 12 BLLR 1365 (CC) (28 September 2000), para. 34.

underprivileged and a powerful group and their economic interests.

In the jurisprudence regarding sexual orientation and religion, South African Constitutional Court has in fact closed the door of litigation by same-sex couples <sup>472</sup>

#### 1.4. Conclusion: Powerlessness as the Basis for Institutional Openness in Equality Jurisprudence

South Africa (and its inherent tension between transformative constitutionalism and individualized concern with harm) constitutes a middle ground between Brazil (and its full rhetorical embrace of group-related political powerlessness) and the United States (and its sharper aversion to group-related political powerlessness derived from how judicial cases are formulated there in individualized terms and the increasing pluralism anxiety). In its turn, South Africa, for obvious historical reasons derived from the apartheid legacy, takes societal discrimination seriously, while leaving the doors of the courts open to the countermovements here analyzed via an individualized concern for dignity. That said, while Brazil and South Africa incorporate a group perspective in their equality jurisprudence because of the textual emphasis on substantive equality with constitutional clauses listing protected characteristics, the United States does so by the traditional three-tier classification of standards of scrutiny in Equal Protection, and more recently, through an animus test focused on prejudice and its harm to one's dignity.

Thus, political powerlessness in equality jurisprudence is bound to very different functions in each jurisdiction: in the United States, to correct malfunctions in the representative process; in Brazil, to realize the transformative goal of the

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<sup>472</sup> SOUTH AFRICA, Constitutional Court, *De Lange v Presiding Bishop of the Methodist Church of Southern Africa for the time being and Another* (CCT223/14) [2015] ZACC 35; 2016 (1) BCLR 1 (CC); 2016 (2) SA 1 (CC) (24 November 2015).

constitution; and in South Africa, to also enforce transformation but with the ultimate goal of overcoming group-related inequalities towards a non-racial, non-sexist society of the future. A closer look at these three functions, however, points to a common concern which will be relevant for the remainder of this dissertation: powerlessness has historically served as a gatekeeper for courts to know when to address harms to historically discriminated groups and/or groups historically left out of political processes.

## **2. Redefining Powerlessness: From Historical-Political Powerlessness to Individualized Impact**

A common theme in the cases brought by countermovements is the redefinition of powerlessness they build their claims on. The two shifts on powerlessness discussed here are: 1) downplaying the importance of contextual factors associated with group-related political powerlessness in constitutional litigation; 2) moving the focus from political powerlessness to individualized suffering through emphasis on the harm to one's dignity resulting from the victories of others. In this section, each of these redefinitions will be explained in more detail.

### **2.1. Redefinition 1: Downplaying Context Approach**

Countermovements have downplayed the importance of contextual factors associated with political powerlessness in constitutional equality litigation, such as statistical data and historical facts. I call this the downplaying context approach. This strategy will be presented, firstly, by making use of the US example of detaching powerlessness from its historical context and, secondly, presenting the South African case where context is often a concern, but balanced against other factors. Finally, the Brazilian jurisprudence will be presented as a counterpoint to the US and South African situations. The

downplaying context approach reduces the argumentative burden for countermovements, by releasing them from the need of challenging historical-structural discrimination, and by allowing them to make arguments focused on individuals, rather than as members of groups. This approach increases the appeal of countermovements' claims, thus the institutional openness of courts to such claims.

### 2.1.1. *Downplaying Context: the US example*

Strict scrutiny requires special judicial attention to state measures targeting individuals belonging to specific groups which historically have been discriminated in the political branches.<sup>473</sup> Different levels of scrutiny imply different levels of constitutionally relevant harm suffered. Powerlessness, it is argued here, implies a harm against members of a given group because those members have suffered harms from historical disadvantages (e.g. slavery) and were sidelined and mistreated by the political parties.

One way of zooming out from historical context is to focus in very general terms on the format of discrimination measures (e.g. the fact that affirmative action policies often classify groups) to **equalize affirmative action with the history of racism**. The 1989 *Croson* case<sup>474</sup> clarified that strict scrutiny equally applies to benign racial classification in relation to state and local measures (e.g. affirmative action in city contractual processes), while in 1995, the *Adarand v. Peña*<sup>475</sup> case applied the same strict standard to the federal government. In this analysis, the context is lost because remedial measures such as affirmative action programs in universities are looked at

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<sup>473</sup> Yoshino, "The New Equal Protection," 756–57.

<sup>474</sup> See: THE UNITED STATES, US Supreme Court, *City of Richmond v. J. A. Croson Company*, 488 US 469 (1989).

<sup>475</sup> See: THE UNITED STATES, US Supreme Court, *Adarand Constructors, Inc. v. Peña*, 515 US 200 (1995).



from afar, from where only their general format matters and not their underlying, historical reasons that are evident from a closer look

Changes can occur in the judicial understanding of powerlessness because one of its key foundations is malleable. The past discrimination rationale is read increasingly a fact-specifically by the US Supreme Court. Courts often zoom in or out the history of discrimination, to the extent of leaving little room for discussions of structural inequality,<sup>476</sup> which would often require covering a longer period in the analysis. This process might pave the way of countermovements to equality litigation by releasing the argumentative burden of placing discrimination in historical terms. The downplaying approach contributes to the judicial acceptance of countermovements' claims.

For instance, the US Supreme Court has read political powerlessness Afro-Americans had suffered in a localized manner in several cases. In *Croson*, the US Supreme Court struck down a city regulation that reserved 30% of the city contracts to minority businesses. By referring to local politics as evidence of political power – rather than the broader patterns of systematic discrimination in the country at large –, Justice O'Connor reveals that **in certain cases the Court can zoom in or out its geographical or even temporal focus on what constitutes political powerlessness**, leaving this issue even more subject to the above-mentioned criticism of inconsistency. Once the zoom in/out effect takes care of long-term historical claims, the courts' doors become open to balancing harms which the constitutional framework presumes to be *prima facie* equally important, while in historical terms they are not. Justice O'Connor points out in *Croson* the fact that “blacks constitute approximately 50% of the population of the

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<sup>476</sup> Derrick A Bell, *Race, Racism and American Law*, 4th Editio (New York: Aspen Law & Business, 2000); Adrienne D Dixon and Celia K Rousseau, “And We Are Still Not Saved: Critical Race Theory in Education Ten Years Later,” *Race Ethnicity and Education* 8, no. 1 (2005): 7–27, <https://doi.org/10.1080/1361332052000340971>.

city of Richmond [and] five of the nine seats on the city council are held by blacks”,<sup>477</sup> in order to cast doubt on the powerlessness of the group at stake here.

The fact that Justice Marshall, in his dissent in *Croson*, employs national, rather than local statistics in order to prove racial discrimination in city contracting speaks volumes about the way the Court can zoom in or out its focus to conceptualize powerlessness (interestingly enough, Justice Marshall – making use of a similar metaphor – calls the majority view *myopic*).<sup>478</sup>

What do local statistics mean in terms of specificity on the history of past discrimination for the overall finding of unconstitutionality in *Croson*? In *Croson*, Justice O’Connor employs statistics to show the political power of black politicians at the local level as a justification to apply strict scrutiny to affirmative action programs, because “political majority will more easily act to the disadvantage of a minority based on unwarranted assumptions or incomplete facts.”<sup>479</sup> In other words, when Black people become a majority in particular decision-making bodies, despite being a socially discriminated group, might act to the disadvantage of a White minority, thus calling for strict scrutiny for the *Croson* court.

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<sup>477</sup> See: UNITED STATES, US Supreme Court, *City of Richmond v. J. A. Croson Company*, 488 US 469 (1989), p. 495. See also: Angela Onwuachi-Willig, Emily Houh, and Mary Campbell, “Cracking the Egg: Which Came First: Stigma or Affirmative Action?,” *California Law Review*, 2008, 1299–1352.

<sup>478</sup> See: UNITED STATES, US Supreme Court, *City of Richmond v. J. A. Croson Company*, 488 US 469 (1989), Justice Marshall, dissenting. In Justice Marshall’s words: “As an initial matter, the majority takes an exceedingly myopic view of the factual predicate on which the Richmond City Council relied when it passed the Minority Business Utilization Plan. The majority analyzes Richmond’s initiative as if it were based solely upon the facts about local construction and contracting practices adduced during the city council session at which the measure was enacted. In so doing, the majority downplays the fact that the city council had before it a rich trove of evidence that discrimination in the Nation’s construction industry had seriously impaired the competitive position of businesses owned or controlled by members of minority groups. It is only against this backdrop of documented national discrimination, however, that the local evidence adduced by Richmond can be properly understood. The majority’s refusal to recognize that Richmond has proved itself no exception to the dismaying pattern of national exclusion which Congress so painstakingly identified infects its entire analysis of this case.” (p. 530).

<sup>479</sup> UNITED STATES, US Supreme Court, *City of Richmond v. J. A. Croson Company*, 488 US 469 (1989), page 495-6. Justice O’Connor even uses Ely’s article on reverse discrimination for this point: John Hart Ely, “The Constitutionality of Reverse Racial Discrimination,” *The University of Chicago Law Review*, 1974, 723–41.

There are at least two detachments currently at play in the US constitutional jurisprudence on equality in affirmative action cases: first, when applied to affirmative action, strict scrutiny has been detached from powerlessness and the harms it causes; second, the diversity rationale has been detached from past discrimination. By detaching constitutional harms in equality jurisprudence from the harms of powerlessness and past discrimination, the US Supreme Court has downplayed the relevance of social and historical contexts in defining what it means to be harmed in a constitutionally relevant manner. This is particularly problematic taking into consideration how affirmative action plans have been challenged by White/majority applicants, in particular being brought up by countermovements.

### **Detaching strict scrutiny from powerlessness**

In affirmative action cases, when the notion of political powerlessness is detached from historical disadvantage and is turned into a battle about which stigmatic harm is more severe, both social movements and countermovements have the possibility of getting judicial acceptance of their claims because both can plausibly argue to have suffered a stigmatic harm.

By stigmatic harm, this dissertation means the injury caused by government programs or directly from legislation that sends a signal that some are inferior to others on the grounds of race, sexual orientation, gender identity or others. The term comes from Justice O'Connor's opinion joined by the Chief Justice, Justice White, and Justice Kennedy in *City of Richmond v. J. A. Croson Company* (1989), where she mentioned in an opinion: "Classifications based on race carry a danger of stigmatic harm. Unless

they are strictly reserved for remedial settings, they may in fact promote notions of racial inferiority and lead to a politics of racial hostility.”<sup>480</sup>

One of the key critics of equalizing harms suffered from racism with harms from affirmative action programs are the Critical Race Theorists. Critical Race Theory (hereafter, CRT) started as a movement by students and professors in some of the most prestigious law schools in the United States, such as at University of California at Berkeley since 1960’s<sup>481</sup>, and at Harvard Law University in the 1980’s<sup>482</sup> seeking to challenge institutional racism. CRT is a theory designed to criticize the liberal foundation of the Civil Rights Movement. In particular, it rejects “*traditional civil rights, which embraces incrementalism and step-by-step progress, [while] critical race theory questions the very foundations of the liberal order, including equality theory, legal reasoning, Enlightenment rationalism, and neutral principles of constitutional law,*”<sup>483</sup> as pointed out by Delgado and Stefancic. Therefore, CRT presents itself as a radical theory, which seeks to challenge how legal scholars understand law and its relation with societal distribution of power as well as it seeks to change such distribution including with the use of law itself. Derrick Bell makes it clear that for:

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<sup>480</sup> See: UNITED STATES, US Supreme Court, , 488 US 469 (1989), page 493.

<sup>481</sup> Sumi Cho and Robert Westley, “Critical Race Coalitions: Key Movements That Performed the Theory,” (*U.C. Davis Law Review* no. 4 (1999): 1377. In this piece, Sumi Cho and Robert Westley expressed their concern “*that Crenshaw et al. version overemphasizes the Harvard-centricity of CRT with the foundational attention focused upon Harvard’s 1981 Alternative Course protest, and the Harvard-based CLS movement generally*” (footnote 5).

<sup>482</sup> For the history of the student movement at Harvard which challenged institutional racism, see; Crenshaw, Kimberlé Williams Crenshaw, “Twenty Years of Critical Race Theory: Looking Back To Move Forward,” *Connecticut Law Review* 43, no. 5 (July 2011): 1253–1352. According to Crenshaw, the starting point of the Critical Race Theory was “*institutional struggle over race, pedagogy, and affirmative action at America’s elite law schools*” (p. 1264). In particular Crenshaw highlights the episode at the Harvard Law School in the 80’s, where students with the support of some professors organized an alternative course, to protest the Dean’s decline to adopt race-based affirmative action for professors. In an earlier piece, Crenshaw also pays a tribute to the intellectual contribution of Derrick Bell, Harvard professor at that time, in redefining race in the core of the constitutional literature. Kimberlé Williams Crenshaw, “The First Decade: Critical Reflections, or ‘A Foot in the Closing Door’,” *UCLA Law Review* 49 (June 1, 2002): 1343.

<sup>483</sup> Richard Delgado and Jean Stefancic, *Critical Race Theory: An Introduction*, Critical America (New York: New York University Press, 2001), 3.

“According to critical race scholars, any rule that takes the same approach to invidious and benign racial classifications stabilizes existing racial disparities by making it exceedingly difficult for lawmakers to compensate victims of discrimination or promote diversity through direct race-based subsidies.”<sup>484</sup>

Thus, colorblindness for this theory is a code for perpetuating the racial disparities in society.

The shift towards equalizing the applicable judicial standard to race-oriented measures – regardless of whether those measures harm or benefit historically powerless groups - indicates four important features of the way the US Supreme Court redefine powerlessness. In this sense, **there is a shift towards a jurisprudence of colorblindness**<sup>485</sup> where standards originally constructed to protect disadvantaged racial minorities are seen as mandating an equal application of the law across the spectrum of racial groups – regardless of whether the measures are benign or not – on the basis of “race-neutral doctrinal terms of ‘skepticism,’ ‘consistency,’ and ‘congruence.’”<sup>486</sup>

In *Fisher 1*, the Supreme Court of the United States required that courts must be convinced that “no workable race-neutral alternatives would produce the educational benefits of diversity”<sup>487</sup> in university affirmative action programs. Yet, *Fisher* – while

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<sup>484</sup> Derrick A Bell, “‘Color-Blind Constitutionalism: A Rediscovered Rationale,’” in *Race, Racism, and American Law* (Gaithersburg, {MD}: Aspen Law & Business, 2000), 12.

<sup>485</sup> Reva B Siegel, “From Colorblindness to Antibalkanization: An Emerging Ground of Decision in Race Equality Cases,” *The Yale Law Journal* 120 (April 1, 2011): 1278; Charles R Lawrence III, “Epidemiology of Color-Blindness: Learning to Think and Talk about Race, Again, The,” *Boston College Third World Law Journal* VO - 15, 1995; Ian F Haney Lopez, “Is the ‘Post’ in Post-Racial the ‘Blind’ in Colorblind?,” *Cardozo Law Review* 32 (January 1, 2011): 807.

<sup>486</sup> Cho, “Post-Racialism,” 1615. See also: UNITED STATES, US Supreme Court, *Adarand Constructors, Inc. v. Peña*, 515 US 223-224 (1995).

<sup>487</sup> US Supreme Court, *Fisher v. University of Texas at Austin*, 570 U.S. \_\_\_\_ (2013).

emphasizing the primacy of workable race-neutral affirmative actions – shows a concern with the harms imposed on white applicants in the way it does not show at the same level of sympathy in relation to minority students’ claims, as Siegel argues.<sup>488</sup> As a clear indication, in oral argument, Justice Kennedy asked Ms. Fisher’s lawyer: “*Are you saying that you shouldn’t impose this hurt or this injury, generally, for so little benefit; is . . . that the point?*”<sup>489</sup>

The jurisprudential source of colorblindness in the United States is Justice Harlan’s dissent in *Plessy v. Ferguson*,<sup>490</sup> a case decided in 1896 where the majority of the Court upheld the constitutionality of “separate but equal” doctrine in the US. For Justice Harlan’s, however, “in view of the Constitution, in the eye of the law, there is in this country no superior, dominant, ruling class of citizens. There is no caste here. Our Constitution is color-blind. While colorblindness originally in Justice Harlan’s rationale<sup>491</sup> in *Plessy* meant that the Constitution applies to all in the same manner irrespective of their skin color,<sup>492</sup> it means something very different in today’s legal debates: that ignoring different skin colors in applying equality might perpetuate discrimination rather than address it.

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<sup>488</sup> “Fisher represents a body of equal protection law that devotes special resources to majority claims it no longer provides to minority claims. It is not simply that courts have defined the triggers for strict scrutiny so that strict scrutiny scarcely ever applies to claims that members of minority groups bring today.<sup>304</sup> More importantly, the body of strict scrutiny law that courts have developed for reviewing majority claims requires government to respect citizen concerns about fairness in a way that discriminatory purpose law does not. Over time courts enforcing equal protection have come to intervene in the decisions of representative government to protect members of majority groups in ways they scarcely ever intervene to protect members of minority groups. Considered in this larger context, a case like *Fisher* turns the reasoning of *Carolene Products* on its head.” Siegel, “Foreword: Equality Divided,” 62.

<sup>489</sup> THE UNITED STATES, Transcript of Oral Argument at 23, *Fisher v. Univ. of Tex. at Austin*, 133 S. Ct. 2411 (2013) (No. 11-345).

<sup>490</sup> THE UNITED STATES, US Supreme Court, *Plessy v. Ferguson*, 163 US 537 (1896).

<sup>491</sup> THE UNITED STATES, US Supreme Court, *Plessy v. Ferguson*, 163 US 537 (1896), p. 559.

<sup>492</sup> THE UNITED STATES, US Supreme Court, *Plessy v. Ferguson*, 163 US 537 (1896), Justice Harlan’s dissenting, p. 559.

This new colorblindness is the “justification for presuming that all classifications based on race are impermissible even when the purpose of the classification is benign”<sup>493</sup> as recalled by critical race theorist Derrick Bell. Six decades after *Plessy*, Justice Harlan’s dissent in *Plessy* inspired the Court to strike down segregation in public education in *Brown*. Yet, more recently, colorblindness has been translated as a requirement also applicable to benign racial classification such as affirmative action programs. In *Parents Involved* colorblindness plays exactly this function: to prevent initiatives that were perceived by the Court as treating people not as individuals but as members of a racial group, even if the intention was to benefit underprivileged children by seeking racial diversity in schools rather than to segregate them. In *Parents Involved*, the plurality mentioned that “the way to stop discrimination on the basis of race is to stop discriminating on the basis of race.”<sup>494</sup>

Therefore, arguably, a return to colorblindness<sup>495</sup> detaches strict scrutiny from political powerlessness by putting an emphasis that remedial justice should “impose the least harm possible to other innocent persons competing for the benefit” (to use Justice Powell’s phrasing above). Using strict scrutiny for affirmative action implies that the “stigmatic harm”<sup>496</sup> Afro-Americans have suffered historically is comparable with the stigmatic harm white Americans might suffer as a result of remedial policies. Justice

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<sup>493</sup> Bell, “‘Color-Blind Constitutionalism: A Rediscovered Rationale,’” 14. See more here: Siegel, “From Colorblindness to Antibalkanization: An Emerging Ground of Decision in Race Equality Cases”; Lopez, “Is the ‘Post’ in Post-Racial the ‘Blind’ in Colorblind?”; Darren Lenard Hutchinson, “Progressive Race Blindness?: Individual Identity, Group Politics, and Reform,” *UCLA Law Review* 49 (June 1, 2002): 1455.

<sup>494</sup> THE UNITED STATES, US Supreme Court, *Parents Involved in Community Schools v. Seattle School District No. 1*, 551 US 701 (2007), p. 40-41.

<sup>495</sup> Cho, “Post-Racialism.” As an example of this approach, she cites: UNITED STATES, US Supreme Court, *Parents Involved in Community Schools v. Seattle School District No. 1*, 551 US 701 (2007). A more recent example of tougher standard for affirmative action can be found at: UNITED STATES, US Supreme Court, *Fisher v. University of Texas* (Fisher I), 570 US \_ (2013), and as a restatement of the same standard, see: UNITED STATES, US Supreme Court, *Fisher v. University of Texas* (Fisher II), 579 US \_ (2016).

<sup>496</sup> See: THE UNITED STATES, US Supreme Court, *City of Richmond v. J. A. Croson Company*, 488 US 469 (1989), part III-A.

O'Connor shows above not every race-conscious decision is "equally objectionable" as context matters.

As far as sexual orientation is concerned, recent decisions bypassed<sup>497</sup> the question of the powerlessness which underlines the strict scrutiny doctrine, **by not clarifying under which standard of scrutiny those cases involving sexual orientation were decided**. Not even engaging with powerlessness and strict scrutiny in an area of law (LGBT rights) in which the US Supreme Court has been steadily moving forward in the past decade shows how the move towards greater equality is detached from discussing strict scrutiny and powerlessness.

Russell Robinson argues that – dating back to the 1996 decision in *Romer*<sup>498</sup> – LGBT people enjoy a special test – of animus (this is different from cases concerning sex and race, he argues, while *Cleburne* was also decided under animus against persons with mental disabilities). Under the argument of the bare desire to harm, which goes all the way back to 1944 *Korematsu*,<sup>499</sup> the Court invalidates hate-grounded laws with particular attention to the harm to dignity that the legal system has historically imposed on this group.<sup>500</sup> Later on, the US Supreme Court decided both to strike down the tax-related federal definition of marriage as between a man and a woman (in 2013 *Windsor*),<sup>501</sup> as well as to recognize nationwide same-sex marriage (in 2015 *Obergefell*)<sup>502</sup> under an "animus" standard. Laurence Tribe notes that both the *Windsor* and the *Obergefell* decisions – authored by Justice Kennedy – invoke equal dignity as

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<sup>497</sup> William D Araiza, "After the Tiers: Windsor, Congressional Power to Enforce Equal Protection, and the Challenge of Pointillist Constitutionalism," *Boston University Law Review* 94 (2014): 357–413; Russell K Robinson, "Unequal Protection," *Stanford Law Review* 67 (2015).

<sup>498</sup> UNITED STATES, US Supreme Court, *Romer v. Evans*, 517 U.S. 620 (1996).

<sup>499</sup> THE UNITED STATES, US Supreme Court, *Korematsu v. United States*, 323 U. S. 216, decided December 18, 1944.

<sup>500</sup> Robinson, "Unequal Protection," 173.

<sup>501</sup> UNITED STATES, US Supreme Court, *United States v. Windsor*, 570 US \_ (2013).

<sup>502</sup> UNITED STATES, US Supreme Court, *Obergefell v. Hodges*, 576 US \_ (2015).



a way to combine Equal Protection and Due Process analyses applying this animus standard without clarifying the applicable standard in equal protection terms.<sup>503</sup>

The association between strict scrutiny and powerless in the US appears to be at an ending point also because the very standard of strict scrutiny is closed to incorporating new grounds (e.g. sexual orientation and gender identity) and it has been used to strike down racially conscious measures (e.g. affirmative actions). Such loss of jurisprudential relevance of strict scrutiny in the US constitutional litigation – as far as the last LGBT rights' cases are concerned – seems to have been replaced by an unclear standard of animus, grounded judging from Justice Kennedy's opinions on dignity terms. Animus, if consolidated as a constitutional test, can bridge the gap between strict scrutiny and powerlessness, since judges can insert arguments on historical discrimination into the animus test as an evidence of a prejudicial moral disapproval of a group against others. Indeed, Justice Scalia found that moral disapproval was exactly the state reason laws targeting LGBT people were based (rightfully in his views).<sup>504</sup>

### **Diversity rationale from past discrimination**

There is a difficulty of finding a constitutionally acceptable (compelling) justification for race-based affirmative action – diversity, past discrimination or other. Justice Powell makes clear the judicial struggle of identifying substantial and specific history of discrimination in equal protection causes. In *Bakke*, concerning a rigid racial quota, Justice Powell wrote a plurality opinion, casting the conclusive vote between the four Justices who found that the use of racial quotas are constitutionally impermissible and the other four Justices who found the use of race constitutionally permissible. Justice

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<sup>503</sup> Laurence H Tribe, "Equal Dignity: Speaking Its Name," in *Harvard Law Review Forum*, vol. 129, 2015, 16–32.

<sup>504</sup> THE UNITED STATES, US Supreme Court, *Romer v. Evans*, 517 U.S. 620 (1996), Justice Scalia dissenting, p. 644.

Powell was able to strike such a balance by arguing that diversity rationale can be a compelling interest in the context of higher education, yet race should be considered among other factors and not operate as a quota. For that matter, see Justice Powell's opinion:

"The State certainly has a legitimate and substantial interest in ameliorating, or eliminating where feasible, the disabling effects of identified discrimination. The line of school desegregation cases, commencing with *Brown*, attests to the importance of this state goal and the commitment of the judiciary to affirm all lawful means toward its attainment. In the school cases, the States were required by court order to redress the wrongs worked by specific instances of racial discrimination. That goal was far more focused than the remedying of the effects of "societal discrimination," an amorphous concept of injury that may be ageless in its reach into the past."<sup>505</sup>

Right after, in the paragraph that follows, Justice Powell opens up the window of opportunity currently used by countermovements questioning affirmative actions in universities: concern with harms on innocent parties not benefiting from affirmative actions:

"We have never approved a classification that aids persons perceived as members of relatively victimized groups at the expense of other innocent individuals in the absence of judicial, legislative, or administrative findings of constitutional or

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<sup>505</sup> THE UNITED STATES, US Supreme Court, *Regents of the University of California v. Bakke*, 438 US 265 (1978), p. 307.

statutory violations. (...). After such findings have been made, the governmental interest in preferring members of the injured groups at the expense of others is substantial, since the legal rights of the victims must be vindicated. In such a case, the extent of the injury and the consequent remedy will have been judicially, legislatively, or administratively defined. Also, the remedial action usually remains subject to continuing oversight to assure that it will work the least harm possible to other innocent persons competing for the benefit.”<sup>506</sup>

Although Justice Powell did not write for the majority of the Court in *Bakke*, his arguments on what amounts to a compelling interest – including diversity promotion – was later endorsed by the Court in later cases.<sup>507</sup>

Yet, the window of opportunity for countermovements as far as affirmative action in universities is concerned is the detachment of the diversity rationale from the earlier justification of remedying for past discrimination. Recent affirmative action jurisprudence has made it clear that, while the rationale of remedying past discrimination is still valid as a compelling interest,<sup>508</sup> diversity promotion has consolidated itself as a compelling interest in university admission cases.<sup>509</sup>

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<sup>506</sup> THE UNITED STATES, US Supreme Court, *Regents of the University of California v. Bakke*, 438 US 265 (1978), p. 308. See also: Hutchinson, “Undignified: The Supreme Court, Racial Justice, and Dignity Claims,” 29.

<sup>507</sup> See: THE UNITED STATES, US Supreme Court, *Adarand Constructors, Inc. v. Peña*, 515 US 200 (1995), pages 218-219.

<sup>508</sup> THE UNITED STATES, US Supreme Court, *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989), p. 493.

<sup>509</sup> “we have never held that the only governmental use of race that can survive strict scrutiny is remedying past discrimination. Nor, since *Bakke*, have we directly addressed the use of race in the context of public higher education. Today, we hold that the Law School has a compelling interest in attaining a diverse student body.” (UNITED STATES, US Supreme Court, *Grutter v. Bollinger* 539 US 306 (2003), p. 328).

This section shows different ways through which the social context of past discrimination is bypassed in the United States, primarily looking at affirmative action programs in universities. Yet, past discrimination is not only bypassed in affirmative action scenarios. Consider the celebratory way the US Supreme Court reads the history of violations of voting rights of Afro-Americans in *Shelby County*.

“(...) history did not end in 1965. By the time the Act was reauthorized in 2006, there had been 40 more years of it. In assessing the “current need[.]” for a preclearance system that treats States differently from one another today, that history cannot be ignored. During that time, largely because of the Voting Rights Act, voting tests were abolished, disparities in voter registration and turnout due to race were erased, and African-Americans attained political office in record numbers. And yet the coverage formula that Congress reauthorized in 2006 ignores these developments, keeping the focus on decades-old data relevant to decades-old problems, rather than current data reflecting current needs.”<sup>510</sup>

Bypassing a history of past discrimination in the name of “current needs”, which the dissenters in *Shelby* rejected with evidence of current discrimination,<sup>511</sup> the US Supreme Court shows that it is not willing only to divorce rationales (as in the case of

<sup>510</sup> THE UNITED STATES, US Supreme Court, *Shelby County v. Holder*, 570 U.S. \_\_\_\_ (2013), p. 20. Available at: <https://supreme.justia.com/cases/federal/us/570/12-96/case.pdf>. Last accessed on: Sept. 30<sup>th</sup>, 2018.

<sup>511</sup> See Justice Ginsburg’s dissenting opinion in *Shelby*: “History has proved King right. Although circumstances in Alabama have changed, serious concerns remain. Between 1982 and 2005, Alabama had one of the highest rates of successful §2 suits, second only to its VRA-covered neighbor Mississippi.” THE UNITED STATES, US Supreme Court, *Shelby County v. Holder*, 570 U.S. \_\_\_\_ (2013), p. 24.

diversity and past discrimination), but also is willing to detach remedies seeking to revert past discrimination from any rationale at all by re-writing History itself

More recent jurisprudence on affirmative action in universities (*Fisher* is a case in point, discussed below), the US Supreme Court has focused more on the mechanisms of those programs in light of the harms they might cause on *innocent* privileged individuals not benefiting from those programs, rather than on the connection between diversity and past discrimination. The former without the later is a concept detached from its social context. Countermovements have taken advantage of the fact that, in the specific case of affirmative action in universities – the US Supreme Court has focused its analyses primarily on diversity promotion, producing as a result a jurisprudence out of social context, and focused on individualized harm.

In *Grutter*, Justice O'Connor's words expressed that

“context matters when reviewing race-based governmental action under the Equal Protection Clause. (...) Not every decision influenced by race is equally objectionable, and strict scrutiny is designed to provide a framework for carefully examining the importance and the sincerity of the reasons advanced by the governmental decisionmaker for the use of race in that particular context.”<sup>512</sup>

Context, in Justice O'Connor's quote, means the concrete, real-life circumstances in which affirmative action takes place. For her, strict scrutiny is not fatal for affirmative action programs, but rather the appropriate framework that enables courts to look more closely to the circumstances of a particular case. It is argued here that within such

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<sup>512</sup> THE UNITED STATES, US Supreme Court, *Grutter v. Bollinger* 539 US 306 (2003), p. 327.

contextual analysis the US Supreme Court could pay more attention to history of discrimination. By over focusing on diversity rationale, the judicial reasoning on affirmative action becomes detached from the context of past discrimination.

The charge here is that – when it comes to cases challenging affirmative action programs specifically in educational setting – the context with which the US Supreme Court engages in is not the societal context of past discrimination. The Court engaged rather with the mechanics of diversity programs in educational setting (e.g. whether a affirmative action program enables an individualized assessment of each application, whether race is a plus or not and so on), as well as with the impact or harm on innocent people not benefiting from those programs (e.g. white applicants in universities).

Furthermore, the diversity rationale is sphere-specific. The way it is framed in university affirmative action cases – as “exposure to widely diverse people, cultures, ideas, and viewpoints”<sup>513</sup> – is meant to make sense specifically for higher education, given that the same logic does not even apply, according to the US Supreme Court, to lower levels of education.<sup>514</sup> Given its sphere-specific nature, diversity rationale is not judicially framed as to be able to travel easily to different spheres of life – or what Ackerman calls “spheres of humiliation”.<sup>515</sup> If the US Supreme Court has neither seen diversity rationale, nor past discrimination rationale as overreaching grounds for understanding constitutional equality (overreaching in the sense of not being sphere-specific), this dissertation will show that there is an underlying, overreaching – and in

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<sup>513</sup> THE UNITED STATES, US Supreme Court, *Grutter v. Bollinger* 539 US 306 (2003), p. 330.

<sup>514</sup> See: US Supreme Court, *Parents Involved in Community Schools v. Seattle School District No. 1*, 551 US 701 (2007). “The Court in *Grutter* expressly articulated key limitations on its holding—defining a specific type of broad-based diversity and noting the unique context of higher education—but these limitations were largely disregarded by the lower courts in extending *Grutter* to uphold race-based assignments in elementary and secondary schools. The present cases are not governed by *Grutter*.” (p. 17).

<sup>515</sup> Ackerman, *We The People, Volume 3: The Civil Rights Revolution*, chap. 7.

some instances implicit - principle in constitutional equality: the notions of constitutional harm.

#### 1.1.1. *Bypassing Context: the South African example*

South African equality jurisprudence offers examples of **balancing historical context with individualized harm, through taking into account dignity claims**. This results in downplaying the role context plays and thus opens the doors to claims of equality by countermovements. This balance is clear in the *Walker* case.<sup>516</sup> *Walker* was an early case about a white applicant who claimed he was discriminated on the basis of race for being subjected to a costlier consumption-based system of electricity, as opposed to the flat rate system in force in predominantly black neighbourhoods. In that case, the Constitutional Court clarified the balance between group disadvantage and individualized harm to dignity when reading Section 8, the Equality Clause of the South African 1993 Interim Constitution:

“Processes of differential treatment which have the legitimate purpose of bringing about real equality should not be undertaken in a manner which gratuitously and insensitively offends and marginalises persons identified as belonging to groups who previously enjoyed advantage. Thus persons who have benefited from systematic advantage in the past and who continue to enjoy such benefits today, are by no means excluded from the protection offered by section 8. (...)”<sup>517</sup>

<sup>516</sup> SOUTH AFRICA, Constitutional Court, *City Council of Pretoria v Walker* (CCT8/97) [1998] ZACC 1; 1998 (2) SA 363; 1998 (3) BCLR 257 (17 February 1998).

<sup>517</sup> SOUTH AFRICA, South African Constitutional Court, *City Council of Pretoria v Walker*, paragraph 123.

In *Walker*, this argument of leaving the doors of the courts open to advantaged individuals led to the conclusion that the electricity policy favoring predominantly black neighborhoods caused a harm “in a manner comparably serious to an invasion of the [applicants’] dignity.”<sup>518</sup> This is so because, in the Court’s opinion, “no members of a racial group should be made to feel that they are not deserving of equal ‘concern, respect and consideration’ and that the law is likely to be used against them more harshly than others who belong to other race groups.”<sup>519</sup>

The way apartheid features in *Walker* is telling. Justice Langa recalls that during apartheid there was a general practice of non-payment by black residents, in part as a sign of protest. Then, Justice Langa uses this reminiscence of apartheid to emphasize the racial impact (on White residents in Old Pretoria) of the tariff policy adopted. In Justice Langa’s words:

“I cannot subscribe to this view or to the proposition that this is a case in which, because of our history, a non-discriminatory policy has impacted fortuitously on one section of our community rather than another. There may be such cases, but in my view this is not one of them. The impact of the policy that was adopted by the council officials was to require the (white) residents of old Pretoria to comply with the legal tariff and to pay the charges made in terms of that tariff on pain of having their services suspended or legal action taken against them, whilst the (black) residents of Atteridgeville and Mamelodi were not held to the tariff, were called upon to pay only a flat rate which was lower than the tariff, and were not subjected to having their services suspended or legal

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<sup>518</sup> SOUTH AFRICA, South African Constitutional Court, *City Council of Pretoria v Walker*, paragraph 81

<sup>519</sup> Ibid, same paragraph.



action taken against them. To ignore the racial impact of the differentiation is to place form over substance.<sup>520</sup>

In this way, apartheid history in *Walker* is used to remind that geography is inextricably intertwined with race, and thus impacting adversely a wealthy neighborhood means discriminating against white people living there. Here, it is key to pinpoint that, while the South African Constitutional Court becomes more often confronted with historically advantaged groups and individuals using litigation on equality, the jurisprudence of the Court will have to build the South African understanding of constitutional equality in a way that embraces not only fighting against the reminiscence of apartheid laws but also that is about making sense of plural post-apartheid South Africa. In James Fowkes' view on that:

“The Court will continue to confront newness. The degree to which it does is likely to increase, as invalidating easy apartheid-era unconstitutionality and vindicating clear products of the nation's rejection of apartheid are increasingly replaced by more contested questions. As more conservative groups start to copy the litigation tactics of their progressive counterparts, sharper contests on the papers before the Court will also become more frequent. These sharper social contests will affect the members and factions of the ANC like everyone else, and the party is less likely to enjoy political slack and to see unpopular constitutional positions enforced by its leadership. If this book is right about the value of the ANC's post-1994 stance to the constitution-

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<sup>520</sup> SOUTH AFRICA, South African Constitutional Court, *City Council of Pretoria v Walker*, paragraph 32.

building court, than the possible consequences of an erosion of that stance represents the constitution-building approach's greatest unanswered question going forward.<sup>521</sup>

Ultimately, the Constitutional Court in *Walker* decided that Walker and other residents of the wealthy neighborhood where he lives were indirectly discriminated by the council. Infringing a “comparably serious to an invasion of their dignity,”<sup>522</sup> the council’s decision “to single out white defaulters for legal action while at the same time consciously adopting a benevolent approach which exempted black defaulters from being sued”<sup>523</sup> discriminated against Walker and his neighbors. Thus, the history of apartheid was used to highlight the racial composition of the neighborhood at stake in the case, leading to a judgment in favor of the white applicant.

The Constitutional Court in *Walker* anticipated the test better elaborated later in *Van Heerden*. In *Van Heerden*, the Court mentioned that remedial or affirmative policies, intended to protect historically disadvantaged groups, “should not [nevertheless] constitute an abuse of power or impose such substantial and undue harm on those excluded from its benefits that our long-term constitutional goal would be threatened.”<sup>524</sup> In other words, while the social position of the applicant is an important factor to be considered, there might be an individualized harm to dignity of the kind *Walker* announces as a counterpoint to be balanced.

Interestingly enough, Justice Sachs, in his dissenting opinion in *Walker*, proposes that the appropriate test should have incorporated a concern over

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<sup>521</sup> James Fowkes, *Building the Constitution: The Practice of Constitutional Interpretation in Post-Apartheid South Africa*, vol. 16 (Cambridge University Press, 2016), 347.

<sup>522</sup> SOUTH AFRICA, South African Constitutional Court, *City Council of Pretoria v Walker*, paragraph 81.

<sup>523</sup> SOUTH AFRICA, South African Constitutional Court, *City Council of Pretoria v Walker*, paragraph 80.

<sup>524</sup> SOUTH AFRICA, *Minister of Finance and Other v Van Heerden* (CCT 63/03) [2004] ZACC 3; 2004 (6) SA 121 (CC); 2004 (11) BCLR 1125 (CC) ; [2004] 12 BLLR 1181 (CC) (29 July 2004), para. 44.

“prejudice”<sup>525</sup> in the challenged measure. If that were the case, in other words, the applicant would have needed to prove that there had been prejudice against the otherwise privileged group at stake, and not merely an indirect differentiation on the basis of race. If ever accepted by the Court, a prejudice-oriented test would bring the antidiscrimination test in South Africa closer to the animus standard in the US, given the place it gives to considerations on prejudicial motives as the main sources of unfairness of a discriminatory act. Similarly to dignity, prejudice is a double-edged sword: it can be read in principle referring to historical prejudicial views about a given group, or it can be interpreted as a particularly severe harm to dignity of an individual irrespective of the social group he/she belongs to.<sup>526</sup>

There is a risk of stereotyping in dignity context when courts do not pay special attention to prejudice. In South Africa, the exchanges between the majority and the dissenters in the Constitutional Court cases involving discrimination against sex workers (*Jordan*)<sup>527</sup> as well as against fathers (*Hugo*) reveal how fuzzy powerlessness becomes once it turns into a question of who is more harmed in a dignity-related way. In *Hugo*, the majority and dissenter debated strongly about the role of stereotyping and its harm to one’s dignity (whether giving preferential treatment in presidential pardons to mothers – a powerless group - on the basis of their perceived role as caregivers in

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<sup>525</sup> South African Constitutional Court, *City Council of Pretoria v Walker* (CCT8/97) [1998] ZACC 1; 1998 (2) SA 363; 1998 (3) BCLR 257 (17 February 1998), Justice Sachs, dissenting, para. 106.

<sup>526</sup> To borrow the phrase from the *Hugo* case – a sex discrimination case against fathers involving a presidential pardon rule which favoured detained mothers, in South African Constitutional Court. In the Court’s opinion: “The prohibition on unfair discrimination in the interim Constitution seeks not only to avoid discrimination against people who are members of disadvantaged groups. It seeks more than that. At the heart of the prohibition of unfair discrimination lies a recognition that the purpose of our new constitutional and democratic order is the establishment of a society in which all human beings will be accorded equal dignity and respect regardless of their membership of particular groups. The achievement of such a society in the context of our deeply inegalitarian past will not be easy, but that that is the goal of the Constitution should not be forgotten or overlooked.” SOUTH AFRICA, Constitutional Court, *President of the Republic of South Africa and Another v Hugo* (CCT11/96) [1997] ZACC 4; 1997 (6) BCLR 708; 1997 (4) SA 1 (18 April 1997).

<sup>527</sup> SOUTH AFRICA, Constitutional Court, *S v Jordan and Others* (Sex Workers Education and Advocacy Task Force and Others as Amici Curiae (CCT31/01) [2002] ZACC 22; 2002 (6) SA 642; 2002 (11) BCLR 1117 (9 October 2002).

fact harms or benefits them).<sup>528</sup> In *Jordan*, the majority concluded that the stigma attached to sex work comes from choosing this profession itself, rather than the fact that it is mostly associated with the female gender.<sup>529</sup>

When turned into a debate about which immediate harm to one's dignity is more burdensome, historical context is diluted in the analysis, despite the regular reference to the apartheid background by the Constitutional Court. Despite those references to apartheid – which given South African history will continue to feature prominently – when historically privileged individuals access the Constitutional Court of South Africa arguing dignity-related equality claims, they do mainly with reference to harms they have suffered recently rather than historically relevant powerlessness. This is so because such historical arguments are unavailable for those applicants as they were the ruling class. Under the equality test in South Africa, based on dignity, historically privileged individuals have at least the possibility of arguing dignity-related individualized harms, balancing the social context in light of such harms.

Furthermore, references to the context of apartheid in discrimination cases in some instances go beyond the Manichean dichotomy of oppressed groups under apartheid versus privileged groups under apartheid. Take, for instance, *Walker* again. There, the Constitutional Court made reference to apartheid exactly to emphasize that

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<sup>528</sup> “In this regard I agree with the majority judgment that the fact that women generally “bear an unequal share of the burden of child rearing” cannot render it ordinarily “fair to discriminate between women and men on that basis”. What I cannot endorse, is the majority’s conclusion that although the discrimination inherent in the Act was based on that very stereotyping, it is nevertheless vindicated. In my view the notion relied upon by the President, namely that women are to be regarded as the primary care givers of young children, is a root cause of women’s inequality in our society. It is both a result and a cause of prejudice; a societal attitude which relegates women to a subservient, occupationally inferior yet unceasingly onerous role. It is a relic and a feature of the patriarchy which the Constitution so vehemently condemns.” See: SOUTH AFRICA, Constitutional Court, *President of the Republic of South Africa and Another v Hugo* (CCT11/96) [1997] ZACC 4; 1997 (6) BCLR 708; 1997 (4) SA 1 (18 April 1997), Justice Kriegler, dissenting, para. 80.

<sup>529</sup> “The stigma that attaches to prostitutes attaches to them not by virtue of their gender, but by virtue of the conduct they engage in. That stigma attaches to female and male prostitutes alike.” (SOUTH AFRICA, Constitutional Court, *S v Jordan and Others* (Sex Workers Education and Advocacy Task Force and Others as Amici Curiae (CCT31/01) [2002] ZACC 22; 2002 (6) SA 642; 2002 (11) BCLR 1117 (9 October 2002), para. 16).

the apartheid-era culture of not paying one's electricity bills as a sign of protest to the regime is "a feature of the past (...) It has no place in a constitutional state in which the rights of all persons are guaranteed and all have access to the courts to protect their rights."<sup>530</sup> Likewise, a decade later, in *Mazibuko*, a similar case on changes in the system for water supply in historically disadvantaged areas, the Court emphasized that, despite the racial divisions in neighborhoods dating since the apartheid, in certain cases differential policies are nevertheless reasonable:

"given the deep inequality that exists in South Africa as a result of apartheid policies, any differential treatment of townships or suburbs may have a differential, and arguably adverse impact on the ground of race, and thus constitute indirect discrimination on that ground. On the other hand, given the deep inequality that exists, the City noted, different treatment might often be necessary or desirable. These contentions have merit."<sup>531</sup>

If this continues to turn into a consistent direction of the South African jurisprudence, the constitutional framework in this country will become more open in the future for counter-movements' claims, inviting individualized claims that are either decontextualized from apartheid or at least balancing the context of apartheid with present time concerns with individual dignity of all, historically privileged or not.

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<sup>530</sup> South African Constitutional Court, *City Council of Pretoria v Walker* (CCT8/97) [1998] ZACC 1; 1998 (2) SA 363; 1998 (3) BCLR 257 (17 February 1998), Justice Langa, para. 92.

<sup>531</sup> South African Constitutional Court, *Mazibuko and Others v City of Johannesburg and Others* (CCT 39/09) [2009] ZACC 28; 2010 (3) BCLR 239 (CC) ; 2010 (4) SA 1 (CC) (8 October 2009).

## 2.2. Redefinition 2: Individualization approach: Shifting the Focus to Individualized Impact

The previous section revealed ways through which courts conducting constitutional review can bypass or balance contextual factors such as history of discrimination. In equality cases, it showed that this increases institutional openness of courts to countermovements' claims by reducing their argumentative burden. It was argued that this is especially the case when references to context are replaced with a contention over the extent of individualized impact of state measures, particularly those in the realm of remedial justice such as affirmative action. Following this line, this section will look more closely at the individualization approach as a way through which powerlessness has been redefined to account for harm to dignity. The individualization approach starts when powerlessness is reframed to focus on the individual impact of equality measures (even when it occurs as a result of the social movements' litigation, as in the case of same-sex marriage decisions in the US and the constitutional animus standard). This section studies the way countermovements make use of this individualized impact.

In constitutional litigation on equality, individualization occurs on at least two distinguished, yet inter-related levels. On the first level, individualization shifts attention from *group-membership to individuals themselves*. By focusing on the impact of a challenged measure on particular individuals regardless of their membership in groups, arguments on powerlessness can be logically detached from historical, political and identitarian claims that are often associated with discrimination claims based on group membership. Thus, consequently, individualization in equality litigation would come to the rescue of a jurisprudence – of which US is the primary example - that nurtures the fear of balkanization due to the pulverization of group claims for remedial

justice.<sup>532</sup> Instead, individualization allows simply avoiding talking about individuals *as* members of groups.

Legally, one of the ways through which such shift of attention from group-membership to individuals occurs is by formulating claims of discrimination bypassing historical context. While in theory, context could also be taken into consideration when the unit under analysis is the individual rather than a group, the jurisprudence presented in the last section shows that, more often than not, the two elements come together: with an downplaying approach, membership in a historically disadvantaged group becomes less relevant in constitutional argument and, thus, in judicial decision-making.

On the second level, individualization is a matter of shifting attention from a group-related benefit of a legal regulation (e.g. affirmative action) to its *impact on particular individuals* (e.g. white applicants left out of the university). By focusing on individual impact, such shift allows applicants associated with the countermovements here portrayed to divert judicial attention from group-related disadvantages to the way individuals are formally treated, without giving considerable weight to substantial inequalities between members of different groups. This second element will be better explained below.

Contemporary US affirmative action jurisprudence evidences the strategy of individualizing the impact of the contested measure on at least two fronts. On one hand, as mentioned above, it stresses the impact of affirmative action on innocent whites who are discriminated against by those policies. On the other hand, contemporary affirmative action jurisprudence takes into consideration the negative impact of the

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<sup>532</sup> Darren Lenard Hutchinson, "Preventing Balkanization or Facilitating Racial Domination: A Critique of the New Equal Protection," *Virginia Journal of Social Policy and the Law* 22, no. 1 (2015); Yoshino, "The New Equal Protection."

affirmative action on the benefitting minority individuals themselves. Both are concerned with impact of remedial measures on individuals detached from political powerlessness in a way.

US Supreme Court has never been straight-forward about the place of affirmative action under the Constitution. Thus, **countermovements have taken advantage of conceptual uncertainties to dilute the concept of political powerlessness and the historical context often associated with it into neutral terms, such as diversity.** Diversity is said to be neutral because it does not prima facie favors disadvantaged or advantaged groups, thus diluting the role of historical context. One example of this approach is seen in the basic terms of the sister cases challenging affirmative action in the US (*Fisher I* and *Fisher II* cases).<sup>533</sup>

*The Fisher* cases concerned a white applicant, Abigail Fisher, to the undergraduate program of the University of Texas (hereafter, UT), who, given her unsuccessful application, complained that the UT's race-conscious admission policy violated the Equal Protection Clause. The UT undergraduate admission policy was two-fold: majority of the vacancies (around 75%) was filled in by the top 10% of the students from the State's high schools (the so-called Top Ten Percent program), while the remaining vacancies (around 25%) were filled by a combination of academic and personal achievement indices, in which race is a component among others. *Fisher I* vacated the lower court decision and ordered it to hear the case again under strict scrutiny. *Fisher II*, after the lower court accepted UT's program under strict scrutiny, confirmed the constitutionality of the program, recognizing the inexistence of other race-neutral workable alternatives.

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<sup>533</sup> UNITED STATES, US Supreme Court, *Fisher v. University of Texas at Austin*, 570 U.S. \_\_\_\_ (2013), hereafter *Fisher I*; US Supreme Court, *Fisher v. University of Texas at Austin*, 579 US \_ (2016), hereafter *Fisher II*.



In her own terms, Fisher's claim is as follows:

“Although Ms. Fisher's academic credentials exceeded those of many admitted minority candidates, UT denied her application. Having “suffered an injury that falls squarely within the language and spirit of the Constitution's guarantee of equal protection,” *Grutter v. Bollinger*, 539 U.S. 306, 327 (2003) (quoting *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 230 (1995)), Ms. Fisher brought this challenge to the use of race in UT's undergraduate admissions process seeking monetary and injunctive relief.”<sup>534</sup>

Accordingly, Fisher's claim does not challenge the Top Ten Percent program per se, simply because she could not do so: she was not among the top 10% students of the state. Instead, her claim is narrowly framed to challenge the race component of the remaining 25% of vacancies. Such an aspect blurs the causal link between her personal injury (e.g. UT's rejection of her application) and the racial component, which is only one among others.

Such a blurry causal link raises concerns over the technical aspects of the case, given that in the US system the access to the judiciary (standing) requires the personal injury of the applicant, as seen in the previous section. Bearing in mind that by the time *Fisher II* was decided the applicant had already graduated from a different school, Justice Kennedy in *Fisher II* noted that: “The fact that this case has been litigated on a

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<sup>534</sup> Petition for a Writ of Certiorari, available at: [http://tarlton.law.utexas.edu/ld.php?content\\_id=19666557](http://tarlton.law.utexas.edu/ld.php?content_id=19666557).

somewhat artificial basis, furthermore, may limit its value for prospective guidance.”<sup>535</sup> Justice Kennedy then wrote in the context of the good faith of the University of Texas in complying with legal regulation, since the university implemented the Top Ten Percent program in 1998, i.e. two decades earlier.<sup>536</sup> Thus, the first aspect of *Fisher* turns historical context into a presumably neutral debate about causality and effectiveness of affirmative actions, rather than their underlying historical reasons.

*Fisher*’s core arguments only work logically when put into the context of white innocence.<sup>537</sup> Fisher’s arguments targeting the use of race in admissions reflect a new sense of victimhood, resulting from an unfair treatment in the admission process. Diversity rationale invites a white innocence response while closing the possibility of inter-group cooperation. At once, Fisher would not be responsible for helping to cooperate to alleviate the suffering of black people, and she can argue to have suffered a harm herself due to the affirmative action program adopted in the name of diversity promotion. Since diversity is detached by the US Supreme Court from past discrimination, Fisher’s argument in this line would then make sense.

As Thomas Ross argues, the white innocence rhetoric works in two inter-related ways:

*“Within this rhetoric, affirmative action plans have two important effects. They hurt innocent white people, and they advantage undeserving black people. The unjust suffering of the white person becomes the source of the black person's windfall. These conjoined*

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<sup>535</sup> UNITED STATES, US Supreme Court, *Fisher v. University of Texas at Austin*, 579 US \_ (2016), hereafter *Fisher II*.

<sup>536</sup> UNITED STATES, U.S. Court of Appeals for the Fifth Circuit, *Hopwood v. Texas*, 78 F.3d 932 (5th Cir. 1996).

<sup>537</sup> Thomas Ross, “Innocence and Affirmative Action,” *Vand. L. Rev.* 43 (1990): 297. Furthermore, see: Reva Siegel, “Foreword: Equality Divided,” *Harvard Law Review* 127, no. 1 (2013).

*effects give the rhetoric power. Affirmative action does not merely do bad things to good ('innocent') people nor merely do good things for bad ('undeserving') people; affirmative action does both at once and in coordination.*"<sup>538</sup>

In the certiorari petition for *Fisher II*, her lawyers clearly tied white innocence with individualized harm, by referring to the 2003 *Grutter* case,<sup>539</sup> where the US Supreme Court decided that diversity is a compelling interest for affirmative action programs at university admissions if race operates as a component among others (not a quota) and allows an individualized review of the applications. For Fisher's lawyers:

*"Court found that race-conscious admissions programs do not unduly burden innocent third parties so long as they provide individualized consideration. Grutter, 539 U.S. at 341, 123 S.Ct. 2325 ("[I]n the context of its individualized inquiry into the possible diversity contributions of all applicants, the Law School's race-conscious admissions program does not unduly harm nonminority applicants."*<sup>540</sup>

A similar innocence argument works in relation to objections on same-sex marriage laws, when religious individuals allege being forced by the state into accepting same-sex marriage by interacting with same-sex couples (e.g. providing them services), which violates their conscience. Thus, those individuals might consider themselves innocent victims of a new kind of individualized harm to their dignity, to their

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<sup>538</sup> Ross, "Innocence and Affirmative Action."

<sup>539</sup> UNITED STATES, US Supreme Court, *Grutter v. Bollinger* 539 US 306 (2003).

<sup>540</sup> Petition for a Writ of Certiorari, February 10, 2015, available at: <http://lydenlawnews.com/wp-content/uploads/2015/02/Fisher-II-cert-petition-2-10-15.pdf>. Last accessed on: 29 September 2016.

conscience, as complicit<sup>541</sup> in the sins of others. Because this harm is detached from political powerlessness – founded on historical discrimination and/or lack of representation – it represents a redefinition of powerlessness that can open doors of courts to countermovements’ claims.

If group-related past disadvantage would be the main basis for remedial justice, “the dream of a Nation of equal citizens in a society where race is irrelevant to personal opportunity and achievement would be lost in a mosaic of shifting preferences based on inherently unmeasurable claims of past wrongs.” Those were the words of Justice O’Connor in the 1989 *Croson* case.<sup>542</sup> The Court’s decision in *Croson* is revealing because it clearly articulates – particularly in the exchange of arguments between the majority opinion penned by Justice O’Connor and the dissenting opinion by Justice Marshall – the tensions between remedying past wrongs and eventual impacts on individuals; ultimately, it debates what powerlessness means. There, Justice O’Connor clarifies the emphasis of the US Supreme Court on individuals (in Justice O’Connor’s focus on ‘personal opportunity’) rather than group-based claims. In this passage, such emphasis on individuals is established in the context of a fear of the balkanization of claims of past discrimination, or the fear of a “competition of tears”.<sup>543</sup>

The study of the different ways in which powerlessness can be redefined contributes to the understanding of the range of individualized harms and the varying

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<sup>541</sup> NeJaime and Siegel, “Conscience Wars: Complicity-Based Conscience Claims in Religion and Politics”; and Laycock, “Religious Liberty for Politically Active Minority Groups: A Response to NeJaime and Siegel” contesting their claims.

<sup>542</sup> THE UNITED STATES, US Supreme Court, *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989): “*A DeFunis who is white is entitled to no advantage by virtue of that fact; nor is he subject to any disability, no matter what his race or color. Whatever his race, he had a constitutional right to have his application considered on its individual merits in a racially neutral manner.*” *When we depart from this American principle we play with fire, and much more than an occasional DeFunis, Johnson, or Croson burns.*” (p. 526) (Scalia, J., concurring).

<sup>543</sup> This is an expression coined by the feminist Gloria Steinem. See: FORD FOUNDATION, Video: Gloria Steinem on inequality and reproductive rights, available at: <https://www.fordfoundation.org/ideas/ford-forum/inequalityis/gloria-steinem-on-inequality-and-reproductive-rights/>. While Steinem coined the expression in a different context – a debate on sexual and reproductive rights – it nicely illustrates the idea of a contestation between different groups’ claims of powerlessness and ultimately harm.

legal persuasiveness they carry. Arguments based on “white innocence” used to challenge race-related affirmative action or claims based on the “continuing personal contact to those [one] believes are engaging in a deeply immoral relationship”<sup>544</sup> as the basis for objections to same-sex marriage point out to an *individualization* of impact. At once, such arguments shift the focus from remedies for past group-related discrimination, to individual harm suffered by persons but not as members of historically vulnerable groups. This trend indicates a significant non-textual change in the constitutional understanding of the function of equality in constitutions and in constitutional litigation. It challenges the corrective function of courts conducting constitutional review – one of their core reasons for the legitimacy of such a review – by asking courts to remedy not the intuitively accepted group-related historical disadvantage but an individual discrimination grounded in an individualized notion of harm.

As seen in this subsection, countermovements have sought to shift the jurisprudential focus from group powerlessness, linked with remedying past wrongs, to challenging individualized discrimination as formally equal treatment. This has happened particularly in instances of remedial equality<sup>545</sup> i.e. in cases where those who claim to have been harmed by remedial policies allege that they have suffered discrimination detached from past wrongs in a way.

Affirmative action is a key area where challenges brought on the basis of individualization of impact occurs because – as the South African doctrine of dignity-based equality so vividly revealed in the previous Section – affirmative action programs

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<sup>544</sup> Kent Greenawalt, “Religious Toleration and Claims of Conscience,” *Journal of Law and Politics* 28 (2013): 91–128.

<sup>545</sup> Ackermann, *Human Dignity: Lodestar for Equality in South Africa*, 353–54.

can be framed as a zero-sum game, where historically advantaged groups would inevitably suffer losses (e.g. rejection of university application or payment of higher electricity fee) due to such programs. While this is not necessarily always the case - especially because the direct causal link between affirmative action and individual losses is not given in such a straightforward manner in real life – cases challenging race-conscious affirmative action have witnessed the individualization of impact in legal argumentation.

In South Africa, the 1998 *Walker* and 2014 *Barnard* cases nicely illustrate the issue of individualization of harm in the context of affirmative action, which has opened the doors of constitutional equality litigation to countermovements. The *Walker* case is interesting because it allowed the Constitutional Court to answer the question of individual harm caused by a remedial measure assisting a member of a historically privileged group. In the Court's wording in *Walker*: "minorities of any kind are always potentially vulnerable. Processes of differential treatment which have the legitimate purpose of bringing about real equality should not be undertaken in a manner which gratuitously and insensitively offends and marginalizes persons identified as belonging to groups who previously enjoyed advantage."<sup>546</sup> *Walker* allowed the Court to highlight ways in which socially privileged individuals can still suffer harm to dignity<sup>547</sup> in a specific case, especially as a result of a remedial or affirmative policy.

In *Barnard*, however, the Court went into more detail about the impact of an affirmative action measure on a previously privileged person. As mentioned previously,

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<sup>546</sup> SOUTH AFRICA, South African Constitutional Court, *City Council of Pretoria v Walker* (CCT8/97) [1998] ZACC 1; 1998 (2) SA 363; 1998 (3) BCLR 257 (17 February 1998), Justice Sachs, Opinion of the Court, para. 123.

<sup>547</sup> In the words of the Court, coined by Justice Langa DP: "The conduct of the council officials seen as a whole over the period from June 1995 to the time of the trial in May 1996 was on the face of it discriminatory. The impact of such a policy on the respondent and other persons similarly placed, viewed objectively in the light of the evidence on record, would in my view have affected them in a manner which is at least comparably serious to an invasion of their dignity." South African Constitutional Court, *City Council of Pretoria v Walker*, para. 81.

*Barnard* addressed the case of not promotion of Mrs. Barnard (a White South African woman) at the South African Police National Commission because it would have amount to over-representation of White woman in light of the Employment Equity Act. Mrs. Barnard, on the other hand, complained before the Constitutional Court in the following terms:

*The gut of the complaint is that in declining to appoint her, the National Commissioner made an unlawful and unreasonable decision which must be set aside. To bolster the contention, she advanced a number of criticisms. The National Commissioner did not properly take into account her merit and competence. He had not brought to reckon all relevant factors before deciding on the promotion. He rather attached undue weight on demographic equity at the expense of her personal competence.*<sup>548</sup>

By denying that it was a matter of unfair discrimination, the Constitutional Court of South Africa addressed the issue of the impact on Mrs. Barnard's dignity and found it was not excessive. While not being promoted at a workplace and not being admitted to the university might seem inherently different scenarios, the difference between those two scenarios depend on the legal context at stake. In the case of South Africa, where affirmative action at workplace operates along clearly assigned racial lines, race conscious affirmative action in universities are not so different. This is not the case, however, when a given legal system conceptualizes that being promoted is a not a right

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<sup>548</sup> South African Constitutional Court, *City Council of Pretoria v Walker*, para. 58.

per se, but being admitted to university is.

Interestingly, first, the Court in *Barnard* recognized the complexities of intersectionality (gender plus race) – leading it to conclude that there is actually an over-representation of white women on the senior workplace level Barnard is applying to.

In *Barnard*, the South African Constitutional Court went even further to limit the scope of individualization of harm. Both the majority opinion and concurring opinion recognized the limitations of an individualized approach to harm. Speaking for the Court, Justice Moseneke recognized that:

“Remedial measures must be implemented in a way that advances the position of people who have suffered past discrimination. Equally, they must not unduly invade the human dignity of those affected by them, if we are truly to achieve a non-racial, non-sexist and socially inclusive society.”<sup>549</sup>

This is a clear example of the Courts’ balancing between its transformative mandate and the protection of dignity, which characterizes South African equality jurisprudence. Yet, in his concurring opinion, Justice Van der Westhuizen went even further and clarified that dignity in the South Africa context is more objective than a mere subjective analysis of how ‘disappointed’ the individual is, as a result of affirmative action. In his words:

*Barnard felt frustrated, disappointed and indeed wronged by the implementation of the affirmative measure. Thus she approached the courts. However, an exceedingly narrow and subjective view of dignity*

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<sup>549</sup> *Barnard*, Justice Moseneke, majority opinion, para. 32.



*by overly focusing on how a litigant felt about impugned law or conduct is not, without more, appropriate in this context. We are not dealing with a common-law civil claim based on the infringement of dignitas, or self-esteem. Dignity has a more objective and broader dimension. She also stated during cross-examination that it was hard to remain positive. If this means that she felt despondent and as if the Constitution and the law did not treat her as a fully recognised member of South African society, this aspect would require attention. The constitutional founding value and aim of a democracy founded on human dignity, equality, non-racialism and non-sexism would not allow for exclusion.*”<sup>550</sup>

*Barnard* is an example of the South African apex court’s partial institutional openness to countermovements’ claims, and of the redefinition of powerlessness. *Barnard* lost the case, because the Constitutional Court found that the exercise of discretion by the Police Commissioner was done “rationally and reasonably”<sup>551</sup> given the overrepresentation of white women. *Barnard* then reveals a strong affirmation of remedial measures such as employment affirmative action.<sup>552</sup> Yet, the applicant was able to get the Court to stress the need of a balancing exercise between historical discrimination (one of the conceptual foundations of political powerlessness) and individual harm. Also, *Barnard* got the Court to stress that – as in the concurring opinion by Justices Cameron, Froneman and Majiedt – remedial measures can give rise to “transformative tensions”<sup>553</sup> (or contention, if you will) between different groups.

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<sup>550</sup> *Barnard*, Justice Van der Westhuizen, para. 170.

<sup>551</sup> *Barnard*, para. 70.

<sup>552</sup> Penelope Andrews, “Race, Inclusiveness and Transformation of Legal Education in South Africa,” 2017, 11.

<sup>553</sup> *Barnard*, Justices Cameron, Froneman and Majiedt, *concurring opinion*, para. 77.

In a subsequent case, *Solidarity v. DCS* case,<sup>554</sup> decided in 2016, the South African Constitutional Court clarified what it calls the "Barnard principle". As mentioned before, *Solidarity* was presented by the same labor union who represented Barnard, which has the objective of reverting affirmative action policies in the workplace in South Africa. The case challenged the Equity Plan of the Department of Correctional Services for overrepresentation of minorities in the workplace. Interpreting its precedent in *Barnard*, in *Solidarity*, the Court defined that the Barnard Principle determines that employers are entitled to set up affirmative action programs in order to establish a balance in the representation of different racial groups in the workplace, but this means — “that the workforce of an employer should be broadly representative of the people of South Africa.”<sup>555</sup>

Thus, the limitations to overrepresentation of white people in the workplace (by favoring disadvantaged groups) apply as well as to other racial groups as well as to women and people with disabilities who should equally not be overrepresented in the workplace as a result of affirmative action policies. Justice Nugent in a concurring opinion leaves crystal clear the need of balancing group-related affirmative action with the ‘dignity of others’,<sup>556</sup> i.e. with a view of powerlessness as derived from the individualized impact on dignity of such quota-like measures. Thus, the South African case reveals a similar approach to the US based on an individualization of harm, but only with the extra component of balancing this harm with the transformative mandate

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<sup>554</sup> SOUTH AFRICA, Constitutional Court, *Solidarity v Department of Correctional Services*, (CCT 78/15) [2016].

<sup>555</sup> *Solidarity*, para. 40.

<sup>556</sup> “(...) reconciling the redress the Constitution demands with the constitutional protection afforded the dignity of others is profoundly difficult. That goal is capable of being achieved only by a visionary and textured employment equity plan that incorporates mechanisms enabling thoughtful balance to be brought to a range of interests. It is only in that way that the constitutional tensions referred to in *Barnard* are harmonised. And it is in that way that the Constitution’s demand for a public service that is “broadly representative of the South African people” will be realised. Ours are a vibrantly diversified people. It does the cause of transformation no good to render them as ciphers reflected in an arid ratio having no normative content.” *Solidarity*, [Nugent AJ](#), [Cameron J](#), concurring, para. 133.

of the South African constitution primarily in light of dignity arguments, while in the US it has been done through liberty related arguments. As mentioned before, the shift from equality towards liberty claims<sup>557</sup> - for instance, in the area of religious objections to complicity in same-sex marriage in the US - assumes an individualized rationale, where religious objectors claim they have been individually discriminated in a way detached from their religious group's powerlessness.

Brazil reveals an extremely different case than the US and South African ones in relation to how context is incorporated into equality jurisprudence. This is in line with the view that the doors of the courts are closed before countermovements in Brazil's equality cases. Structuring equality as a group-based concept, the Brazilian Supreme Court has explicitly advanced a substantive or material perspective of equality (both terms used here interchangeably).<sup>558</sup> While interpreting Brazil's racial equality jurisprudence, Adilson Moreira<sup>559</sup> argues that the STF's 2012 affirmative action decision consolidates a group-based approach to constitutional equality, as opposed to an individualized view of discrimination. This individualized view would alternatively focus less on compensating historical and collective discrimination, and more on whether specific individuals are treated by the above-mentioned affirmative action programs in a formally equal way.

According to Adilson Moreira, "as other affirmative action cases, the decision recognized Afro-Brazilians as a distinct class of individuals which has been subjected

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<sup>557</sup> Yoshino, "The New Equal Protection."

<sup>558</sup> Walter Claudius Rothenburg, "Igualdade Material e Discriminação Positiva: O Princípio Da Isonomia," *Novos Estudos Jurídicos* 13, no. 2 (2009): 77–92.

<sup>559</sup> "Prominently, the decision in question embraced a group-oriented approach to equal protection instead of resorting to an individualistic conception of equality based on means-ends rationality. In defining the eradication of social marginalization as a fundamental social goal, the Brazilian Constitution incorporates the idea of social groups as object of equal protection analysis. (Moreira, "Discourses of Citizenship in American and Brazilian Affirmative Action Cases," p. 37.)

to discriminatory practices that transformed Brazil in one of the most racially stratified societies of the world.”<sup>560</sup> Such a group-based notion of equality puts forward a specific concept of pluralism. In sharp contrast with the pluralism anxiety seen in the US context, the Brazilian Supreme Court has celebrated pluralism – understood as group diversity in which the State can legitimately interfere for the sake of protecting powerless groups. Such celebration of pluralism can be seen both in cases related to sexual orientation as well as in cases referring to race.

In relation to race, Brazil’s Supreme Court in the *affirmative action case* has understood both pluralism as respect towards differences and remedies for overcoming structural inequalities.<sup>561</sup> Similarly, as recalled by Moreira, in the 2011 case that recognized the constitutionality of same-sex unions, the leading justice (rapporteur) put pluralism in the framework of fraternal constitutionalism mentioned in the Constitution’s preamble:

*““This type of fraternal constitutionalism geared towards the integration of groups in the community (not exactly seeking “social inclusion”) seeks to materialize the necessity of public policies that foments civic and moral equality (thus more than simple economic equality) of those groups who have historically disfavored and frankly demonized. These groups include social segments such as Afro-Brazilians, Native Brazilians, women, disabled individuals and, most recently, those who have been named “homoafectionals” instead of “homosexuals”. This policy orientation complies with the interest in challenging social prejudice, which realizes the*

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<sup>560</sup> Moreira, “Discourses of Citizenship in American and Brazilian Affirmative Action Cases,” p. 37.

<sup>561</sup> BRAZIL, Supreme Federal Court (S.T.F.), ADPF No. 186, Justice Gilmar Mendes, p. 178.

*acceptance of the social and political pluralism, which is one the foundations of the Brazilian Federal Republic.”*<sup>562</sup>

Recalling the point mentioned above, the lack of institutional openness to countermovements in the Brazilian case is due to the continuing prevalence of political powerlessness as a guiding principle of the equality jurisprudence and the transformative tone of the constitutional framework such prevalence entails.

### 3. Conclusion

The conceptual framework of this dissertation (in its Chapter 2) hypothesized that courts’ institutional openness would enable the dynamic engagement of social movements with countermovements: courts would then serve as a permanent forum for competing claims – in other words, courts would become spaces of contention. This hypothesis explains why countermovements’ legal mobilization has endured more in the United States than in South Africa and Brazil (in descending order).

Throughout this Chapter, Brazil has served as a counterpoint to the US’s full and to South Africa’s partial redefinition of powerlessness. In Brazil, partly due to restrictions in formal access to direct constitutional review, partly due to the solid focus of the Brazilian framework of equality on anti-subordination, the contention envisioned in the other countries has not materialized to a considerable degree so far. The Brazilian case - rather than discrediting the assumptions behind this work – proves it: it shows, *a contrario*, that countermovements’ redefinition of powerlessness influences institutional openness heavily. Meanwhile, in the US and in South Africa, the judicial

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<sup>562</sup> S.T.F., ADI No. 4.277, Órgão Julgador: Tribunal Pleno, Relator: Carlos Ayres de Brito, 04.05.2011, S.T.F.J. (Braz.), as appeared translated in: Moreira, “Discourses of Citizenship in American and Brazilian Affirmative Action Cases,” n. 97.

acceptance of countermovements' attempts to redefine constitutionally relevant harm in individual terms resulted in the decline of the explanatory power of political powerlessness as a wrong to be remedied in a constitutional review.

The changing nature of the constitutional framework of equality altered the definition of powerlessness from its strict concept attached to historical disadvantage and lack of political representation (what here was defined as *political powerlessness*) to a new kind of powerlessness which is grounded fully in the US and partially in South Africa in a concept of individual harm. Both examples point out to an exacerbation of contention in constitutional equality between different movements once the doors of the apex court are open to new kinds of claims as those presented by countermovements.

In this Chapter, institutional openness was presented as the judicial acceptance of arguments aiming to redefine powerlessness, which triggers the corrective role of courts in ameliorating malfunctions of political processes in equality litigation. The US shows the demise of political powerlessness related to historical disadvantage and/or lack of representation, and a growing concern with individualized impact of equality. In the US, countermovements, primarily those contesting race-conscious measures, have made use of this redefining of powerlessness in order to gain judicial acceptance of their claims. Even gains of social movements, such as the recent acceptance of same-sex marriage nationwide, were framed in terms of harm to one's dignity, rather than of political powerlessness. In this sense, the US constitutes an example of the demise of political powerlessness and institutional openness to countermovements.

As far as Brazil and South Africa are concerned, other considerations come to play. Like the US, individualization of harm is key to understanding the South African dignity-based equality framework. While, like Brazil, South Africa, both textually and

jurisprudentially, displays a transformative concern with political powerlessness, South Africa has also shown signs – once again in relation to contesting affirmative action – that the doors of its equality jurisprudence might be partially open to countermovements if they are able to plausibly make the case of individualized harm to one’s dignity as a sign of (a redefined) powerlessness, as *Walker* was able to and *Barnard* was not.

Brazil’s example occupies the other extreme. Brazil offers a combination of restrictive standing rules, which favours abstract control of constitutionality directly presented by high-level political and legal actors, rather than individual cases, who can only reach the court by appeal, and a heavy textual and jurisprudential emphasis on political powerlessness rather than individualized harm. In this context, while countermovements have been able to present claims before the country’s apex court (formal access) – in instances regarding contesting same-sex marriage and affirmative action – they have not been able to gain judicial acceptance of their concept of powerlessness (institutional openness).

The common thread in those cases is that institutional openness to countermovements’ claims is inextricably related to how each jurisdiction conceptualizes powerlessness and the role of courts conducting constitutional review in remedying it. Furthermore, those case studies reveal the important role played by individual impact – particularly harm to one’s dignity – in such a redefinition of powerlessness and thus in the openness to countermovements’ claims. The next section showed two ways – the downplaying approach and the individualization approach – through which countermovements have redefined powerlessness and, thus, gained judicial acceptance to their claims.

Bearing in mind these country-specific nuances, this Chapter revealed certain core lessons regarding the equality framework and its impact on institutional openness,

defined as judicial acceptance to countermovements' claims. First of all, **constitutional text matters**. South Africa and Brazil confirmed their transformative constitutional mandate in their equality jurisprudence, to different degrees. In Brazil, the apex court has used the constitutional text heavily to reaffirm group-related political powerlessness. In South Africa, the Constitutional Court has explored the internal tensions in the constitutional text (between a transformative rights' framework, a focus on dignity, and the constitutional aim of a colorblind society) in its jurisprudence.

Secondly, while institutional openness is defined here not as formal access but as judicial acceptance, the debate in this Chapter also revealed that **formal access matters** for deciding which countermovements' claims get accepted by the courts. Brazil illustrates this point. Despite the rhetoric of institutional openness of constitutional review to social mobilization vindicated by transformative neoconstitutionalism in Brazil, persisting structural barriers to formal access to abstract constitutional review in the country – restricted to a few actors - have curtailed the ability of countermovements to turn courts into spaces of contention in a sustained manner. Furthermore, the fact that political powerlessness is heavily grounded in historical disadvantage in Brazil, countermovements have had a hard time asserting their claims before the highest court in the land. If that is the case, Chapter 5 will be crucial in seeking an understanding of how legal battles in Brazil are promoted elsewhere by countermovements, in other venues such as administrative bodies and political branches. More generally, taken together, those two Chapters then form a larger picture of the legal structure opportunity countermovements enjoy in the three jurisdictions.

Thirdly, when departing from political powerlessness, courts conducting constitutional review, especially in South Africa and in the United States, **have focused**



**on the individual impact of equality-related measures, particularly of remedial measures (e.g. affirmative action), moving towards an individualized notion of harm, such a notion can be embraced by liberty or dignity arguments.** This leads us to Chapter 6, where this study digs into the question of what harm-focused equality means for social movements-counter-movements contentions.

## **CHAPTER 4 CONTESTATION: BETWEEN CONTAINMENT AND COUNTERSTRIKE STRATEGIES**

Countermovement legal mobilization often occurs in multiple venues. For a legal scholar, an essential question is then how constitutional standards influence in which instances countermovements turn to courts or to other venues to promote or resist constitutional change. This Chapter looks more closely at the first element of the conceptual framework presented in the previous Chapter, namely: judicial standards of contestation in multiple venues, including outside courts. In addition to rules on access to court, ultimately, the way apex courts define harm influence the available options for countermovements' legal mobilization in multiple venues, including outside courts.

Why do countermovements take contestation outside courts conducting constitutional review? Consider the legal structure opportunity framework presented in the previous Chapter. Is it because countermovements have access to the formal institutional structure of Legislative and Executive bodies better than they do in relation to, let's say, apex courts? Is it because in a specific context politicians and bureaucrats or the general public make up more powerful allies than apex judges? Or even is it because the legal framing of previous constitutional decisions allows or at times invites countermovements to make claims outside courts more easily than they can make constitutional claims about equality before courts? This is the question to be answered in this Chapter, on the basis of the conceptual framework presented in the previous Chapter.

Looking at this issue from the point of view of courts, courts conducting constitutional review would influence, according to this hypothesis, through

constitutional standards how much contestation can occur outside courts. If an apex court restricts the extrajudicial debate on certain issue (e.g. by deciding bluntly that same-sex marriage should be recognized nationwide), contestation outside courts will then be considerably limited on that issue. On the other hand, if an apex court leaves certain issues open for debate outside court – intentionally or not (e.g. by allowing referendum on affirmative action programs), thus contestation outside court will likely endure if the existing configuration of power (which includes for instance public support) allows it. As the conceptual framework presented in Chapter 2 predicts, the conditions for sustaining legal mobilization endure as long as countermovements have a sounding legal frame for their claims; as well as when they enjoy a favorable configuration of power retaining important allies among other political branches or political actors (such as political parties).

Accordingly, this Chapter will examine how countermovements sustain their legal strategy to trigger constitutional change outside the courtroom in issues of racial and sexual equality. Following the conceptual framework presented in the previous Chapter, *whenever the configuration of power allows it, countermovements will sustain their legal mobilization outside courts, seeking to either contain social movements' agenda before political branches, or counterstriking with the countermovements' own agenda before those political branches.*

Whenever countermovements fail to achieve their aims through constitutional litigation, they may take their battles outside the judicial process (such as the voting box in the case of referenda or legislative and administrative bodies outside courts). **The chapter aims to (1) explore the conditions which affect the success of such extra-judicial legal mobilization, and (2) reflect on the interaction between such extra-judicial mobilization and constitutional standards of harm.**

The range of extrajudicial venues with which this Chapter could potentially deal with is vast. ‘Extrajudicial venues’ can range from bureaucratic bodies such as Brazil’s National Council of Justice – the country’s oversight body for the judiciary - to antidiscrimination or employment tribunals (when separated from the ordinary judicial system), independent institutions such as human rights commissions, as well as executive bodies and legislatures at national, state and local levels. More specifically, the case presented in this Chapter focus on the interaction between courts and legislatures, the public through popular initiatives and administrative bodies such as Brazil’s National Council of Justice.

The cases presented in this Chapter reveal strategies of legal mobilization outside the judicial sphere as well as their interaction with constitutional change. The chapter argues that apex courts deciding equality claims have the power to influence how open or close spaces for contestation between social movements and countermovements outside courts are. The way one can measure such openness or closure of spaces of contestation outside courts is how expansively apex courts are willing to define constitutionally relevant harm.

When courts do not consider certain measures against social movements as imposing harm in a constitutionally relevant way (i.e. by allowing states to prohibit affirmative action) or when courts consider at least *prima facie* that countermovements’ claims address a constitutionally relevant harm (i.e. by permitting complicity claims even from legal entities), apex courts thus allow – even if indirectly – contestation outside the judiciary on the contours of what it means to be harmed.

Here, for analytical purposes, the strategies by countermovements are divided into two. First, this Chapter is interested in instances where countermovements made use of *reactive* measures seeking to contain constitutional change from being effected

elsewhere, often outside the courts [the **containment strategy**, examined in Part 1]. Constitutional jurisprudence that leaves little room for effective enforcement of its decisions before political branches enables such containment strategy, by allowing legislatures and other officials to be ommissive in fulfilling constitutional change. The case of Brazil's same-sex marriage saga illustrates this point: legislative history clearly indicates a purposeful omission by Brazil's political elite to fulfil the apex court decision in favor of same-sex unions. Brazilian constitutional jurisprudence on the topic, despite its progressive exterior, lacks proper enforcement, thus allowing for such containment strategy to take place in the legislative branch.

Second, this Chapter is particularly interested in instances where countermovements *proactively* questioned in other venues the very need of legal protection for social movements, encouraging state officials or the general public to express constitutional views sympathetic to countermovements' claims [here called the **counterstrike strategy**, analyzed in Part 2]. Constitutional equality jurisprudence opened the way for such counterstrike strategies in contexts where it found no relevant harm in undoing constitutional change historically favorable for social movements. This is the case of the latest equality jurisprudence in the United States insofar it allows countermovements to counterstrike progress in antidiscrimination law on the basis of race through popular vote.

The difference between counterstrike and containment strategies is not merely a matter of degree, but is rather qualitative: the first seeks to affirm constitutional change in multiple venues; the second aims to prevent constitutional change that is already underway.

Third, finally, this Chapter focuses primarily on Brazil and the United States given the predominance of countermovements' contestation outside courts in those

countries. The case of South African marriage equality is often seen as a case of the dialogue between the Constitutional Court of South Africa and the Parliament. This was the case of how the saga of same-sex marriage unraveled in South Africa in the *Fourie* case (2005).<sup>563</sup> There the Court gave one year of deadline for the Parliament to make the necessary adjustments in the marriage law in order to fully recognize same-sex marriage. By doing so, the Court inhibited eventual contestation in the political branches by countermovements opposing same-sex marriage.

This dissertation defines the same-sex marriage saga in South Africa as a dialogical strategy of that country's Constitutional Court in giving 12 months to the South African Parliament to change marriage laws in compliance with the court's decision, thus changing the configuration of power reducing the influence of countermovements in the Parliament and strengthening the stance of the South African LGBT movement in the legislative branch. South Africa has experienced vivid contestation within courts, partly due to an attempt from otherwise privileged members of white middle class to access South African court in order to question remedial measures.<sup>564</sup> Yet, South Africa has not witnessed considerable contestation outside courts in matters of racial and sexual equality, either through counterstrike or containment strategies, partly due to the dominance of African National Congress in post-apartheid politics,<sup>565</sup> and partly due to the ability of the Court to balance matters of principle and pragmatism in its way of addressing political branches.<sup>566</sup>

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<sup>563</sup> SOUTH AFRICA, Constitutional Court of South Africa, *Minister of Home Affairs and Another v Fourie and Another* (CCT 60/04) [2005] ZACC 19; 2006 (3) BCLR 355 (CC); 2006 (1) SA 524 (CC) (1 December 2005).

<sup>564</sup> SOUTH AFRICA, Constitutional Court, *City Council of Pretoria v Walker* (CCT8/97) [1998] ZACC 1; 1998 (2) SA 363; 1998 (3) BCLR 257 (17 February 1998); *South African Police Service v Solidarity obo Barnard* (CCT 01/14) [2014] ZACC 23; 2014 (6) SA 123 (CC); [2014] 11 BLLR 1025 (CC); 2014 (10) BCLR 1195 (CC); (2014) 35 ILJ 2981 (CC) (2 September 2014).

<sup>565</sup> Paremoer and Jung, "The Role of Social and Economic Rights in Supporting Opposition in Postapartheid South Africa," 2011. Thoreson, "Somewhere over the Rainbow Nation: Gay, Lesbian and Bisexual Activism in South Africa."

<sup>566</sup> Roux, *The Politics of Principle: The First South African Constitutional Court, 1995-2005*.

Countermovements in South Africa did not take contestation outside courts forward, at least not in the form of legal mobilization, because of the existing elite alignment in that country. Post-apartheid South Africa, for the past two decades, has revealed a one-party dominance in the legislature. Thus, as Paremoer and Jung argue, social movements and civil society organizations have filled the gap, exercising the role of political opposition via, *inter alia*, the constitutional court.<sup>567</sup> In this sense, the access of countermovements to the country's apex court to uphold initiatives of contestation outside courts – of the type seen in the US – is unlikely to constitute a major strategy given the courts' inclination towards the movements' claims and the inexistence, for instance, of countermovement-led popular ballots in the first place.

Additionally, speaking to the issue of different concepts of harm, in South Africa one key element that has prevented contestation outside courts to gain considerable weight is the constitutional discourse of social transformation. Bearing in mind the rhetoric of transformative constitutionalism and the history of constitution-driven liberation from apartheid, any contestation outside courts would have to find a place in such framing of liberation. That is why the harm argued by challengers to affirmative action in South Africa has been more convincingly argued before courts: because it has found a space in the individualization of the dignity jurisprudence, as shown in the previous Chapter, than before the post-apartheid political circles dominated by the African National Congress. As seen in Chapter 5, in South Africa the only relatively successful strategy as far as harm is concerned is the one adopted in race cases by countermovements making use of non-racialism and individual dignitary harm which are argued as compatible, rather than opposite to the constitutional politics of

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<sup>567</sup> See: Paremoer and Jung, "The Role of Social and Economic Rights in Supporting Opposition in Postapartheid South Africa," 2011.

liberation. All these elements justify to a certain degree the failure of countermovements to transport contestation outside courts in South Africa, in particular in relation to LGBT rights.

## 1. Containment Strategy: the Brazilian Case

This Part 1, **on containment strategy**, shows how countermovements in Brazil – in reaction to the same-sex union decision of 2011 – blocked the national Congress to enact regulation that would move LGBT rights forward. As a result, Brazil's CNJ, essentially an administrative body responsible for overseeing administratively and financially the judicial institutions, ended up doing what one could expect would have been the role of the national legislature: recognizing same-sex marriage for LGBT couples across the country.

This story – told in detail below – can be traced back to constitutional jurisprudence itself. Brazilian constitutional jurisprudence on the topic, despite its progressive exterior, often does not offer clear way forward in terms of remedies, thus allowing for such containment strategy to take place. In other words, by phrasing its decision on same-sex union as a mere interpretation of existing norms rather than ordering the legislature to change statutory legislation on marriage (differently from South Africa), **Brazil's STF hid in the marriage equality case behind a jurisprudence *prima facie* transformative, but with limited impact in preventing containment strategies by countermovements.**

In the terms of the present dissertation, Brazil's STF focuses its jurisprudence on the harm the institutional exclusion from civil union imposes on LGBT people. Yet, for its lack of dialogue with the legislature, the STF imposes another harm on the same



people it seeks to protect by depriving them of a clear constitutional change towards same-sex marriage. The enactment of the CNJ resolution on same-sex marriage was more an incidental effect of the STF decision, made possible within Brazil's context of bureaucratic autonomy, rather than its intentional outcome. The more recent case law by the STF on trans rights' cases reaffirms the role of STF of guaranteeing LGBT rights in light of the omission of the legislative branch.

### 1.1. Brazil's Same-Sex Union Decision and its Aftermath

In 2011, Brazil's Supreme Federal Tribunal issued a joint unanimous ruling in two related cases. The first lawsuit was specifically about the parity of social benefits for state civil servants in the State of Rio de Janeiro, and was presented by the Governor of that state with the assistance of prominent legal scholars. The second lawsuit was presented by the interim General-Prosecutor of Brazil, contesting the nationwide non-recognition of same-sex unions.<sup>568</sup> The STF held that the provision in the Civil Code that expressly recognizes de facto unions as between a man and a woman should be interpreted as also including unions between same-sex couples. Ultimately, the holding of the STF decision stated that:

“Article 1723 of the Civil Code shall be interpreted according to the Federal Constitution to exclude any meaning that hinders the recognition of the continuous, public, lasting union of same-sex couples as a ‘family entity’, understood as a synonym of

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<sup>568</sup> BRAZIL, Supreme Federal Tribunal (STF), the Claim of Fundamental Principle Violation (ADPF) 132 and the Direct Action on Unconstitutionality (ADI) 4277 and, jointly decided on May 5<sup>th</sup> 2011. For an overall analysis of both cases, see: Luís Roberto Barroso, “Same-Sex Unions: Legal Recognition of Common Law Unions between Same-Sex Partners // Uniãoes Homoafetivas: Reconhecimento Jurídico Das Uniãoes Estáveis Entre Parceiros Do Mesmo Sexo,” *Revista Direito. UnB* 1, no. 1 (2014): 211–69.

‘family’. To this recognition shall be applied the same rules and consequences derived from heteroffective ‘stable unions’.”<sup>569</sup>

First, it is the first strong statement of the highest court in Brazil, after years of litigation at other levels,<sup>570</sup> in favor of same-sex couples. Second, the court expressly opened the road to the legal recognition of marriage once partners in *de facto* unions have roughly the same rights as married ones and couples in *de facto* unions can legally request to convert their legal status to married. As Roger Raupp Rios points out,

"the consequences are practical and effective ... a number of rights arise from [the decision of the STF], such as: inclusion in health plans, social security, membership as a dependent in clubs and societies, duty of care in case of need, division of assets acquired during the union, right to inheritance, usufruct of the deceased's assets and accompaniment of partner in hospital institutions." <sup>571</sup>

Apart from the rights gained by same-sex couples due to the recognition of same-sex unions as *de facto* unions, it is key to understand the role of the legal institution of *de facto* unions in the history of the gradual legal recognition of non-marital relations in Brazil, with different or same-sex couples. In Brazil, recognizing same-sex unions as *de facto* unions can be read in light of the long history of judicial decisions defining domestic cohabitation as the basis for *de facto* unions in Brazil, influenced by decades

<sup>569</sup> As translated in: Friedman and Thiago Amparo, "On Pluralism and Its Limits: The Constitutional Approach to Sexual Freedom in Brazil and the Way Ahead," 276.

<sup>570</sup> Adilson Jose Moreira, "We Are Family! Legal Recognition of Same-Sex Unions in Brazil," *American Journal of Comparative Law* 60, no. 4 (2012): 1003–42. See also: Roger Raupp Rios, Celio Golin, and Fernando Altair Pocahy, eds., *A Justiça e Os Direitos de Gays e Lésbicas: Jurisprudência Comentada [The Judiciary and the Rights of Gays and Lesbians: A Commentary on the Jurisprudence]* (Porto Alegre: Editora Sulina, 2003).

<sup>571</sup> Rios, "Direitos Sexuais, União Homossexual e Decisão Do Supremo Tribunal Federal (ADPF 132 - RJ e ADI 4.277) [Sexual Rights, Homosexual Unions and the Supreme Federal Tribunal Decision]," 103.

of litigation by different-sex couples before lower courts seeking the recognition of their de facto relations as quasi marriage. For Moreira,

“Same-sex couples who began to seek legal protection in the early 1980s looked at this history of domestic cohabitation adjudication and decided to try to convince the courts of the similarities between same-sex and opposite-sex unmarried couples. This long national tradition of extending legal protection to cohabiting couples played a central role in the surprisingly rapid and frequently positive response from the courts.”<sup>572</sup>

Following the STF decision on same-sex unions, two further legal developments led to the current state of the same-sex marriage in Brazil. First, the highest court of appeal on statutory matters, the Superior Tribunal of Justice (*Superior Tribunal de Justiça* – STJ) decided in October 2011 in favor of a case presented by a lesbian couple seeking to formalize their same-sex marriage,<sup>573</sup> holding that the statutory federal definition of marriage (as contained in the Civil Code of 2002) should be interpreted in accordance with the Constitution. The STJ ruled in light of the decision of the STF regarding same-sex unions, arguing for the constitutionalization of family law in Brazil. In the hybrid system of judicial review in Brazil,<sup>574</sup> the STJ does not have the authority to impose a nationwide interpretation of the Constitution, which is the prerogative of the STF. Nevertheless, the STJ is the highest judicial authority in terms

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<sup>572</sup> Moreira, “We Are Family!: Legal Recognition of Same-Sex Unions in Brazil,” 1014–15.

<sup>573</sup> BRAZIL, Superior Tribunal of Justice (STJ), Special Appeal (RESP) 1.183.378 - RS (2010/0036663-8), decided on October 10<sup>th</sup> 2011.

<sup>574</sup> For an explanation of the Brazilian system in English, see: Keith S Rosenn, “Judicial Review in Brazil: Developments under the 1988 Constitution,” *Southwestern Journal of Law and Trade in the Americas* 7 (October 1, 2000): 291.

of federal statutory law, and thus has the power to issue individual decisions that serve as a parameter for other courts at the state level in relation to their understanding of the federal law.

Second, in a further development, the National Council of Justice (CNJ) – with a resolution from May 2013 containing only 3 lines in its operative part<sup>575</sup> - ordered all the relevant authorities (e.g. registry officials and judges) to not deny requests by same-sex couples for marriage or conversion of their de facto unions into marriage. The explicit legal bases for this resolution, as provided by the CNJ in the text of the resolution itself, are the precedents mentioned above: the STF decision on same-sex unions in an *erga omnes* case and the STJ decision on same-sex marriage in an *inter partes* case. Such initiative by the CNJ, in practical terms, represented the nationwide recognition of same-sex marriage in Brazil, with around 1,000 marriages being celebrated throughout the country in its first year, with data collected until May 2014.<sup>576</sup>

## 1.2. The STF and Legislative Omission

As far as rights development is concerned in Brazil, a number of scholars have noticed that, despite the transformative nature of the 1988 Constitution, Brazil is marked by a legislative omission<sup>577</sup> in moving forward the country's anti-discrimination law framework. Brazil lacks a general antidiscrimination legislation.<sup>578</sup> It presents instead

<sup>575</sup> Resolution 175 from 14 May, 2013, available at: <http://www.cnj.jus.br/atos-administrativos/atos-da-presidencia/resolucoespresidencia/24675-resolucao-n-175-de-14-de-maio-de-2013>. Last accessed: 2 February, 2015.

<sup>576</sup> CNJ, *Um ano após norma sobre o casamento gay, chegam a 1.000 as uniões entre o mesmo sexo*, available at: <http://www.cnj.jus.br/noticias/cnj/28530:um-ano-apos-resolucao-do-casamento-gay-chega-a-1000-o-numero-de-uniões-entre-pessoas-do-mesmo-sexo>. Last accessed: 2 February 2015.

<sup>577</sup> De la Dehesa, *Queering the Public Sphere in Mexico and Brazil: Sexual Rights Movements in Emerging Democracies*; Hernández, *Racial Subordination in Latin America: The Role of the State, Customary Law, and the New Civil Rights Response*.

<sup>578</sup> Adilson José Moreira, *O Que é Discriminação? [What Is Discrimination?]* (Belo Horizonte: Letramento; Casa do Direito; Justificando, 2017).



player – a third legislative chamber – but as a first and only legislative chamber. Social and political actors wishing to completely bypass the political decision-making process have successfully prompted the Court to deliver decisions that: (a) established rules in areas of law where the elected branches had not taken any decisions for the last decades; and (b) at least in how they came to be treated by the Supreme Court itself, left no room at all for further congressional or presidential lawmaking on these topics.”<sup>584</sup>

While the above-mentioned authors are right in their assessment of the STF acting as the first and only legislature on LGBT rights, overemphasizing this aspect might lose sight of the constitutional reasons underlying such phenomenon: that legislative omission has historically harmed LGBT people in Brazil and that such omission is not the result of the STF decisions but rather the product of conscious choice of political parties connected with countermovements seeking to block LGBT rights’ legislation.

Despite the existence of allies including in the President’s party during the Lula (2003-2010) and Dilma (2011-2016) presidencies, there is a strong resistance by the federal legislature against LGBT issues. For instance, same-sex union bills were defeated in Congress multiple instances.<sup>585</sup> In 1995, it was presented a legislative proposal seeking to recognize same-sex partnerships in Brazil’s House of Representatives, which after years of inaction was never put to vote in the plenary

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<sup>584</sup> Diego Werneck Arguelles and Leandro Molhano Ribeiro, “Courts as the First and Only Legislative Chambers? The Brazilian Supreme Court and the Legalization of Same-Sex Marriage,” *VRÜ Verfassung Und Recht in Übersee* 50, no. 3 (2017): 261–62, <https://doi.org/10.5771/0506-7286-2017-3-281>.

<sup>585</sup> Santos, “Movimento LGBT e Partidos Políticos No Brasil [LGBT Movement and Political Parties in Brazil].” See also: Rosa Maria Rodrigues de Oliveira, “Direitos Sexuais de LGBTTT No Brasil: Jurisprudência, Propostas Legislativas e Normatização Federal [Sexual Rights of LGBTTT in Brazil: Jurisprudence, Legislative Proposals and Federal Law-Making],” *Brasília: Ministério Da Justiça, Secretaria Da Reforma Do Judiciário*, 2012.

session of the Parliament.<sup>586</sup> The same fate has been reserved to a legislative proposal in 2011 in the Senate recognizing same-sex de facto unions,<sup>587</sup> as well as the legislative bill to criminalize homophobia which was voted once in the House of Representatives but the Senate took no action regarding this proposal.<sup>588</sup>

More importantly, in line with what US scholars have called anticipatory countermobilization, countermovements have rehearsed what could be considered a counterstrike strategy orchestrated by the Evangelical Caucus in the national congress, yet still without much success. Juliana Gomes has described this countermobilization in her book on citizenship and social movements. Gomes recalls three recent legislative proposals that were debated in the House of Representatives' Human Rights Commission but which in the final vote failed or were filed: (i) the Legislative Decree Bill 234/2011 which sought to reinstate the practice of conversion therapies recently prohibited by the Federal Council of Psychology – filed after intense public pressure; (ii) a Legislative Bill allowing churches to remove from their premises citizens that were considered in violation of their values (a code for LGBT people) – which passed at the Human Rights Commission; (iii) a Legislative Bill seeking to call for a referendum on same-sex marriage and the suspension of the CNJ resolution – which also passed at the Human Rights Commission; (iv) a Legislative Bill called Family Statue defining family as union between men and women – which passed at a special commission installed to revise it.

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<sup>586</sup> BRAZIL, House of Representatives, Legislative Proposal 1151/1995, <http://www.camara.gov.br/proposicoesWeb/fichadetramitacao?idProposicao=16329>, available at: 6 April 2018.

<sup>587</sup> BRAZIL, Senate, Legislative Proposal 612/2011, <https://www25.senado.leg.br/web/atividade/materias/-/materia/102589>, available at: 6 April 2018.

<sup>588</sup> Santos, "Movimento LGBT e Partidos Políticos No Brasil [LGBT Movement and Political Parties in Brazil]," 204.

Those initiatives have not yet been successful in the final vote in the Parliament. Additionally, “although such initiatives are somewhat incipient and still do not express the position of the National Congress as a whole, they demonstrate a persistent articulation against LGBT rights in one of its legislative houses.”<sup>589</sup> The Brazilian scholar Daniel Cardinali argues that despite their lack of success (so far), those legislative strategies constitute an attempt of religious countermovements in reaction the jurisprudence of the STF.<sup>590</sup>

Nevertheless, Brazil’s LGBT movement indeed managed to advance their supporters across a considerable range of political parties. In Brazil, social movements and countermovements have partnered with political parties to advance their cause. Encarnación<sup>591</sup> recalls the rise of Evangelicals who have been vocal against LGBT rights in federal, state and local legislatures in Brazil. At the same time the LGBT movement in Brazil maintains close ties with political parties (specially left-wing ones), thus often adopting a partisanship language, as opposed to a language focused on human rights as seen in Argentina, argues Encarnación. The LGBT movement in Brazil closed those ties, in Encarnación’s words, by “appealing [in the 1990s-2000s] to individual lawmakers framing their mission around human rights and the representation of ‘minorities’”<sup>592</sup> After reviewing the history of LGBT groups inside political parties in Brazil, Gustavo Gomes<sup>593</sup> finds that LGBT groups became popular *within* center and right-wing political parties only after mid-2000s, thus expanding the presence of LGBT

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<sup>589</sup> Gomes, *Por Um Constitucionalismo Difuso: Cidadãos, Movimentos Sociais e o Significado Da Constituição* [For a Diffuse Constitutionalism: Citizens, Social Movements and the Meaning of the Constitution], 139.

<sup>590</sup> Daniel Carvalho Cardinali, *A Judicialização Dos Direitos LGBT No STF* [The Judicialization of LGBT Rights in before the STF] (Belo Horizonte: Arraes Editores, 2018), 180–206.

<sup>591</sup> Encarnación, *Out in the Periphery: Latin America’s Gay Rights Revolution*, 153–54.

<sup>592</sup> De la Dehesa, *Queering the Public Sphere in Mexico and Brazil: Sexual Rights Movements in Emerging Democracies*, 116.

<sup>593</sup> Santos, “Movimento LGBT e Partidos Políticos No Brasil [LGBT Movement and Political Parties in Brazil].”



groups within political parties primarily in the left-wing spectrum of the political system. Yet, as legislative inaction on LGBT rights has shown, despite the increasing institutionalization of LGBT groups within political parties, countermovements still maintain considerable strength in Brazil's Parliament.

Brazil's legislative omission is so striking that there is a pending case, presented by a left-wing political party asking the Supreme Court to declare that such omission is itself unconstitutional and therefore the Parliament should be judicially constrained to move the bill on criminalization of homophobia forward.<sup>594</sup>

### 1.3. Countermovements Fight Back Through Containment Strategy in Court

Countermovements not only contain legislative proposals in the Parliament, but they also strike back before the STF. In response to the legalization of same-sex marriage in the whole territory of Brazil through the CNJ resolution countermovements' orchestrated a judicial strategy to block such initiative outside courts. Pursuing a containment strategy, countermovements sought to block this legalization of same-sex marriage outside courts, by preventing any legislation on the matter to be passed by the Congress as well as simultaneously reaching out to the Supreme Court to avoid the continuation of the nationwide legalization of same-sex marriage.

Right in the aftermath of the CNJ resolution, in the same month (May 2013), a Social-Christian right-leaning party (*Partido Social Cristão* – PSC) presented a case – numbered Direct Action on Unconstitutionality (ADI) 4966<sup>595</sup> – challenging precisely

<sup>594</sup> BRAZIL, Supreme Federal Tribunal, Direct Action of Unconstitutionality by Omission (ADO) 26, <http://www.stf.jus.br/portal/processo/verProcessoAndamento.asp?numero=26&classe=ADO&origem=AP&recursao=0&tipoJulgamento=M>. Last accessed on: 2 April 2018.

<sup>595</sup> More available at: <http://www.stf.jus.br/portal/cms/verNoticiaDetalhe.asp?idConteudo=240588>. Last accessed on: 2 February 2015.

the CNJ resolution 175/2013, which established same-sex marriage nationwide, as described above.

The main arguments of the PSC are as follows. First, it argued that the CNJ resolution violates separation of powers, since for the PSC the CNJ resolution was of legislative nature due to its general and abstract character. Second, accordingly, the PSC argued that the CNJ mandate is only administrative, and therefore it is only allowed to control administrative and financial matters pertaining the judiciary. Third, more importantly, it argued that there is no legal basis for the resolution. This would be so because the STF decision was related only to same-sex unions and not marriage, recalling as well the careful words of Justices Peluso and Mendes who – according to the PSC – reaffirmed the need of a legislative rather than judicial solution to the issue. In addition to the PSC petition, several organizations<sup>596</sup> have contributed with *amici curiae* in this case,<sup>597</sup> which has been a common practice of the Court.<sup>598</sup>

The case would have been a usual judicial challenge backed up by a countermovement to marriage equality, if it were not for two key elements of the case. First, the challenged act of legalization of same-sex marriage in the case was neither carried out through a previous judicial decision nor a piece of legislation adopted by the parliament, but rather an administrative resolution<sup>599</sup> enacted by the country's CNJ extending same-sex marriage to the whole country. It suggests an attempt by

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<sup>596</sup> For an example in favor of the CNJ resolution, see: Conectas Human Rights and the Brazilian Society of Public Law (Sociedade Brasileira de Direito Público – SBDP) present

<sup>597</sup> See more at: <http://www.stf.jus.br/portal/cms/verNoticiaDetalhe.asp?idConteudo=178775>. Last accessed: 2 February 2015.

<sup>598</sup> For instance, see the special edition of the constitutional law journal, *Revista Brasileira de Estudos Constitucionais* in 2012 (Oct./Dec.), on the STF public hearings and *amici curiae* in the context of participation before the court. See: <http://www.editoraforum.com.br/ef/index.php/publicacoes/periodicos/listar-periodicos/revista-brasileira-de-estudos-constitucionais-rbec/?numero=24&ano=2012>. Last accessed: 2 February 2015. Coelho, “As Idéias de Peter Häberle e a Abertura Da Interpretação Constitucional No Direito Brasileiro.”

<sup>599</sup> Resolution 175 from 14 May, 2013, available at: <http://www.cnj.jus.br/atos-administrativos/atos-da-presidencia/resolucoespresidencia/24675-resolucao-n-175-de-14-de-maio-de-2013>. Last accessed: 2 February, 2015.

countermovements to avoid – through the judiciary - the enactment of constitutional change in venues other than courts. The fact that such major rights development occurred through an administrative body indicates from the outset the distinguishingly low-profile nature of the strategies used by the gay and lesbian movement, which in its turn influenced the strategic choices of the countermovement.

Second, accordingly, the PSC, in its constitutional challenge ADI 4966, did not seek to justify the unconstitutionality of same-sex marriage *per se*, but rather the incorrectness of the administrative route chosen by the opposing movement vis-à-vis the more suitable, in their view, legislative strategies that could have in theory been adopted. This line of argumentation avoids the merits of the issue of same-sex unions by simply focusing on the procedural matter of which institution has competence to decide on this matter, in a similar way *Schuette* in the US focuses on who can decide to prohibit affirmative action, rather than on the constitutional stature of affirmative action *per se*.

#### 1.4. Multiple Spaces of Contention in Local Legislatures and Executive

In light of the context of legislative avoidance, two trends have been currently underway in Brazil: legal rules protecting LGBT people have been adopted at the local and state levels. In addition, there is a process of bureaucratization<sup>600</sup> of LGBT rights in Brazil with the Executive branch taking a lead role in promoting such rights through administrative acts. Both trends show that countermovements have lost a few battles in the Executive branches at all levels of the federation and at local and state legislatures across the country, while keeping a strong containment strategy at the federal

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<sup>600</sup> Thiago Amparo, “Bureaucratizing Sexual Rights in Brazil,” OxHRH Blog, 2016, <http://ohrh.law.ox.ac.uk/bureaucratizing-sexual-rights-in-brazil/>.

legislature. Furthermore, those trends show that changes in the official understanding of the constitutional rights of LGBT people in Brazil are largely contingent upon the existing configuration of power in the multiple forums where contestation between LGBT movement and its countermovement takes place, despite STF decisions on LGBT rights penned strongly in favor of this group.

As far as local legislatures in Brazil are concerned, Antonio Maués categorizes initiatives at this level into three main groups: “(a) combating discrimination: they establish penalties for discriminatory practices based on the sexual orientation of persons; b) sex education: the inclusion of content on sexual orientation in school curricula; c) affirmative actions: establish policies aimed at promoting the rights of homosexuals.”<sup>601</sup> The first category includes for instance recent laws in the states of Rio de Janeiro<sup>602</sup> and São Paulo,<sup>603</sup> imposing administrative fines on those who commit discriminatory acts against LGBT people. The second category includes federal and local policies towards inclusion of sex education as well as education on diversity in public schools.<sup>604</sup> The last category includes initiatives towards promotion of sexual diversity such as the Day of Sexual Diversity in the State of Paraíba.<sup>605</sup>

As far as the Executive is concerned, it is key to note that, in light of the omission of the national legislature in advancing LGBT rights, there is an ongoing process of bureaucratization of those rights in Brazil, with the Executive branch taking

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<sup>601</sup> Antonio Moreira Maués, “Chapters of a Story: The STF Ruling about Same-Sex Unions in the Light of Law as Integrity,” *Sequência (Florianópolis)*, no. 70 (2015): 154.

<sup>602</sup> BRAZIL, Rio de Janeiro, Law 7041, July 15th 2015, available at: <http://alerjln1.alerj.rj.gov.br/CONTLEI.NSF/b24a2da5a077847c032564f4005d4bf2/0e48c858ff67abf883257e89006b504b?OpenDocument>

<sup>603</sup> BRAZIL, São Paulo, Law 10.948, November 5<sup>th</sup> 2001, available at: <http://www.al.sp.gov.br/repositorio/legislacao/lei/2001/lei-10948-05.11.2001.html>

<sup>604</sup> Cláudia Pereira Vianna, “The LGBT Movement and the Gender and Sexual Diversity Education Policies: Losses, Gains and Challenges,” *Educação e Pesquisa* 41, no. 3 (2015): 791–806.

<sup>605</sup> BRAZIL, Law number 7.901/2005 (State of Paraíba).

a leading role in promoting those rights. One clear example of this process is how gender reassignment surgeries became available for free as part of the public health system. This was not done through a legislative change, but rather a process of law-making by the Ministry of Health in response to a state-level judicial decision.<sup>606</sup>

The fact that an administrative body such as the CNJ enacted same-sex marriage nationwide is symptomatic of the bureaucratization<sup>607</sup> of LGBT rights more broadly. Especially for foreign readers, the CNJ resolution might sound odd against a background in which constitutional changes such as same-sex marriage usually occur in other countries via the legislative branch (e.g. Argentina), via the judiciary (e.g. Spain or the United States) or a combination of both (e.g. South Africa). Even for the national audience, the CNJ resolution, enacted by an arguably regulatory body composed primarily by the elite of the legal community,<sup>608</sup> seems odd, in particular when one considers that the CNJ constitutional mandate is to exercise administrative and financial control over the judiciary.<sup>609</sup> The CNJ enacted the resolution to harmonize the practice within the judiciary and registry officials in light of the different responses same-sex couples seeking marriage received from registry officials and judges throughout the country in these two years between the STF and the STJ decisions and the CNJ resolution in 2013.

In light of the context of growing acceptance of LGBT rights in many important urban centers in Brazil and the increasing jurisprudence on the matter, it was expected that countermovements went to the Supreme Court to avoid the recognition of same-

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<sup>606</sup> BRAZIL, Ministry of Health, Decrees 1.707/GM/MS and 457/SAS/MS, available at: <http://portalmis.saude.gov.br/atencao-especializada-e-hospitalar/especialidades/processo-transexualizador-no-sus>.

<sup>607</sup> Amparo, “Bureaucratizing Sexual Rights in Brazil.”

<sup>608</sup> See: Article 103-B, Federal Constitution.

<sup>609</sup> See: Article 103-B, Federal Constitution, paragraph 3.

sex marriage at the national level by an administrative body. While the CNJ is not popularly accountable, its resolution on same-sex marriage might as well help to build up the support of the population for same-sex marriage in the long run. According to a 2017 survey, 74% of Brazilians consider that homosexuality "should be accepted by all of society", compared to 64% in 2014, a 10% increase over just three years as same-sex marriages increased across the country.<sup>610</sup> In comparison, in 1993, 56% of people interviewed in Brazil said they would not consider be friends with a work colleague if they find out he/she was gay.<sup>611</sup> In this sense, the countermovements' containment strategy can be read as an orchestrated attempt to block this administrative route on neutral grounds, e.g. referring to the limits of the institution's mandate, avoiding a debate on the merits of the harms at stake.

From a theoretical standpoint in relation to social movement and countermovement dynamics, the Brazilian context marked by legislative omission and the protagonist role of the bureaucracy can be plausibly understood as a form of "subterranean governance",<sup>612</sup> as Alison L. Gash names it. Gash's work provides an explanation for instances when social movements have used low-visibility judicial and administrative strategies, for instance when movements advanced rights while avoiding publicity in order to reduce the risk of backlash by countermovements.

In this line, much of the contestation outside courts in Brazil plays out in the context of low-visibility policymaking and administrative action, i.e. the CNJ adopted a resolution allowing same-sex marriage throughout the country in a very succinct and

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<sup>610</sup> Available at: <https://catracalivre.com.br/geral/cidadania/indicacao/pesquisa-revela-que-brasileiros-aceitam-mais-homossexualidade/>. Last accessed on: 1 May 2018.

<sup>611</sup> Gomes, *Por Um Constitucionalismo Difuso: Cidadãos, Movimentos Sociais e o Significado Da Constituição* [For a Diffuse Constitutionalism: Citizens, Social Movements and the Meaning of the Constitution], 130.

<sup>612</sup> Alison L. Gash, *Below the Radar: How Silence Can Save Civil Rights* (Oxford University Press, 2015), chap. 2. Gash's book "Below the Radar" uses as key examples US litigation on parenting rights for same-sex couples and group home advocacy for persons with disabilities.

poorly reasoned document disguised as an administrative decision to harmonize the approach of registration officials and judges towards requests of same-sex marriage licenses. Likewise, the adoption of legislation at state and municipal levels in Brazil establishing administrative sanctions against discrimination on the basis of sexual orientation and gender identity also exemplifies this low-visibility policymaking, designed to advance rights as merely administrative sanctions against discriminators. In such cases described below, countermovements have sought to raise the stakes of the issue by calling up courts to avoid constitutional change to be carried out in those other administrative and legislative venues.

Taking note of such bureaucratization of LGBT rights, countermovements have also fought back in the Executive branch, whenever the configuration of power allows for it. As noted by Gomes:

“In addition to promoting bills that are contrary to sexual rights within the legislative branch, these conservative sectors have been very active in blocking government actions that promote LGBT citizenship. An example of this occurred in May 2011 when the material developed by NGOs in partnership with the Ministry of Education (MEC) was launched to train teachers in the public high school to deal with the issue of sexual diversity. Stalled by opponents of the "gay kit", the distribution of the material was suspended by President Dilma Rousseff (Labor's Party), on the grounds that it would not be appropriate to address the matter in schools. However, a number of media outlets stressed the pressure of MPs from the Evangelical Parliamentary Caucus to have the President veto the material, in exchange for

the support of the Caucus' parliamentarians to approve bills of interest to the executive branch.”<sup>613</sup>

The case of the so-called gay kit – an educational material on sexual rights - in schools is an example of how countermovements have started to pay attention to how LGBT issues have advanced through bureaucratic means, and with the assistance of a powerful Evangelical Caucus <sup>614</sup> in the national parliament, countermovements through Evangelical congressmen as mentioned in the quote above have pressured Executive officials to contain their support for LGBT rights. This means that countermovements will likely also pay attention to low-visibility strategies by LGBT movements, seeking to contain advances on the LGBT agenda also in the administrative channels.

### 1.5. Conclusion: Conceptual Framework and Containment Strategy in Brazil

The magnitude of the Brazilian state, with multiple spaces of contestation at local, state and federal levels, opens up the possibility for continuous contestation outside courts, including by containment strategies. Countermovements will continue their legal mobilization outside courts whenever the elements to sustain such mobilization persist, if other venues are at their disposal by the existence of a viable legal framing to defend their claim, if there is a favorable configuration of power, including existence of allies, and so on.

As seen in this Chapter regarding the containment strategy by countermovements in Brazil, changes in the constitutional equality of LGBT people do not depend exclusively on the stance of courts. If they did, countermovements would

<sup>613</sup> Santos, “Movimento LGBT e Partidos Políticos No Brasil [LGBT Movement and Political Parties in Brazil],” 181.

<sup>614</sup> Natividade and de Oliveira, “Sexualidades Ameaçadoras: Religião e Homofobia (s) Em Discursos Evangélicos Conservadores [Threatening Sexualities: Religion and Homophobia(s) in Conservative Evangelical Discourses]”; Gomes, *Por Um Constitucionalismo Difuso: Cidadãos, Movimentos Sociais e o Significado Da Constituição [For a Diffuse Constitutionalism: Citizens, Social Movements and the Meaning of the Constitution]*, 136–40.



have a hard time defending any pro-traditional family position given the view of the STF on the matter, strongly in favor of LGBT equality. At the same time, as the same-sex marriage saga in Brazil shows, the STF has left room for countermovements to keep contestation outside courts alive, by not setting a clear remedy of legislative redress based on the argument that a legislative omission in fact harms LGBT people.

As a result, social movements, in particular the LGBT movement, ended up having to rely on administrative rules such as the ones imposed by the CNJ as a basis for their rights. Given the containment strategy leading to legislative omission on the one hand, and the lack of assertive remedies from the Supreme Court on the other hand, it was left then to low-level bureaucratization to define LGBT rights. This scenario outsourced the debate on defining and redefining harm from the legislative to the executive branch.

As shown in Figure 3 below, when we apply the conceptual framework of legal opportunity structure, we have a clearer view of why constitutional change has been partly contained by countermovements outside courts:

**Figure 3: Containment Strategy in Brazil and the Legal Opportunity Structure**

- ***Access to the formal institutional structure:*** in light of the pro-LGBT rights stance so far of the STF, pro-traditional family countermovements in Brazil have sought to shape constitutional change by moving an anti-LGBT agenda forward at the national Legislative and the Executive branches.
- ***Availability of allies and configuration of power:*** with the assistance of the considerable power of the Evangelical Caucus in the national Legislature, pro-traditional family countermovements have managed to contain advances in the LGBT legislative agenda outside courts.
- ***Cultural and legal frames:*** given the strong language of constitutional equality for LGBT people that STF has consistently adopted so far, pro-traditional family countermovements have resorted to neutral arguments such as challenging the mandate of the CNJ to enact nationwide same-sex marriage to contain the LGBT agenda before courts. Furthermore, there are early signs of a more proactive anticipatory countermobilization in the national Congress seeking to reinforce the meaning of family as between a man and a woman, yet without success before the Parliament itself.

This Chapter has shown that constitutional change in Brazil regarding LGBT rights has depended more on those elements of legal opportunity structure than on what the STF had ruled five years ago. Any comprehensive view on how constitutional equality of LGBT people changes over time in Brazil involves an understanding of how countermovements seek to redefine the meaning of LGBT people's rights also outside courts. Looking at contestation outside courts from the perspective of the use by countermovements of the existing legal opportunity structure, Brazil has witnessed that constitutional change outside courts depends not exclusively on the STF view on the matter, but on the containment strategy carried out by countermovements outside courts. This containment strategy depends on those countermovements' access to formal institutional structures such as the National Congress' Human Rights Commission, the existing configuration of power including the power of the Evangelical Caucus in the National Congress and the availability of a legal framing –

such as rules regarding the CNJ mandate – which allow them to challenge constitutional change also outside courts.

## 2. Counterstrike Strategy: Contestation in Multiple Venues in the United

### States and their Judicial Limits

Unlike the story we have just told about the containment strategy pursued in Brazil, in the US, countermovements have proactively promoted contestation outside courts pushing a counterstrike strategy. In the US, countermovements have promoted contestation in multiple venues to tackle judicial rulings favoring social movements and to make other venues affirm countermovements' claims. Those countermovements have even on certain occasions resorted to courts to keep contestation outside courts alive. As a result, the outcomes of such popular initiatives have been litigated again before the US Supreme Court (of which *Schuette*<sup>615</sup> case in relation to race-based affirmative action and *Perry*<sup>616</sup> case in relation to marriage equality are primary examples).

What countermovements seek to do in those cases is to promote constitutional change through litigation that would allow them to contest social movements' gains outside courts. If courts do not see reverting social movements' gains such as affirmative action as a constitutionally meaningful harm, courts then leave open the gates for contestation outside courts. By allowing this contestation to happen, courts do not only allow countermovements to contain the legal gains of social movements but it allows for more: it enables them to counterstrike social movements elsewhere, outside courts. In other words, as argued here, when called up to decide on what it means to

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<sup>615</sup> UNITED STATES, US Supreme Court, *Schuette v. Coalition to Defend Affirmative Action*, 572 U.S. \_\_\_\_ (2014).

<sup>616</sup> UNITED STATES, US Supreme Court, *Hollingsworth v. Perry*, 570 US \_ (2013).

be constitutionally harmed, courts might open or close spaces or opportunities for contestation inside or outside the court, depending on the constitutional standard adopted.

The US story on contestation outside courts is different than the Brazilian one also due to the different legal framework in each country. While in Brazil civil law (here included marriage regulation) is exclusively regulated by federal law, in the United States marriage regulation differs from one state to another. From a contestation perspective, this difference entails that in the US countermovements have a larger number of battlegrounds (in the different states, in particular those with easier requirements for popular initiatives) in which they can play, while in Brazil the contestation regarding same-sex marriage is partly happening before state level courts that interpret the Federal Constitution and the federal Civil Code differently, and partly happening at the national Congress.

US jurisprudence regarding contestation outside courts adds to the analysis on the courts' role of regulating processes that happen in other venues, in particular when courts are prepared to step in by restricting or allowing other state officials or the public through popular vote (e.g. referendum) to express constitutional views sympathetic to countermovements' claims. Consequently, those cases will shed light on the interplay between extra-judicial mobilization and constitutional standards as one of the conditions which affect the success of such extra-judicial mobilization.

### **2.1. Countermovements' Contestation Outside courts at the State Level**

Countermovements in the US have historically used popular legislative initiatives to counterstrike social movements' gains, including those gains acquired through litigation. In this way, countermovements' use of popular initiatives have turned some

states<sup>617</sup> in the US into battlefields for the contestation outside courts on what it means to be harmed in a constitutionally salient way. In the US, for instance, pro-traditional family countermovements or

“the Religious Right is far more successful in the arena of ballot measures and initiatives than they are on the legislative or judicial level (...). Since 1974, there have been over 155 ballot measures regarding LGBTQ rights on ballots at the town, municipal, county, and state level. The Religious Right sponsors almost all anti-gay ballot measures, and three-quarters of these ballot measures result in either the rescinding of a LGBTQ rights law or the creation of a new anti-gay law.”<sup>618</sup>

Given the proactive tactics of ballot measures, countermovements’ contestation outside courts in the US is historically less about containing legislative, judicial or bureaucratic gains by social movements (like the case in Brazil), and rather more about counterstriking in a proactive manner with the countermovements’ own agenda, or in the terms of this dissertation the countermovements’ own view of constitutional harm. In order to understand judicial cases involving popular initiatives by countermovements (explained in the next sections in more detail better), one must first be able to place such ballot initiatives in their historical context. In particular those proposed by the pro-traditional family countermovements across the United States since the 1970s, and their consequent impact on the opposing social movement are relevant here. The emphasis is placed on the anti-LGBT countermovement because of their systematic use of

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<sup>617</sup> “More than two-thirds of all attempted referendums and initiatives between 1974 and 2009 took place in seven states – Oregon, California, Michigan, Florida, Washington, Maine, and Colorado (...) the different rates of statewide initiatives can be directly attributed to the ease of signature requirements in different states.” Stone, *Gay Rights at the Ballot Box*, 9.

<sup>618</sup> Stone, “The Impact of Anti-Gay Politics on the LGBTQ Movement,” 3–4.

contestation outside courts through popular initiatives in the US. This is not how the anti-affirmative action countermovement works.

Proposition 8 in California is an important case in point here. In reaction to a 2008 decision by the California Supreme Court<sup>619</sup> striking down restrictions to same-sex marriage, California voters adopted Proposition 8 or the so-called California Marriage Protection Act in the same year, by 52.1% of the vote,<sup>620</sup> against 47.9%. Proposition 8 reads as follows: “Section 2. Article I. Section 7.5 is added to the California Constitution, to read: Sec. 7.5. Only marriage between a man and a woman is valid or recognized in California.”<sup>621</sup>

In the bellicose conflict between opposing movements, one clear impact of the proactive counterstrike by the Religious Right against same-sex marriage laws across the United States has been to boost a resourceful reaction by the LGBT movement which concentrated the resources of the LGBT movement towards battles over same-sex marriage. Stone recalls that “organizers of the campaign to fight Proposition 8 spent \$43.3 million, shattering campaign-spending records. LGBT activists had run campaigns in twenty-four other states to fight same-sex marriage initiatives; the campaign to fight Proposition 8 spent more than all of the other campaigns combined”<sup>622</sup> to face up the challenge of the resourceful Religious Right.

Proposition 8 also made the LGBT respond to the Religious Right’s emphasis on

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<sup>619</sup> “the amendment imposes a special disability upon those persons alone. Homosexuals are forbidden the safeguards that others enjoy or may seek without constraint. They can obtain specific protection against discrimination only by enlisting the citizenry of Colorado to amend the State Constitution or perhaps, on the State’s view, by trying to pass helpful laws of general applicability. This is so no matter how local or discrete the harm, no matter how public and widespread the injury.” (UNITED STATES, US Supreme Court, *Romer v. Evans*, 517 U.S. 620 (1996), p. 631.)

<sup>620</sup> WASHINGTON POST, *California Votes for Prop 8*, 5 November 2008, available at: <https://www.wsj.com/articles/SB122586056759900673>. Last accessed on: 7 February 2017.

<sup>621</sup> UNITED STATES, *California Marriage Protection Act*, full text available here: [http://www.ag.ca.gov/cms\\_pdfs/initiatives/i737\\_07-0068\\_Initiative.pdf](http://www.ag.ca.gov/cms_pdfs/initiatives/i737_07-0068_Initiative.pdf). Last accessed on: 7 February 2017.

<sup>622</sup> Stone, *Gay Rights at the Ballot Box*, xiii.

same-sex marriage as the central topic of national importance by also making marriage equality central to their agenda.<sup>623</sup> This interactive social movement – countermovement dynamic on agenda-setting is clear when the countermovements’ popular initiatives are seen from a historical perspective.

In her account on the history of anti-LGBT ballot initiatives by the Religious Right, Amy Stone divides such initiatives into several phases: (1) 1974-1987: local initiatives around “small, localized social networks that ran through Christian churches and radio and television shows”<sup>624</sup> reacting to the LGBT movement; (2) 1988-1992: with a growing national Religious Right movement moving its tactics from reactive to proactive contestation, seeking to restrict legal protection for LGBT people in certain spheres of life such as workplace, public accommodation and etc.; (3) 1993-1996: the Religious Right spread its proactive tactics on restricting antidiscrimination laws across the country through popular initiatives; (4) 1997-onwards: after the US Supreme Court struck down one of those “legal-restrictive initiatives” – as Stone calls them – in *Romer v. Evans* in 1996<sup>625</sup> (a Colorado amendment restricting antidiscrimination law for LGBT people), the focus increasingly shifted towards restricting same-sex marriage in particular after 2003 when the US Supreme Court struck down Texas sodomy law in *Lawrence v. Texas*<sup>626</sup> spreading the fear (clearly voiced by Justice Scalia’s dissenting opinion)<sup>627</sup> among the Religious Right that nationwide regulation of same-sex marriage was just a matter of time.

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<sup>623</sup> Dorf and Tarrow, “Strange Bedfellows: How an Anticipatory Countermovement Brought Same-Sex Marriage into the Public Arena.”

<sup>624</sup> Stone, *Gay Rights at the Ballot Box*, 12.

<sup>625</sup> UNITED STATES, US Supreme Court, *Romer v. Evans*, 517 U.S. 620 (1996).

<sup>626</sup> UNITED STATES, US Supreme Court, *Lawrence v. Texas*, 539 U.S. 558 (2003).

<sup>627</sup> “Today’s opinion dismantles the structure of constitutional law that has permitted a distinction to be made between heterosexual and homosexual unions, insofar as formal recognition in marriage is concerned.” (UNITED STATES, US Supreme Court, *Lawrence v. Texas*, 539 U.S. 558 (2003), J. Scalia dissenting, p. 20-21).

In such interactive analysis of the impact of the LGBT movement on the pro-traditional family countermovement and vice-versa, it is key to recall the literature on the legal structure opportunity presented in Chapter 2. When Zald and Useem defined the interaction between opposing movements as a “loosely coupled conflict”,<sup>628</sup> in which while “wars are more like fights or games, (...) social M/CM [movement and countermovement] interactions are more like debates. (...) debates rely on persuasion to convince and convert opponents and authorities”,<sup>629</sup> it becomes clear that contestation outside courts between those opposing movements in the US became largely a debate trying to convince the general public and at times courts of their different views on LGBT rights, religious freedom and more specifically same-sex marriage.

While this section does not have the intention of describing at length the history of anti-LGBT popular initiatives in the United States in their complexity,<sup>630</sup> it is key here to understand the dynamics of contestation outside courts by opposing movements and their relationship with changes in constitutional equality. In her book *How the Religious Right Shaped Lesbian and Gay Activism*, Tina Fetner enlists several impacts of the Religious Right vis-à-vis the LGBT movement, including professionalization of the LGBT movement to face the challenge of the wide web of the Religious Rights through churches, foundations and civil society organizations; radicalization of the

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<sup>628</sup> Zald and Useem, “Movement and Countermovement: Loosely Coupled Conflict.”

<sup>629</sup> Zald and Useem, “Movement and Countermovement Interaction: Mobilization, Tactics, and State Involvement,” 251–52.

<sup>630</sup> For a more comprehensive account on this topic, see: Stone, *Gay Rights at the Ballot Box*; Amy L Stone, “Rethinking the Tyranny of the Majority: The Extra-Legal Consequences of Anti-Gay Ballot Measures,” *Chap. L. Rev.* 19 (2016): 219–40; Stone, “The Impact of Anti-Gay Politics on the LGBTQ Movement”; Stone and Ward, “From ‘Black People Are Not a Homosexual Act’ to ‘Gay Is the New Black’: Mapping White Uses of Blackness in Modern Gay Rights Campaigns in the United States”; Fetner, *How the Religious Right Shaped Lesbian and Gay Activism*, 2008; Dorf and Tarrow, “Strange Bedfellows: How an Anticipatory Countermovement Brought Same-Sex Marriage into the Public Arena”; DONALD P HAIDER-MARKEL and Kenneth J Meier, “Legislative Victory, Electoral Uncertainty: Explaining Outcomes in the Battles over Lesbian and Gay Civil Rights,” *Review of Policy Research* 20, no. 4 (2003): 671–90.



political discourse of the LGBT movement increasingly framed in opposition to the Religious Right rather than in an inclusive language; increasing the use of anger in political protests by the LGBT movement against the Religious Right.<sup>631</sup>

Often the conflict between the LGBT movement and the pro-traditional family countermovement occurs in response to and influences certain constitutional debates. Thus contestation outside courts, as it is argued here, occurs in light of and responding to changing constitutional standards. Four phases of constitutional change vis-à-vis contestation outside courts can be identified:

- After the LGBT movement struck a victory for marriage equality in Hawaii through *Baehr* case (1993),<sup>632</sup> marriage equality was put “on the agenda of a reluctant LGBT movement and ‘panicked’ the antigay Right (Stone 2012, 31) into pushing to pass DOMA at the national level and ‘little’ DOMAs in the states.”<sup>633</sup>
- After the LGBT movement stroke another victory against a popular initiative restricting antidiscrimination law for LGBT people in *Romer* (1996),<sup>634</sup> this case “discouraged the Right from trying to pass broadly antigay laws, leading the countermovement to turn to the narrower ground of opposing marriage, while encouraging the LGBT movement to believe that the courts might sustain more gay-friendly equal protection cases.”<sup>635</sup>
- When the LGBT movement won again against sodomy law in Texas through

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<sup>631</sup> Fetner, *How the Religious Right Shaped Lesbian and Gay Activism*, 2008, 122–29.

<sup>632</sup> UNITED STATES, *Baehr v. Lewin*. Hawai'i Supreme Court. 74 Haw. 645, 852 P.2d 44. May 5, 1993.

<sup>633</sup> Dorf and Tarrow, “Strange Bedfellows: How an Anticipatory Countermovement Brought Same-Sex Marriage into the Public Arena,” 461.

<sup>634</sup> UNITED STATES, US Supreme Court, *Romer v. Evans*, 517 U.S. 620 (1996).

<sup>635</sup> Dorf and Tarrow, “Strange Bedfellows: How an Anticipatory Countermovement Brought Same-Sex Marriage into the Public Arena,” 461.

*Lawrence v. Texas*<sup>636</sup> (2003), “the Court did not endorse same-sex marriage, but by declaring that it was no business of a state to forbid same-sex relationships between consenting adults, Justice Kennedy gave encouragement to advocates in Massachusetts to take same-sex marriage restrictions to court.”<sup>637</sup>

- Upon the victory by the LGBT movement in *Windsor* (2013)<sup>638</sup> and in *Obergefell* (2015)<sup>639</sup>, the nationwide recognition of same-sex marriage (first for federal law purposes and then nationally, respectively), “while progressives were celebrating their victories in the state houses and at the Supreme Court, conservatives were defending narrow spaces of objection.”<sup>640</sup> Thus, several states passed “statutes [which] reflected a careful accommodation: in exchange for marriage equality rights, religious organizations, including religious nonprofits, received statutory protections allowing them to maintain their objections to same-sex marriage.”<sup>641</sup>

One example of the latest kind of compromise reached at the state level was the so-called Utah Compromise. This compromise is a case in point to describe the possibility of a balancing approach to contestation outside courts between opposing movements. According to one of the main advocates for religious freedom in the context of LGBT rights, David Laycock:

“It is now illegal in Utah to discriminate, in employment or in

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<sup>636</sup> UNITED STATES, US Supreme Court, *Lawrence v. Texas*, 539 U.S. 558 (2003).

<sup>637</sup> Dorf and Tarrow, “Strange Bedfellows: How an Anticipatory Countermovement Brought Same-Sex Marriage into the Public Arena,” 462.

<sup>638</sup> UNITED STATES, US Supreme Court, *United States v. Windsor*, 570 US \_ (2013)

<sup>639</sup> UNITED STATES, US Supreme Court, *Obergefell v. Hodges*, 576 U.S. \_\_\_\_ (2015). For literature on resistance after *Obergefell*, see: Tiffany C Graham, “*Obergefell* and Resistance,” *UMKC L. Rev.* 84 (2015): 715.

<sup>640</sup> Graham, 716.

<sup>641</sup> Graham, 716. See also: Laycock, Picarello Jr, and Wilson, *Same-Sex Marriage and Religious Liberty: Emerging Conflicts*.

housing, on the basis of sexual orientation or sexual identity. In *Utah*—the state that often gives the highest percentage vote to Republican presidential candidates. This is a huge accomplishment. Churches, the Boy Scouts, and religious nonprofits and their affiliates and subsidiaries are wholly exempt. There is no explicitly religious exemption for the for-profit sector, but the law does not apply to employers with fewer than fifteen employees, and religious nonprofits occasionally have for-profit affiliates or subsidiaries. And the new law does not cover public accommodations.”<sup>642</sup>

All in all, the Utah Compromise is an example of the current stage of countermovements’ contestation outside courts on same-sex marriage in the United States.

This is the latest stage in a series of attempts by countermovements of keeping contestation outside courts alive, that started in the 1970-80s with countermovements arguing that LGBT wanted undeserved special rights in antidiscrimination law, to challenging the legitimacy of same-sex relations including marriage, and to finally seeking exemptions from laws recognizing same-sex marriages/partnerships. Thus, the next sections show that one can place each LGBT victory before the US Supreme Court against a background of contestation happening outside courts proactively instigated by the pro-traditional family countermovements. As shown in the last Chapter, by seeking to redefine, including before courts, what it means to be harmed as a religious person being forced to socially recognizes same-sex couples, the pro-traditional family

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<sup>642</sup> Douglas Laycock, “Campaign against Religious Liberty,” in *The Rise of Corporate Religious Liberty*, ed. Micah Schwartzman, Chad Flanders, and Zoë Robinson (New York: Oxford University Press, 2016), 252.

countermovement has adapted the legal framings of its struggle to the new scenario where nationwide recognition of same-sex marriage is a constitutional reality.

## 2.2. Constitutionally Regulating Countermovements' Claims on LGBT Rights

What is the role of courts vis-à-vis counterstrike strategies by countermovements in the United States? The previous section has shown how Brazil's STF, despite its transformative language on LGBT and racial equality, has not engaged directly with the legislature in its remedies' jurisprudence in order to revert to a legislative omission which has developed in part through countermovements' containment strategy.

The US case is a more nuanced one. On a number of occasions, the US Supreme Court has had the opportunity to set the limits for the counterstrike strategy of countermovements outside courts, and it has occasionally let such strategy to keep going and in other occasions it has set a constitutional boundary beyond which countermovements should not pass. It is argued in this dissertation that in those nuanced judicial standards, the US Supreme Court has underlined different notions of what it means to be harmed in a constitutionally relevant way.

### 2.2.1. Partially Opening the Door for Countermovements' Claims: *Romer*

The US Supreme Court in the 1996 gay rights case *Romer v. Evans* decided to strike down an amendment to Colorado state constitution, adopted through a statewide referendum in 1992, which reads as follows:

““No Protected Status Based on Homosexual, Lesbian or Bisexual Orientation. Neither the State of Colorado, through any of its branches or departments, nor any of its agencies, political subdivisions, municipalities or school districts, shall enact, adopt or enforce any statute, regulation, ordinance or policy whereby homosexual, lesbian or

bisexual orientation, conduct, practices or relationships shall constitute or otherwise be the basis of or entitle any person or class of persons to have or claim any minority status, quota preferences, protected status or claim of discrimination. This Section of the Constitution shall be in all respects self-executing.”<sup>643</sup>

The so-called Amendment 2 adopted in Colorado by popular initiative was no accident. It was part of a well-documented orchestrated effort by the Religious Right countermovement (in that state led by the Colorado for Family Values), reproduced across the US,<sup>644</sup> which shifted the discourse from religious aversion to LGBT rights towards a legalistic opposition to those rights as special rights.<sup>645</sup>

The very text of the Amendment 2 was clearly designed to be overinclusive (‘any statute, regulation, ordinance or policy’), as well as dismissive of any claim by an entire class of people of a protected condition under law (‘any minority status, quota preferences, protected status or claim of discrimination’). Special rights, as Stone retells from the argumentation of countermovements before courts and in campaigns for anti-LGBT popular initiatives, meant three things: “that gays did not qualify for minority status because of their wealth, power, and lack of discrimination”; “gays wanted more rights than other individuals”; “not only gays want special right but that rights would

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<sup>643</sup> UNITED STATES, US Supreme Court, *Romer v. Evans*, 517 U.S. 620 (1996), p. 624.

<sup>644</sup> “Of the forty-one attempted ballot measures during this time period, most were either referendums on nondiscrimination legislation (48.8 percent) or legal-restrictive initiatives (24.4 percent), although the Right also sponsored initiatives to restrict the right of people living with AIDS (14 percent) and to eliminate newly passed domestic partnership laws (9.7 percent). Slightly more than half of the ballot measures made it to the ballot box and 57 percent ended in a victory for the Right.” Stone, *Gay Rights at the Ballot Box*, 18.

<sup>645</sup> For a chronology of the changing arguments in the LGBT debate from disgust, through special rights, to human dignity, see: Nussbaum, *From Disgust to Humanity: Sexual Orientation and Constitutional Law*.

ultimately usurp rights from legitimate minorities such as blacks by rendering civil rights gains meaningless.<sup>646</sup>

That said; in *Romer*, the US Supreme Court struck down Amendment 2 with a 6-3 majority, with the conclusion that it failed even the most basic constitutional standard, the rational basis one. For the Court's majority, coined by Justice Kennedy, the "bare ... desire to harm a politically unpopular group cannot constitute a legitimate governmental interest."<sup>647</sup> In this sense, while granting a victory to the LGBT movement, the Court did not engage with the political powerlessness argument falling short of granting strict scrutiny to the LGBTs as a group, thus making the road of litigation to countermovements much easier later on since those countermovements did not need to overcome a strict scrutiny analysis.

In *Romer*, "the State's principal argument in defense of Amendment 2 is that it puts gays and lesbians in the same position as all other persons. So, the State says, the measure does no more than deny homosexuals special rights",<sup>648</sup> in the words of Justice Kennedy in the majority opinion. By reacting to and finding implausible countermovement's claim of special rights, the Court in *Romer* sets a clear limit to contestation outside courts along the likes of the Colorado Amendment 2. The judicial majority articulated that such a broad measure imposing a collective 'disability'<sup>649</sup> on an entire group of people constitutes a harm not to be tolerated under the US Constitution. *Romer* is particularly important here because it is a case where the result of a counterstrike strategy by a countermovement was on trial. There, the Court

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<sup>646</sup> Stone, *Gay Rights at the Ballot Box*, 26. See also: Stone, "Rethinking the Tyranny of the Majority: The Extra-Legal Consequences of Anti-Gay Ballot Measures."

<sup>647</sup> UNITED STATES, US Supreme Court, *Romer v. Evans*, 517 U.S. 620 (1996), p. 634 (citing US Supreme Court, *Department of Agriculture v. Moreno*, 413 U.S. 528, 1973), p. 534. Even.

<sup>648</sup> UNITED STATES, US Supreme Court, *Romer v. Evans*, 517 U.S. 620 (1996), p. 626.

<sup>649</sup> UNITED STATES, US Supreme Court, *Romer v. Evans*, 517 U.S. 620 (1996), p. 634

imposed a straightforward limit to such initiatives, making it clear that initiatives with an *animus*<sup>650</sup> to *harm* an unpopular group would not be constitutional. As later seen in *Perry*, animus to harm, often is argued by LGBT movements, violates the anti-humiliation principle,<sup>651</sup> as Yoshino recalls in relation to the same-sex marriage litigation.

### 2.2.2. Partially Shutting Down Countermovements' Claims of Constitutional Harm: *Perry* and *Windsor*

Later on, the US Supreme Court decided two other major cases on LGBT rights in 2013, *Perry*<sup>652</sup> and *Windsor*<sup>653</sup>. Read together these cases constitute an illustration of a constitutional narrative on countermovements-social movements dynamics. *Windsor* was a case presented with the support of the LGBT movement against a countermovement legislative gain, the Defense of Marriage Act (DOMA) which defined marriage as the union between a man and a woman for federal law purposes. In contrast, *Perry* was a case supported by the traditionalist countermovement<sup>654</sup> involving private individuals seeking to reaffirm the result of the contestation outside courts they had proposed, the so-called Proposition 8 in California, a state constitutional amendment defining marriage as a union between a man and a woman, as discussed above. When read together, *Perry/Windsor* set limits to countermovements' contestation in multiple venues, including outside courts.

First, let us look at the facts in *Perry*. After the lower courts struck down Proposition 8 as a violation of Equal Protection, the US Supreme Court granted

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<sup>650</sup> Pollvogt, "Unconstitutional Animus."

<sup>651</sup> Kenji Yoshino, "The Anti-Humiliation Principle and Same-Sex Marriage," n.d., 3101.

<sup>652</sup> UNITED STATES, US Supreme Court, *Hollingsworth v. Perry*, 570 US \_ (2013).

<sup>653</sup> UNITED STATES, US Supreme Court, *United States v. Windsor*, 570 US \_ (2013)

<sup>654</sup> Interestingly, some of the members of the LGBT movement considered *Perry* perhaps a too bold move that, if it had been decided on its merits, might had produced a backlash against same-sex marriage. For the full story of *Perry*, see: Kenji Yoshino, *Speak Now: Marriage Equality on Trial* (New York: Broadway Books, 2015).

certiorari to hear the case. The road leading to *Perry* being decided by the US Supreme Court in 2013 was a long, bumpy one. Few cases show so clearly the involvement of multiple fora. The case involved local courts conducting constitutional review on a divisive issue, the state Executive vetoing a progressive law, the general public blocking legal change through referendum (the so-called Proposition 8), LGBT movement being reluctant of initiating litigation at federal level, and finally proactive private individuals (the original proponents of Proposition 8) working as a countermovement presenting the lawsuits leading up to *Perry* case.

In *Perry*, the Supreme Court dismissed the case on procedural grounds for lack of standing by the petitioners who were private individuals originally the proponents of the referendum resulting in the Proposition 8. In the majority opinion coined by the Chief Justice Roberts,

“The Article III requirement that a party invoking the jurisdiction of a federal court seek relief for a personal, particularized injury serves vital interests going to the role of the Judiciary in our system of separated powers. (...) We have never before upheld the standing of a private party to defend the constitutionality of a state statute when state officials have chosen not to. We decline to do so for the first time here.”<sup>655</sup>

In responding to this argument of the lack of an agency relationship between the government and proponents of the popular initiative (since the latter cannot respond for the former, in the opinion of the Court), Justice Kennedy elaborated a dissenting opinion that focused on the importance of contestation outside courts. Justice Kennedy

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<sup>655</sup> UNITED STATES, US Supreme Court, *Hollingsworth v. Perry*, 570 US \_ (2013), p. 17.



affirmed that: “In California and the 26 other States that permit initiatives and popular referendums, the people have exercised their own inherent sovereign right to govern themselves. The Court today frustrates that choice (...).”<sup>656</sup>

Personal injury is central to the procedural question of standing, and *Perry* makes it evident. The Ninth Circuit put it clearly in that case: “All a federal court need determine is that the state has suffered a harm sufficient to confer standing and the party seeking to invoke the jurisdiction of the court is authorized by the state to represent its interest in remedying that harm.”<sup>657</sup> Chief Justice Roberts thus dismisses the harm claimed by the members of the countermovement from an institutional perspective, in the sense that an “interest in proper application of the Constitution and laws”<sup>658</sup> is not enough injury for standing purposes.

In the public contestation surrounding the Proposition 8 referendum, a specific kind of injury talk played a key role: *harm imposed by the very institution of constitutional change, in comparison with a specific harm of the application in a given individual circumstance of such change.*

First, the trial records of *Perry* before lower courts clearly show how harm talk played a role in defining which harm is constitutionally relevant. In *Perry*, as already recalled by Kenji Yoshino’s monograph on the trial,<sup>659</sup> countermovements put their anti-marriage stance in the terms of protecting the institution of marriage against the

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<sup>656</sup> UNITED STATES, US Supreme Court, *Hollingsworth v. Perry*, 570 US \_ (2013), p. 14 (Justice Kennedy dissenting).

<sup>657</sup> UNITED STATES, US Ninth Circuit Court, *Perry v. Brown*, 671 F. 3d 1052, p. 1070 (2012).

<sup>658</sup> In the words of the Chief Justice: “We have repeatedly held that such a “generalized grievance,” no matter how sincere, is insufficient to confer standing. A litigant “raising only a generally available grievance about government—claiming only harm to his and every citizen’s interest in proper application of the Constitution and laws, and seeking relief that no more directly and tangibly benefits him than it does the public at large—does not state an Article III case or controversy.” *Defenders of Wildlife*, supra, at 573–574; see *Lance v. Coffman*, 549 U. S. 437, 439 (2007) (per curiam).” UNITED STATES, US Supreme Court, *Hollingsworth v. Perry*, 570 US \_ (2013), p. 7.

<sup>659</sup> Yoshino, *Speak Now: Marriage Equality on Trial*.

harm of its weakening. Yoshino brings to light the debate held before lower courts in which the authors of the Proposition 8 sought to differentiate themselves from mere bigots, or in other words from the “bare desire to harm”, in the terms of *Romer*.<sup>660</sup> Proponents of this initiative therefore sought to shift the terms of the debate from the harm imposed upon same-sex couples from not being able to get married to the harm upon the very institution of marriage, which would, according to them, be a weaker institution if same-sex marriages would be accepted. Their lawyer, Charles J. Cooper, stressed that point in the oral arguments before the US Supreme Court by highlighting the link between procreation and marriage.<sup>661</sup>

Again, focusing on this idea of harm, countermovements and their legal representatives sought to keep their legal mobilization alive in multiple venues, by redefining what amounts to harm caused by the proposed legal changes – to a certain extent a harm from an institutional standpoint, i.e. a harm caused by how legal institutions are framed - which would justify their popular initiative in the ballot and their subsequent defense of the result of that ballot in court. In Chapter 5, this kind of harm will be presented as a way countermovements have used to reframe political powerlessness, framing themselves as harmed parties not because of historical discrimination but because of the impact of constitutional change.

Importantly, as indicated in Chapter 2 on the conceptual framework, even before the nationwide recognition of same-sex marriage, countermovements’ mobilization in *Perry* reveals an example of the so-called “anticipatory countermobilization”.<sup>662</sup> Not only *Perry* is founded on a well-crafted strategy of

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<sup>660</sup> Yoshino, chap. 12.

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<sup>662</sup> Dorf and Tarrow, “Strange Bedfellows: How an Anticipatory Countermovement Brought Same-Sex Marriage into the Public Arena.”

contestation outside courts to counterstrike the recognition of same-sex marriage in that state, it was followed by a litigation strategy which, if it had been accepted procedurally and on its merits, could pre-emptively make nationwide recognition of marriage impossible, opening the door for state-by-state definition of marriage as a union between a man and a woman. In this sense, anticipatory countermobilization is one way in which a counterstrike strategy is at play in the case of US countermovements. Ultimately, when read alongside *Windsor*, the story of *Perry* is about how the US Supreme Court again blocked the line of argument by countermovements grounded on harm.

The US Supreme Court did not stop there as far as LGBT rights are concerned. The Court did not only reject the formulation of harm as argued by countermovements in *Perry* (a harm caused by the judicial reversal of a constitutional change promoted by popular vote) – conveniently done through standing doctrine that requires personal injury. It also accepted the claims of the LGBT social movements of harm caused by their exclusion of the institution of marriage.

*Windsor* in the same judicial term took the harm of being excluded from the institution of marriage for the purposes of federal tax law into consideration. Petitioner in *Windsor* was a widow, who had to pay for taxes related to inheritance from her deceased partner, given that the Defense of Marriage Act (DOMA) defined marriage as a union between a man and a woman, excluding her for the tax benefit had her and her partner seen as couple in the eyes of federal law. When read together, *Perry/Windsor* outline a constitutional narrative of limiting countermovements' argumentation of harm in the sense of a personal injury caused by progressive constitutional change. Both cases also recognize for members of social movements a dignity-related personal injury derived from exclusion of the institution available to others, in that case marriage.

### 2.3. Allowing Countermovements' Claims of Harm in Affirmative Action

While the pro-traditional family countermovement focused more on promoting popular initiatives, as shown above, racial issues were not totally immune to this kind of action either. A way countermovements seek a remedy for harm in constitutional terms is when they aim to limit the enactment of protective legislation for vulnerable groups such as affirmative action programs. Both in California (1996) and in Michigan (2008), countermovements have in the past decades made use of popular campaigns against affirmative action framing affirmative action as a detrimental 'preferential treatment'.<sup>663</sup>

By looking at popular initiatives, in particular referenda, seeking to limit the scope of affirmative action legislation, this subsection shows how contestation outside courts (e.g. referendum) is scrutinized in equality jurisprudence as far as race is concerned. Those cases would in principle constitute hard ones for apex courts to decide, given that they challenge precisely the core justifications for the legitimacy of such courts: courts' role in preserving vulnerable groups' access to political change in representative branches. Popular initiatives that enshrine in state constitutions a prohibition of affirmative action make it harder for the social movements to revert such changes and enact protective legislation; in other words, those state amendments through popular ballot make it harder for vulnerable groups to achieve political change in the representative branches. That alone justifies a closer look at the conception of harm formulated in those cases. Such a focus makes evident the tension between the historical harm such legislation seeks to remedy in the first place even when formally

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<sup>663</sup> Serena E Hinz, "Interest Groups Vie for Public Support: The Battle Over Anti-Affirmative Action Initiatives in California and Michigan," *Educational Policy* 30, no. 6 (2016): 17.

it is enacted under more neutral justifications, such as promoting diversity<sup>664</sup> versus a new formulation of harm used by countermovements, focusing on alleged institutional harm caused by protective legislation.

Popular initiatives on affirmative action are peculiar of the US system. The more recent constitutions in South Africa and in Brazil expressly allow affirmative action or other remedial measures for vulnerable groups as an essential facet of equal protection. Therefore, if countermovements were to challenge the constitutionality of affirmative action measures altogether in Brazil and South Africa they likely would have to campaign for a formal constitutional amendment, and not simply for non-textual constitutional change.

### 2.3.1. Opening the door for contestation outside courts: the legal boundaries of affirmative action in *Gratz/Grutter*

The US Supreme Court also regulated contestation outside courts promoted by countermovements in relation to the issue of race-based affirmative action. Beforehand, it is vital to understand the boundaries within which the US Supreme Court has talked about race and affirmative action. In the Court's pair decisions in 2003 in *Grutter*<sup>665</sup> regarding University of Michigan's Law School and in *Gratz*<sup>666</sup> about undergraduate admissions to the same university, it was held permissible the use of race "as a plus" in individualized manner in universities for the sake of student diversity (the Court found that *Grutter* met that standard; *Gratz* did not).

*Grutter/Gratz* opened a space for contestation outside courts delineated by the contours of the constitutional standard on affirmative action established by the Court.

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<sup>664</sup> Margaux Poueymirou, "Schuette v. Coalition to Defend Affirmative Action & the Death of the Political Process Doctrine," *UC Irvine Law Review* 7, no. 1 (2017): 167.

<sup>665</sup> UNITED STATES, US Supreme Court, *Grutter v. Bollinger*, 539 US 306 (2003), decided on Jun 23, 2003.

<sup>666</sup> UNITED STATES, US Supreme Court, *Gratz v. Bollinger*, 539 US 244 (2003), decided on Jun 23, 2003.

In *Grutter*, the US Supreme Court answered the question of whether Equal Protection Clause “prohibits the Law School’s narrowly tailored use of race in admissions decisions to further a compelling interest in obtaining the educational benefits that flow from a diverse student body.”<sup>667</sup> To answer that, the Court focused on individual harms of affirmative action on applicants, and not on whether there is an institutional harm derived from the affirmative action institution itself. Thus, consequently, the Court left open the question of whether affirmative action plans would be banned altogether. That is the question *Schuetz* answered in response to a popular initiative adopted in the State of Michigan.

Although those cases did not involve contestation outside courts, they touched upon issues of harm that would influence later the jurisprudence on contestation. *Grutter* articulated an individualized notion of harm, being particularly concerned with the possible impact of affirmative action on nonminority applicants. In the words of Justice O’Connor, in the majority opinion, *Grutter* met the standard of individualized assessment of each student because “we agree that, in the context of its individualized inquiry into the possible diversity contributions of all applicants, the Law School’s race-conscious admissions program does not unduly harm nonminority applicants.”<sup>668</sup> The undue harm at stake was being treated as a member of a racial class, rather than an individual applicant (for instance, by being assigned an automatic set of points in the university selection process due to racial criteria).

### 2.3.2. Walking through the door of contestation outside courts in affirmative action: *Schuetz*

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<sup>667</sup> UNITED STATES, US Supreme Court, *Grutter v. Bollinger*, 539 US 306 (2003), page 307.

<sup>668</sup> UNITED STATES, US Supreme Court, *Grutter v. Bollinger*, 539 US 306 (2003), page 341.

Through its 2014 decision in *Schuette v. Coalition to Defend Affirmative Action*, the US Supreme Court allowed the state of Michigan to ban affirmative action programs by popular initiative (referendum).<sup>669</sup> Voters in Michigan adopted a popular initiative called Proposition 2 or Michigan Civil Rights Initiative. It is this Proposition 2 in question in *Schuette*. Here, the concern is with the countermovements' legal argument before courts about the permissibility of such popular initiatives.

By a majority of 58%,<sup>670</sup> the Proposition 2 effectively prevents affirmative action programs in the realm of public employment, education or contracting. Thus, what the Proposition 2 in Michigan - turned into force on 22 December 2006 – did was “bann[ing] precisely what the Supreme Court found permissible, but declined to mandate in *Grutter*.”<sup>671</sup> The *Gratz* and *Grutter* cases had different outcomes. Yet, the Court's rationale for the pair of cases was the same: in favor of admissibility of race as a plus and of diversity as a compelling interest in university<sup>672</sup> selection procedures. **In other words, countermovements which presented Proposition 2 sought to fill in a space for contention left by *Grutter/Gratz*: countermovements sought to formalize a prohibition of affirmative action, since the Court then declined to mandate affirmative action as a right.**

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<sup>669</sup> UNITED STATES, US Supreme Court, *Schuette v. Coalition to Defend Affirmative Action*, 572 US \_ (2014).

<sup>670</sup> Harry G Hutchinson, “Affirmative Action: Between the Oikos and Cosmos Review Essay: Richard Sander & Stuart Taylor, Jr., Mismatch: How Affirmative Action Hurts Students It's Intended to Help and Why Universities Won't Admit It,” *SCL Rev.* 66 (2014): 140.

<sup>671</sup> Harry G Hutchinson, “Affirmative Action: Between the Oikos and Cosmos Review Essay: Richard Sander & Stuart Taylor, Jr., Mismatch: How Affirmative Action Hurts Students It's Intended to Help and Why Universities Won't Admit It,” *SCL Rev.* 66 (2014): 140.

<sup>672</sup> The same – regarding diversity as a compelling interest - did not apply to high school institutions, specially taken into consideration that diversity does not mean racial balance in high schools. UNITED STATES, US Supreme Court, *Parents Involved in Community Schools v. Seattle School District No. 1*, 551 US 701 (2007), decided on Jun 28, 2007. *Grutter v. Bollinger*, 539 US 306 (2003), decided on Jun 23, 2003.

Proposition 2 added Section 26 to the Article 1 of the Michigan Constitution,<sup>673</sup> reading as follows:

“(1) The University of Michigan, Michigan State University, Wayne State University, and any other public college or university, community college, or school district shall not discriminate against, or grant preferential treatment to, any individual or group on the basis of race, sex, color, ethnicity, or national origin in the operation of public employment, public education, or public contracting.

(2) The state shall not discriminate against, or grant preferential treatment to, any individual or group on the basis of race, sex, color, ethnicity, or national origin in the operation of public employment, public education, or public contracting.”

With a plurality opinion written by Justice Kennedy and joined by Chief Justice Roberts and Justice Alito, the US Supreme Court found that:

“There is no authority in the Constitution of the United States or in this Court’s precedents for the Judiciary to set aside Michigan laws that commit this policy determination to the voters. (...) Deliberative debate on sensitive issues such as racial preferences all too often may shade into rancor. But that does not justify removing certain court-determined issues from the voters’ reach.

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<sup>673</sup> UNITED STATES, 1963 Constitution of the State of Michigan, Section 26, Article 1, available at: [http://www.legislature.mi.gov/\(S\(12uw2rzvgryswlnw1tgbb2vf\)\)/mileg.aspx?page=getObject&objectName=mcl-Article-I-26](http://www.legislature.mi.gov/(S(12uw2rzvgryswlnw1tgbb2vf))/mileg.aspx?page=getObject&objectName=mcl-Article-I-26), last accessed on: 1 July 2016.



Democracy does not presume that some subjects are either too divisive or too profound for public debate.”<sup>674</sup>

The history of *Schuette* tells volumes about the way contestation outside courts is justified in equality terms in the United States, in particular from a harm-perspective. **The most striking aspect of *Schuette*, heavily criticized in academic circles,<sup>675</sup> is the permissibility with which the Court treated the voters rejecting affirmative action as a valid policy choice among others.**

Justice Kennedy in the plurality opinion affirms clearly: “This case is not about how the debate about racial preferences should be resolved. It is about *who* may resolve it. There is no authority in the Constitution of the United States or in this Court’s precedents for the Judiciary to set aside Michigan laws that commit this policy determination to the voters” (emphasis added).<sup>676</sup> Justice Beyer goes even further by stating that, while it is harder for a movement to revert a constitutional amendment, the Proposition 2 cannot be considered unconstitutional because it transferred the decision’s locus from an unelected body to the level of a constitutional amendment.

In other words, the plurality in *Schuette* considers both sides as equal from a constitutional standpoint – of movements in favor of the possibility of enacting affirmative action programs, and countermovements seeking to constitutionally enshrine a prohibition against those programs. More importantly, those policy choices

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<sup>674</sup> UNITED STATES, US Supreme Court, *Schuette v. Coalition to Defend Affirmative Action*, 572 US \_ (2014), page 18.

<sup>675</sup> See e.g. “This leaves Justice Kennedy’s opinion vulnerable to the following criticism: it makes little sense to hold that (1) a referendum invalidating a ban on private housing discrimination as in *Mulkey* and *Hunter* inflicts a constitutionally cognizable injury on minorities even though private action is not covered by the Equal Protection Clause, but (2) when a referendum invalidates a policy that allowed state universities to adopt admissions policies that mitigate the vast ‘underrepresentation’ of black and Hispanic students in public colleges, no constitutionally cognizable injury can be recognized. Justice” (David E Bernstein, “Reverse *Carolene Products*, the End of the Second Reconstruction, and Other Thoughts on *Schuette v. Coalition to Defend Affirmative Action*,” *Cato Sup. Ct. Rev.*, 2013, p. 269).

<sup>676</sup> UNITED STATES, US Supreme Court, *Schuette v. Coalition to Defend Affirmative Action*, 572 US \_ (2014), page 18.

are equal in the plurality's view (meaning that voters might as well adopt either of them and the court has no say on it), since the US Constitution does not require affirmative action. The plurality opinion assumes that the harms that the two sides argue to be at stake (the harm of making it more difficult to enact protective legislation, on one hand; and the harm of preferential treatment, on the other) are of the same stature in constitutional terms.

Interestingly, both harms are institutional in nature, related to the general application of laws, rather than concern with specific individual impact of such preferences. Thus, from the perspective of contestation outside courts, by equalizing both institutional harms, the Court left open the possibility of contestation between those opposing movements in future popular initiatives across the United States.

The countermovements' campaign in Michigan for Proposition 2 addressed the issue of *preferential treatment*,<sup>677</sup> and – as much as *Fisher*'s lawyers did in relation to individual university admissions – revealed the harm that such preferential treatment generates as a deviation of formal equality standards in a meritocratic context. While, as Bernstein recalls in light of *City of Richmond v. J.A. Croson Co.*<sup>678</sup>, “under existing Supreme Court precedent, government affirmative action preferences, in universities and elsewhere, are illegal if undertaken to redress societal discrimination”,<sup>679</sup> it is artificial to defend that affirmative action programs are only designed to enhance diversity and not remedy past discrimination. Critical race theorists have long made

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<sup>677</sup> Hinz, “Interest Groups Vie for Public Support: The Battle Over Anti-Affirmative Action Initiatives in California and Michigan,” 17.

<sup>678</sup> UNITED STATES, US Supreme Court, *City of Richmond v. J.A. Croson Co.* 488 U.S. 469, 499 (1989).

<sup>679</sup> Bernstein, “Reverse Carolene Products, the End of the Second Reconstruction, and Other Thoughts on *Schuette v. Coalition to Defend Affirmative Action*.”

loud and clear the critique of the “liberal defense” of affirmative actions criticizing exactly this artificiality.<sup>680</sup>

The justifications of affirmative action aside, *Schuette*, from a harm perspective, reveals that contestation outside courts is allowed by the Court in this matter. This is so because while the Constitution permits affirmative action programs, it does not require them. Therefore the harms argued by the movements/countermovements on each side of the case are equally bearable from a constitutional perspective. Such equality of harms contrasts clearly with the one in *Romer* decades earlier. There, a case on constitutional amendment preventing antidiscrimination laws protecting LGBT people, the Court struck down a constitutional amendment prohibiting affirmative action on the basis of sexual orientation, stating also in Justice Kennedy’s words that: “A law declaring that in general it shall be more difficult for one group of citizens than for all others to seek aid from the government is itself a denial of equal protection of the laws in the most literal sense.”<sup>681</sup>

**What separates *Romer* from *Schuette* is the difference in the perception of the harms contestation outside courts imposes in each case.** For the deciding justices, *Romer* is a case about imposing an unbearable harm on a unpopular group, preventing antidiscrimination laws to be enacted for them; while *Schuette* is a case about two equally legitimate constitutional policy choices regarding affirmative action programs. It is worth noting that in *Romer* the US Supreme Court focused more on the desire or intent to harm rather than on the impact or the exact harm of the measure, mostly likely because the impact of the measure was too enormous to be calculated. In

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<sup>680</sup> Charles R Lawrence III, “Two Views of the River: A Critique of the Liberal Defense of Affirmative Action,” *Columbia Law Review* 101 (May 1, 2001): 928, <http://search.ebscohost.com/login.aspx?direct=true&db=edslex&AN=edslex61DDF845&site=eds-live>.

<sup>681</sup> UNITED STATES, US Supreme Court, *Romer v. Evans*, 517 U.S. 620 (1996), p. 633.

*Romer*, the US Supreme Court gave an idea of the extent of the impact of the measure at stake: “these are protections against exclusion from an almost limitless number of transactions and endeavors that constitute ordinary civic life in a free society.”<sup>682</sup> Schuette, on the other hand, sidelines the issue of intent of the Michigan voters, while focusing on the measure (quite similar to the one in *Romer*) as a plausible policy action. In Justice Kennedy’s opinion for the majority of the Court:

*“This case is not about how the debate about racial preferences should be resolved. It is about who may resolve it. There is no authority in the Constitution of the United States or in this Court’s precedents for the Judiciary to set aside Michigan laws that commit this policy determination to the voters.”*<sup>683</sup>

What follows from *Romer/Schuette* is that, while both cases are about claims brought by countermovements contesting the legal protection of historically disadvantaged groups on the ballot, the Supreme Court prohibited institutionally harming LGBTs, while it allows such harm in the case of race-related historical disadvantages.

## 2.4. Conclusion: Conceptual Framework and Counterstrike Strategy

In this Part 2 on counterstrike strategy, the Chapter analyzed the history of contestation outside courts in the US and the constitutional standards regulating such popular initiatives. It was clear here, specially through the lens of the anti-LGBT contestation, that countermovements in the US in the last decades sought to promote constitutional change in light of and responding to constitutional standards while focusing on contestation outside courts and through popular votes. The multiple spaces for

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<sup>682</sup> UNITED STATES, US Supreme Court, *Romer v. Evans*, 517 U.S. 620 (1996), p. 631.

<sup>683</sup> UNITED STATES, US Supreme Court, *Schuette v. Coalition to Defend Affirmative Action*, 572 US \_ (2014), p. 18.

contestation in the US reflected the specific legal opportunity structure (Figure 4) available for those countermovements, which helps explaining why constitutional change occurred the way it did.

**Figure 4: Counterstrike Strategy in the US and the Legal Opportunity Structure**

- ***Access to the formal institutional structure:*** responding to the gradual pro-LGBT rights stance of the US Supreme Court in the recent decades, countermovements in the United States have sought to shape constitutional change by focusing on popular initiatives in a number of battleground states. Both the anti-LGBT and the anti-affirmative action countermovements have at times resorted to the US Supreme Court to keep contestation outside courts alive.
- ***Availability of allies and configuration of power:*** with the help of a resourceful Religious Right, pro-traditional family countermovements have found allies in the general public for popular initiatives, thus managing to counterstrike, often in an anticipatory way, the LGBT agenda.
- ***Cultural and legal frames:*** the history of US countermovements analyzed here in their contestation outside courts can be told through the lens of their gradual response to the constitutional standards developed by courts conducting constitutional review. From the special rights language to religious objections, to affirmative action not being a right, countermovements' harm language in their contestation outside courts often was carefully crafted to fit into the spaces of legal framing left by those courts for contestation outside courts and changed their language as constitutional equality also changed.

In this section, the interplay between constitutional standards, notions of harm and contestation in multiple venues, including outside courts, became clear. By telling the story through constitutional standards controlling contestation outside courts, this Part showed how the US Supreme Court regulates notions of harm, which ultimately define the boundaries of contestation outside courts promoted by countermovements. If the court dismisses certain social movements' claim as *not* involving a constitutionally relevant harm (e.g. harm from prohibiting race-based affirmative action), countermovements will then be free to promote constitutional change on multiple spheres, including outside courts – e.g. through popular vote – into this direction. On

the contrary, if the court qualifies certain social movements' claim as involving a constitutionally relevant harm (e.g. harm from prohibition antidiscrimination law on sexual orientation and gender identity), countermovements then will not be able to promote constitutional change into this direction.

### 3. Conclusion: Realizing the Conceptual Framework of Contestation

In this Chapter, we argued that countermovements take contestation outside courts conducting constitutional review, in particular regarding LGBT rights in Brazil and the US, because the legal structure opportunity outside courts so allows and in certain moments not only allows it but is more favorable to countermovements than litigation. Looking back to the conceptual framework presented in Chapter 2, by the legal structure opportunity we meant the access to formal institutional structure (e.g. legislature or popular initiative processes); availability of allies and existing configuration of power (e.g. the strength of Evangelical parliamentarians); cultural and legal frames (e.g. special rights language or neutral arguments).

Looking more specifically to contestation outside courts regarding LGBT rights in Brazil and the US, it became clear in this Chapter that changes on the meaning of constitutional equality do not stem directly from apex courts' rulings. How apex courts define harm – in particular institutional harm and individualized harm – determines how free countermovements are to contest previous legal gains by social movements outside courts. Constitutional change often occurs in a more tortious way: apex courts' rulings influence the existing legal structure opportunity (e.g. by endorsing or rejecting certain legal framings) which then enables or hinders contestation outside courts to happen. In reacting to increasing recognition of same-sex relationships in the US by the Supreme Court, countermovements have shifted the framings of their contestation from

special rights, passing through a protection of traditional marriage to finally seeking state-level compromises that insulate certain people (e.g. marriage officials), places (e.g. religious organization), and/or relationships (e.g. complicity relationships between religious people and other perceived by them as sinners). In such understanding, it is plausible to see contestation outside courts happening differently in Brazil and in the United States (e.g. with more emphasis on popular initiatives or in the national legislature), but primarily responding to the existing legal structure opportunity and the mobilization by countermovements in that structure.

As the comparative analysis of this dissertation reveals, countermovements in the US case are not unique for adopting proactive strategies. In Brazil as well – despite sharply different legal and political contexts and with varying degrees of success – countermovements have at least sought to take such proactive strategy in their contestation in multiple venues. However, the section on containment strategy in Brazil evidenced that the proactive stand of countermovements have encountered considerable institutional obstacles. This has led countermovements in Brazil to pursue an obstructive position – seeking to avoid the adoption of protective legislation for historically vulnerable groups.

To be sure, even dealing with contestation outside courts, this Chapter shows that courts conducting constitutional review in those cases are hardly mere bystanders. Often, the role of courts lies in policing constitutional views expressed by members of political structures. In the Chapter 4, courts were seen as gatekeepers of their own judicial game, i.e. defining powerlessness in a way that triggers or hinders the courts' institutional openness in constitutional equality litigation towards countermovements' claims. In this Chapter, courts are seen as policing political structures (e.g. electorate

in referendums, decision-makers in administrative bodies), which as shown below also express certain conception of harm in equality matters outside the judicial realm.



## **PART 3: TOWARDS A CONCLUSION**

## CHAPTER 5 *HARMING* CONSTITUTIONAL CHANGE AND THE JUDICIAL ROLE

At the heart of equality lies an understanding of what amounts to a constitutionally relevant assertion of harm. Generally harm is an injury to a constitutional right (e.g. the right not to be unfairly discriminated as in *Barnard*) or to a constitutional interest (“”<sup>684</sup> as in *Perry*).

Often, harm language is inserted into the judicial test used to verify the constitutionality of a race-based measure. In affirmative action cases involving race, while applying strict scrutiny, the US Supreme Court will check whether university affirmative actions “unduly harm members of any racial group”.<sup>685</sup> This dissertation has shown that countermovements have appropriated harm language and in certain cases courts have been receptive to their claims of harm. Thus, contemporary equality jurisprudence has increasingly become a field of competition of claims of harms. The conquest to (re)define the concept of harm underpinning constitutional equal protection takes place – as Chapters 3 and 4 show – inside as well as outside courts.

This Chapter looks more closely at the third element of the conceptual framework presented in Chapter 2, namely: harm-management. The present dissertation argued that courts can control access to debates inside and outside courts where notions of harm are debated. The objective of this final chapter is to offer an insight on the different roles courts play vis-à-vis claims of harm in the equality jurisprudence of Brazil, South Africa and United States, in particular taking into the account the context of countermovements’ litigation.

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<sup>684</sup> THE UNITED STATES, US Supreme Court, *Hollingsworth v. Perry*, 570 US \_ (2013), p. 7.

<sup>685</sup> THE UNITED STATES, US Supreme Court, *Gratz v. Bollinger*, 539 US 244 (2003), p. 341.

Courts are in the business of constitutional harm-management. When assessing the merits of opposing movements' claims, the apex courts can decide which burdens or grievances (e.g. past discrimination) deserve being addressed and eventually remedied as *constitutional harms*. Such a perspective of harm is often not what one finds on constitutional law textbooks on equality. Traditional discourses by scholars and judges regarding equal protection in constitutional law tend to focus on protecting vulnerable minorities against an oppressive majority.

This dissertation does not postulate that notions of harm in Brazil, South Africa and United States are synonymous. Rather, it argues that, despite their differences, equality jurisprudence in those three countries has navigated a sea of different groups claiming injuries that are not necessarily grounded on historical discrimination. Furthermore, this dissertation looks more closely at cases of a claim framed as opposed to another discrimination claim by an opposing group in a contestation that extends beyond the courtroom but is framed, constrained and often underpinned by standards set within the courtroom.

The previous Chapters have shown that the contestation between different movements has led to constitutional changes influencing what harm means in constitutional equality litigation. In Part 1 of this Chapter, it is argued that competition for the redefinition of harm has led to at least **three constitutional changes**:

- constitutional jurisprudence has recognized a **proliferation of claims of harms**, which has opened the door of courts to new types of harms (e.g. complicity-based conscience claims) as well as old claimants in new clothes (companies arguing equality and religious claims);

- the proliferation of harm-based claims resulted in the **aggravation of tensions both inside and outside courts in equality terms** (e.g. tensions around affirmative action or same-sex marriage);
- by fostering or at least hosting radically different conceptions of harms, courts cannot minimize those tensions resulting from clashes between opposing movements as long as different conceptions of harm are built on **diverse and changing conceptual foundations** that further hurt historically disadvantaged groups.

Those constitutional changes point towards a plural and nuanced future of equality jurisprudence in Brazil, South Africa and the United States. In this future, courts might lose control over the constitutional meaning of equality, unless they are able to navigate clearly between competing claims of harm, beyond a majority-minority dichotomy. Thus, Part 2 of this Chapter will shed light on the judicial roles courts will likely assume in the future of equal protection jurisprudence if those constitutional changes endure. This final section points to a theme present throughout this dissertation, but yet not clearly addressed: what is the future of courts amid constitutional changes of constitutional harm? This final section will offer more questions than definitive answers, to be explored in future research.

## 1. Constitutional Changes

There are several constitutional changes influenced by countermovements' legal mobilization inside and outside courts in the three jurisdictions studied here. For analytical purposes and without the intention of presenting a final list of all instances of constitutional change in the United States, South Africa and Brazil, this section offers further details on three changes, in this order:

- **Proliferation of claims** resulting from competing submissions about constitutionally relevant harms;
- Proliferation of harm-based claims exacerbates in its turn **clashes in equality cases inside and outside courts**;
- Tensions and clashes cannot be resolved so long as radically different (and conceptually incompatible) **foundational notions of harm** underscore equality claims.

### 1.1. Change 1: Proliferation of new claims by old claimants

#### 1.1.1. Framing objections in diversity-enhancing terms

Successfully rebranding claims of harm eases countermovements' institutional access to constitutional equality litigation. Petitioners in *Perry* were unsuccessful on standing grounds partly because they lacked injury in fact, as in line with its standing jurisprudence, the US Supreme Court did not find that seeking the proper application of the law would grant them standing in that case.<sup>686</sup> Similarly, in *Gill v. Whitford* discussing partisan gerrymandering in Michigan<sup>687</sup> which also involved racial elements,<sup>688</sup> the US Supreme Court unanimously ruled in 2018 that the applicants - twelve Democratic Party voters - lacked standing for not showing an injury in fact. The voters had argued that “they have been ‘harmed by the manipulation of district boundaries’ because Democrats statewide ‘do not have the same opportunity provided to Republicans to elect representatives of their choice to the Assembly.’”<sup>689</sup> In *Whitford*, the US Supreme Court recalled that injury in fact means “a plaintiff’s

<sup>686</sup> THE UNITED STATES, US Supreme Court, *Hollingsworth v. Perry*, 570 US \_ (2013).

<sup>687</sup> THE UNITED STATES, US Supreme Court, *Gill v. Whitford*, 585 US \_ (2018).

<sup>688</sup> Olga Pierce and Kate Rabinowitz, “‘Partisan’ Gerrymandering Is Still About Race,” ProPublica, 2017, <https://www.propublica.org/article/partisan-gerrymandering-is-still-about-race>. Last accessed on: 30<sup>th</sup> September 2018.

<sup>689</sup> THE UNITED STATES, US Supreme Court, *Gill v. Whitford*, 585 US \_ (2018), p. 3.

pleading and proof that he has suffered the ‘invasion of a legally protected interest’ that is ‘concrete and particularized,’ *i.e.*, which ‘affect[s] the plaintiff in a personal and individual way.’<sup>690</sup>

In that sense, in order to find ways to successfully show injury in fact to challenge same-sex marriage, countermovements need to find new legal framings that would justify their concrete and particularized harm derived from the recognition of same-sex marriage with a concrete injury. This section describes how old litigators (e.g. Christian Right <sup>691</sup> opposing LGBT rights in general and same-sex marriage specifically) sought to contest marriages that were against their values. The debate on same-sex marriage has come a long way from expressions of pure disgust<sup>692</sup> towards same-sex couples. Neither the argument rejecting “special rights”<sup>693</sup> for LGBT would work because, at least in the case of marriage, it is in question a basic civil institution, not a special privilege. In order to fully appreciate these claims, one needs another legal framing of harm, beyond disgust or special rights.

At the bottom line, often there is a general recognition of the right of religious ministers to refuse to perform same-sex weddings in most of the jurisdictions that recognized same-sex marriage. <sup>694</sup>In *Fourie*, the South African Constitutional Court stated that: “Religious institutions would remain undisturbed in their ability to perform

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<sup>690</sup> THE UNITED STATES, US Supreme Court, *Gill v. Whitford*, 585 US \_ (2018), p. 13.

<sup>691</sup> Southworth, “Conservative Lawyers and the Contest over the Meaning of Public Interest Law”; Southworth, *Lawyers of the Right: Professionalizing the Conservative Coalition*; Teles, *The Rise of the Conservative Legal Movement: The Battle for Control of the Law*; Thoreson, “Somewhere over the Rainbow Nation: Gay, Lesbian and Bisexual Activism in South Africa”; Amparo, “Notes on Countermovements and Conservative Lawyering: The Bumpy Road to Constitutional Marriage Equality in Brazil.”

<sup>692</sup> Nussbaum, *From Disgust to Humanity: Sexual Orientation and Constitutional Law*; Martha C Nussbaum, *Hiding from Humanity: Disgust, Shame, and the Law* (Princeton University Press, 2009).

<sup>693</sup> Stone, “The Impact of Anti-Gay Politics on the LGBTQ Movement.”

<sup>694</sup> In Brazil, the question of religious objections to same-sex marriage was not before the court because the case was primarily concerned with same-sex civil unions, which are not religious unions under civil code. To be clear, arguing conscience objections in relation to same-sex marriage is not a new thing, in fact it is often a central part of the religion freedom debate when recognizing same-sex marriage. What is new is an increasing doctrinal and jurisprudential acceptance of the expansion of the reach of such exemptions to complicity acts.

marriage ceremonies according to their own tenets, and thus if they wished, to celebrate heterosexual marriages only.”<sup>695</sup> The parliamentary debate that followed *Fourie* in adopting a law that would recognize same-sex unions – called Civil Union Bill<sup>696</sup> – clearly shows that the topic of religious objections was constantly at the discussion table.<sup>697</sup> The first draft of the Civil Union Bill contained the institution of ‘civil partnership’ only for same-sex unions, while the second version which finally came into law established, as Pierre De Vos recalls,

“the right to conclude a civil union by way of either a civil partnership or a marriage. Clearly, this version of the legislation was a vast improvement on the regime initially proposed. And, despite the religious outcries, the charges that Parliament had gone too far in testing the patience of God, the ANC eventually used its political power in the committee and in the houses of Parliament to pass this version of the legislation in time to meet the deadline of the Constitutional Court.”<sup>698</sup>

In the US, in *Obergefell*, the US Supreme Court addressed this question by recognizing the sincerity of religious objections, but clearly affirming that the state cannot bar same-sex marriages for religious reasons:

“it must be emphasized that religions, and those who adhere to religious doctrines, may continue to advocate with utmost,

<sup>695</sup> SOUTH AFRICA, Constitutional Court, *Minister of Home Affairs and Another v Fourie and Another* (CCT 60/04), para. 159.

<sup>696</sup> [https://www.gov.za/sites/www.gov.za/files/a17-06\\_1.pdf](https://www.gov.za/sites/www.gov.za/files/a17-06_1.pdf). Last accessed on: 27 January 2017.

<sup>697</sup> Gustavo Gomes da Costa Santos, “Citizenship and Sexual Rights: A Comparative Study of the Legal Recognition of Same-Sex Unions in Brazil and South Africa” (Unicamp, 2011).

<sup>698</sup> De Vos and Barnard, “Same-Sex Marriage, Civil Unions and Domestic Partnerships in South Africa: Critical Reflections on an Ongoing Saga,” 820.

sincere conviction that, by divine precepts, same-sex marriage should not be condoned. The First Amendment ensures that religious organizations and persons are given proper protection as they seek to teach the principles that are so fulfilling and so central to their lives and faiths, and to their own deep aspirations to continue the family structure they have long revered. The same is true of those who oppose same-sex marriage for other reasons. In turn, those who believe allowing same-sex marriage is proper or indeed essential, whether as a matter of religious conviction or secular belief, may engage those who disagree with their view in an open and searching debate. The Constitution, however, does not permit the State to bar same-sex couples from marriage on the same terms as accorded to couples of the opposite sex.”<sup>699</sup>

When it comes to religious objections to same-sex marriage, for instance, such objections are often framed within the liberal discourse of enhancing diversity or pluralism. The line between bare desire to harm another group and the liberal celebration of pluralism is thin. Take for instance the debate in South Africa, mentioned earlier in this dissertation in Chapter 1, on the alleged right of religious associations to discriminate.<sup>700</sup> Patrick Lenta, for instance, grounds its defense of a right of religious associations to discrimination on associational rights, echoing arguments seen elsewhere such as the *Boy Scouts* case<sup>701</sup> in the US:

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<sup>699</sup> THE UNITED STATES, US Supreme Court, *Obergefell v. Hodges*, 576 U.S. \_ (2015), p. 27.

<sup>700</sup> Kruuse, “Conscientious Objection to Performing Same-Sex Marriage in South Africa”; Lenta, “Right of Religious Associations to Discriminate”; Lenta, “In Defence of the Right of Religious Associations to Discriminate: A Reply to Bilchitz and De Freitas.”

<sup>701</sup> THE UNITED STATES, US Supreme Court, *Boy Scouts of America v. Dale*, 530 US 640 (2000).



“What underpins my conviction that religious associations should in certain circumstances have a right to discriminate is my understanding of religious believers' rights to religious and associational freedom. It is hard to conceive of religious believers enjoying religious liberty without being able to form certain kinds of association with other like-minded individuals" and without being permitted to organise and run their groups in accordance with shared, discrimination-mandating religious beliefs.”<sup>702</sup>

Lenta's statement reads as a new type of argument, at least in the sense of not being grounded on disgust against LGBT people or on a rejection of 'special rights' (or even on teleological foundations). It reads as a concern with the harms of enforcing equality of LGBTs against associational rights of religious organizations. Understanding the placement of this argument in terms of harms, David Bilchitz in his reply to Lenta's article makes it clear that the question of harm is constitutive of the debate *on the limits of intolerance* in a liberal democracy:

“The central question that must be engaged within this legal (and political philosophical) debate is whether discrimination in employment by private associations on prohibited grounds in the Constitution (and statute) constitutes harm of such a nature that it justifies restricting the liberty of such associations.”<sup>703</sup>

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<sup>702</sup> Lenta, “Right of Religious Associations to Discriminate,” 234.

<sup>703</sup> David Bilchitz, “Why Courts Should Not Sanction Unfair Discrimination in the Private Sphere: A Reply,” *S. Afr. J. on Hum. Rts.* 28 (2012): 299.

One must bear in mind the context of such complicity-based conscience claims. First, despite being novel, those claims come after a long history of religious accommodations claims under the 1<sup>st</sup> Amendment in the US. As NeJaime recalls,<sup>704</sup> a series of cases in the US presented by representatives of the Christian Right sought to get a “place at the table” as Hacker defined,<sup>705</sup> in public education for religious people.

Constitutional claims are all the more important as the US Supreme Court recognized a religious conscience claim brought by a for-profit company in *Hobby Lobby*.<sup>706</sup> This is all the more important in the US where in several states<sup>707</sup> and also federally antidiscrimination laws do not protect employees from discrimination on the basis of sexual orientation and gender identity. State level anti-discrimination laws create exactly the same type of patchwork that was found demeaning in *Windsor*<sup>708</sup> for same-sex marriage.

It is worth noting that claims of discrimination against religious people when framed as a “place at the table” of diversity resemble a liberal claim of pluralism. Consider for an example of this “place at the table” approach the words of the United States District Court, E.D. Michigan in *Hansen v. Ann Arbor Public Schools* questioning a school’s prohibition of a student to speak from a Catholic perspective about homosexuality at a school event:

“This case presents the ironic, and unfortunate, paradox of a public high school celebrating ‘diversity’ by refusing to permit

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<sup>704</sup> Douglas NeJaime, “Inclusion, Accommodation, and Recognition: Accounting for Differences Based on Religion and Sexual Orientation,” *Harvard Journal of Law and Gender* 32, no. 2 (2009): 343. Hans J Hacker, *The Culture of Conservative Christian Litigation* (Rowman & Littlefield, 2005), 25.

<sup>705</sup> Hacker, *The Culture of Conservative Christian Litigation*, chap. 2.

<sup>706</sup> THE UNITED STATES, US Supreme Court, *Burwell v. Hobby Lobby Stores*, 573 US \_\_ (2014).

<sup>707</sup> Human Rights Watch, “United States: State Laws Threaten LGBT Equality,” 2018. Available at: <https://www.hrw.org/news/2018/02/19/united-states-state-laws-threaten-lgbt-equality>.

<sup>708</sup> THE UNITED STATES, US Supreme Court, *United States v. Windsor*, 570 U.S. \_\_ (2013).

the presentation to students of an ‘unwelcomed’ viewpoint on the topic of homosexuality and religion, while actively promoting the competing view. This practice of ‘one-way diversity,’ unsettling in itself, was rendered still more troubling both constitutionally and ethically by the fact that the approved viewpoint was, in one manifestation, presented to students as religious doctrine by six clerics (some in full garb) quoting from religious scripture. In its other manifestation, it resulted in the censorship by school administrators of a student's speech about ‘what diversity means to me,’ removing that portion of the speech in which the student described the unapproved viewpoint.

All of this, of course, raises the question, among others presented here, of what ‘diversity’ means and whether a school may promote one view of ‘diversity’ over another. Even accepting that the term ‘diversity’ has evolved in recent years to mean, at least colloquially, something more than the dictionary definition, the notion of sponsorship of one viewpoint to the exclusion of another hardly seems to further the school's purported objective of ‘celebrating diversity’.”<sup>709</sup>

“Place at the table” arguments speak to aspects of legal opportunity structures, as defined in Chapter 2. When courts accept “place at the table” arguments made by countermovements, courts are at the same time inviting countermovements to have access to the formal institutional structure of constitutional litigation as well as courts

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<sup>709</sup> THE UNITED STATES, U.S. District Court for the Eastern District of Michigan, *Hansen v. Ann Arbor Public Schools*, 293 F. Supp. 2d 780 (E.D. Mich. 2003), 293 F. Supp. 2d 780 (E.D. Mich. 2003) December 5, 2003., US Supreme Court, *United States v. Windsor*, 570 U.S. \_ (2013).

are giving to those countermovements a legal frame in which countermovements' constitutional harms can be inserted in a way that is likely to be accepted by the judiciary.

In Brazil, as mentioned in Chapter 4, countermovements have framed the (pending) legal case against same-sex marriage in procedural terms, focusing more on the incorrectness of the administrative route of the National Council of Justice (CNJ), rather than on the unconstitutionality of the same-sex marriage per se. Countermovements challenging same-sex marriage in Brazil used procedural arguments of that sort before the Supreme Court while pursuing before the legislature a anticipatory countermobilization seeking, unsuccessfully so far, to define family as an entity between a man and a woman.<sup>710</sup> Comparative research developed in this dissertation has shown that focusing on diversity-enhancing type of arguments work better as legal framings for countermovements than procedural challenges in a country with heavy emphasis on transformative constitutionalism, which might open the doors of legal opportunity structures, apex courts included, to those movements.

### 1.1.2. Privatizing constitutional harms

Constitutional change occurs when old players such as religious groups present new claims, namely: what NeJaime and Siegel defined as “complicity-based conscience claims” as “religious objections to being made complicit in the assertedly sinful conduct of *others*” (emphasis added).<sup>711</sup> NeJaime and Siegel argue that those are a new kind of claim,<sup>712</sup> in at least two ways: in form, as they often impose considerable harm on

<sup>710</sup> Gomes, *Por Um Constitucionalismo Difuso: Cidadãos, Movimentos Sociais e o Significado Da Constituição* [For a Diffuse Constitutionalism: Citizens, Social Movements and the Meaning of the Constitution]; Cardinali, *A Judicialização Dos Direitos LGBT No STF* [The Judicialization of LGBT Rights in before the STF].

<sup>711</sup> NeJaime and Siegel, “Conscience Wars: Complicity-Based Conscience Claims in Religion and Politics.”

<sup>712</sup> I.e. new in relation to traditional religious accommodation claims. According to NeJaime and Siegel: “As we show, complicity-based conscience claims differ in form and in social logic from the claims featured in the free exercise cases RFRA invokes (...) In the free exercise cases that RFRA invokes, claims were advanced by religious

others); and in social function (they are not simply requests for religious accommodation but a way of addressing the conduct of others that somehow differ from traditional morality).

Courts might not be completely resistant to these novel types of conscience claims, depending on how they are phrased. In an amicus brief presented by conservative lawyers, among them Douglas Laycock,<sup>713</sup> in the *Obergefell* case, the lawyers were very strategic in presenting the conflict between LGBT rights and religious liberty as a win-win situation:

“The proper response to the mostly avoidable conflict between gay rights and religious liberty is to protect the liberty of both sides. Both sexual minorities and religious minorities make essentially parallel claims on the larger society. Both sexual orientation and religious faith, and the conduct that follows from each, are fundamental to human identity. Both same-sex couples, and religious organizations and believers committed to traditional understandings of marriage, face hostile regulation that condemns their most cherished commitments as evil. The American solution to this conflict is to protect the liberty of both sides. Same-sex couples must be permitted to marry, and

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minorities who sought exemptions based on unconventional beliefs generally not considered by lawmakers when they adopted the challenged laws; the costs of accommodating their claims were minimal and widely shared. Complicity-based conscience claims differ in form. Because the claims concern the conduct of citizens outside the faith community, accommodating the claims can harm those whose conduct the claimants view as sinful. Complicity-based conscience claims also differ in social logic. Complicity claims are now asserted by growing numbers of Americans about some of the most contentious “culture war” issues of our day.<sup>12</sup> As we show, complicity claims are often encouraged by those seeking to mobilize the faithful against laws that depart from traditional sexual morality.” NeJaime and Siegel, 2516.

<sup>713</sup> Laycock, “Religious Liberty for Politically Active Minority Groups: A Response to NeJaime and Siegel”; Laycock, Picarello Jr, and Wilson, *Same-Sex Marriage and Religious Liberty: Emerging Conflicts*.

religious dissenters must be permitted to refuse to recognize those marriages.”<sup>714</sup>

Laycock’s argument works even in a state that later (after *Obergefell*) recognized legal protection to same-sex couples. This is so because his religious objection to same-sex marriage is not framed within the boundaries of public space (i.e. he is not expressing an objection to state laws recognizing same-sex marriage).<sup>715</sup>

Laycock is rather making an argument in favor of private individuals and organizations being constitutionally able to not recognize same-sex marriage in their private relations with same-sex couples. In a way, it resembles a **privatization of opposition to same-sex marriage**. The trick lies in the last section of the quoted passage, in the word ‘recognize’. It might mean actually not recognizing same-sex marriage in the provisions of services (photography, cakes, and so on) if service providers, based on their moral, conscious and/or religious beliefs consider they are being forced to be complicit with same-sex marriage. Thus, the harm would lie in being forced to perform an action that would send a message of being complicit to same-sex marriage. This play on the public-private divide is all the more crucial to understand at a time when countermovements are making the consequences of (private) religious convictions public through litigation and outside the judicial process via popular initiatives.

The Constitutional Court of South Africa addressed claims asserting the right to discriminate in private settings by refusing in 2015 to hear a claim of indirect discrimination presented by a church minister who was fired after she revealed her intentions to marry her same-sex partner, after same-sex marriage was already the law

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<sup>714</sup> THE UNITED STATES, US Supreme Court, *Obergefell v. Hodges*, 576 U.S. \_\_\_\_ (2015), page 28.

<sup>715</sup> Yoshino, *Speak Now: Marriage Equality on Trial*.

in South Africa. In *De Lange* case,<sup>716</sup> the Constitutional Court of South Africa declined to hear the case on several technical grounds, including the fact that the church minister should have first brought up the case before the Equality Court. Yet, Justice Moseneke DJC, writing for the Court, also stressed the “considerable complexity and vast public repercussions arising from competing constitutional claims” in this case, which “if and when the unfair discrimination claim has been properly ripened, it will require all the judicial, if not Solomonic, wisdom we Judges can muster right through our court system.”<sup>717</sup> *De Lange* reveals that the Constitutional Court of South Africa does not see itself yet ready to deal with cases of conflicts between different claims of harm, in particular in light of the transformative nature of the constitutional order of South Africa.

Arguments on freedom to discriminate in private settings could also emerge in South Africa if the Constitutional Court opens its doors to cases of that sort. As mentioned in the previous section, the *De Lange* case<sup>718</sup> offered such opportunity but the court declined to hear the case, although it took the opportunity to highlight how challenging the case was because both the minister who was fired for declaring her intentions of marrying a woman and the church leaders are both religious, thus the conflict is even more intense. Also, different from the US, in South Africa cases being brought involving private organizations, being businesses or churches in their internal affairs, are even more challenging than in the US given that the Bill of Rights in the

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<sup>716</sup>SOUTH AFRICA, Constitutional Court, *De Lange v Presiding Bishop of the Methodist Church of Southern Africa for the time being and Another* (CCT223/14) [2015] ZACC 35; 2016 (1) BCLR 1 (CC); 2016 (2) SA 1 (CC) (24 November 2015).

<sup>717</sup> SOUTH AFRICA, Constitutional Court, *De Lange v Presiding Bishop of the Methodist Church of Southern Africa for the time being and Another*, para. 65.

<sup>718</sup>SOUTH AFRICA, Constitutional Court, *De Lange v Presiding Bishop of the Methodist Church of Southern Africa for the time being and Another* (CCT223/14) [2015] ZACC 35; 2016 (1) BCLR 1 (CC); 2016 (2) SA 1 (CC) (24 November 2015).

Final Constitution – including its discrimination clause - applies horizontally as well, between private parties.<sup>719</sup>

One important aspect of such transformative constitutionalism is the role of courts in framing conflicts between private organizations and historically discriminated people as a right to be different. In South Africa, it is the right to be different clearly recognized by the Constitutional Court. As the same-sex marriage case, *Fourie*, highlighted:

“there are a number of constitutional provisions that underline the constitutional value of acknowledging diversity and pluralism in our society, and give a particular texture to the broadly phrased right to freedom of association contained in section 18. Taken together, they affirm the right of people to self-expression without being forced to subordinate themselves to the cultural and religious norms of others, and highlight the importance of individuals and communities being able to enjoy what has been called the ‘right to be different’”<sup>720</sup>

The recognition of the right to be different does not in itself solve the problems of unfair discrimination in South Africa. Partly it is so because of the rhetoric of the right to discriminate as mentioned above. Partly, it is so because the right to be different only recognizes societal plurality in constitutional terms, rather than providing much hint on how to solve private conflicts of the type *De Lange* brings up. Yet, by framing the conflict in this way, the Constitutional Court of South Africa at the same time

<sup>719</sup> Danwood Mzikenge Chirwa, “The Horizontal Application of Constitutional Rights in a Comparative Perspective,” *Law, Democracy & Development* 10, no. 2 (2006): 21–48.

<sup>720</sup> SOUTH AFRICA, Constitutional Court, *Minister of Home Affairs and Another v Fourie and Another* (CCT 60/04) [2005] ZACC 19; 2006 (3) BCLR 355 (CC); 2006 (1) SA 524 (CC) (1 December 2005), para. 61.



recognizes that pluralism exists in the society while making it clear that from a rights' perspective judicial decisions should uphold the right to be different for historically vulnerable groups.

When one looks more closely at those claims from a critical perspective as the one developed by the Critical Race Theorists, for instance, one might see the detachment between the foundations of constitutional equality on historical discrimination and the celebration of diversity itself regardless of the context of past discrimination against LGBTs.<sup>721</sup> Such detachment is only logically possible when it is accompanied by an individualization of harm of the type described in this dissertation.

In Brazil, , privatization of discrimination would be hard to justify on constitutional grounds, especially because - as Adilson Moreira has argued – transformative race and LGBT jurisprudences by the STF have recognized implicitly a right to citizenship as a structural principle of constitutional interpretation. In this sense, for Moreira,

"The constitutional text establishes a direct relationship between egalitarianism and inclusion, which implies combating the mechanisms responsible for social stratification. Social inclusion is therefore a principle of justice that enables the affirmation of citizenship, being focused on the situation of groups that are in a situation of structural disadvantage."<sup>722</sup>

In the terms presented in this dissertation, STF decisions regarding affirmative action and LGBT rights have enforced a transformative understanding of autonomy and

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<sup>721</sup> Robinson, "Unequal Protection."

<sup>722</sup> Adilson José Moreira, *Cidadania Sexual: Estratégias Para Ações Inclusivas [Sexual Citizenship: Strategies for Inclusive Actions]* (Belo Horizonte: Arraes Editores, 2017), 190.

citizenship which is not neutral. Such a understanding does not treat equally claims of private objectors to discriminate and the rights of vulnerable groups, but rather privileges the later ones. This understanding thus forecloses legal structure opportunities in Brazil for arguments in line of privatization of constitutional harms.

### 1.1.3. Expanding constitutional harms to for-profit companies

Further expanding the outreach of this debate, a new group in constitutional equality jurisprudence has gained momentum with recent litigation on religious objections: corporations. The debate on whether companies can claim religious objections to limit their female employees' access to contraception further complicates the discussion on where to draw the line between guaranteeing pluralism in constitutional equality and condemning discriminatory acts that harm others. *Hobby Lobby*<sup>723</sup> is a case in point here. The case concerned with Christian owners of companies who objected on religious grounds to providing contraceptive care under the Patient Protection and Affordable Care Act of 2010 (ACA) to their employees. While the Department of Health and Human Services (HHS) already established exemptions for religious organizations such as churches, the question here was whether for-profit companies could claim similar religious objections. In *Hobby Lobby* case, the Court held that a closely held company might object on religious grounds to contraceptive mandate in health insurance for its employees.

*Hobby Lobby* offers an innovative claim in different ways. First, it opened up conscience claim for legal persons; in particular, non-profit persons.<sup>724</sup> Second, it

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<sup>723</sup> THE UNITED STATES, US Supreme Court, *Burwell v. Hobby Lobby Stores*, 573 US \_ (2014).

<sup>724</sup> In the Court's opinion: "This concession effectively dispatches any argument that the term "person" as used in RFRA does not reach the closely held corporations involved in these cases. No known understanding of the term 'person' includes *some* but not all corporations. The term "person" sometimes encompasses artificial persons (as the Dictionary Act instructs), and it sometimes is limited to natural persons. But no conceivable definition of the term includes natural persons and nonprofit corporations, but not for-profit corporations." THE UNITED

extended constitutional protection to complicity based conscience claims. Unlike previous cases on religious accommodation,<sup>725</sup> “complicity-based conscience claims are oriented toward third parties who do not share the claimant’s beliefs about the conduct in question. For this reason, their accommodation has distinctive potential to impose material and dignitary harm on those the claimants condemn”<sup>726</sup> as NeJaime and Siegel put it. Justice Ginsburg, in her dissenting in *Hobby Lobby*, pointed out that: “No tradition, and no prior decision under RFRA, allows a religion-based exemption when the accommodation would be harmful to others—here, the very persons the contraceptive coverage requirement was designed to protect.”<sup>727</sup> Justice Ginsburg’s argument shows that it takes considerable creativity (or in the terms of this dissertation, a redefinition of what constitutional harm means) in order to accept countermovements’ claims of complicity even when the constitutional text is supportive of religious freedom objections.

In the 2017 term, the US Supreme Court heard a post-Obergefell case exactly about the extent of such complicity claims to objections to same-sex marriage. In *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission*,<sup>728</sup> argued in December 2017, the question was whether a baker can be exempted from public accommodation laws to prepare a cake for same-sex couples on the basis of his sincerely held religious beliefs. The baker’s arguments were based on the Free Speech and the Free Exercise Clauses of the First Amendment, because in his views producing

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STATES, US Supreme Court, *Burwell v. Hobby Lobby Stores*, 573 US \_\_ (2014), p. 20. Available at: <https://supreme.justia.com/cases/federal/us/573/13-354/case.pdf>. Last accessed on: Sept. 30<sup>th</sup>, 2018.

<sup>725</sup> E.g. THE UNITED STATES, US Supreme Court, *Employment Division, Department of Human Resources of Oregon v. Smith*, 494 US 872 (1990).

<sup>726</sup> NeJaime and Siegel, “Conscience Wars: Complicity-Based Conscience Claims in Religion and Politics,” 2527.

<sup>727</sup> THE UNITED STATES, US Supreme Court, *Burwell v. Hobby Lobby Stores*, 573 US \_\_ (2014), p. 27 (Justice Ginsburg dissenting).

<sup>728</sup> THE UNITED STATES, US Supreme Court, *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission*, 584 U.S. \_\_\_\_ (2018). Available at: <https://supreme.justia.com/cases/federal/us/584/16-111/case.pdf>. Last time accessed on: Sept. 30<sup>th</sup>, 2018.

a cake is an expressive speech which the state cannot compel him to perform as well as the baker cannot be compelled by the state to go against his religious views.

Writing the Court opinion, Justice Kennedy relies heavily on what he considers the ‘hostility’,<sup>729</sup> with which the Colorado Civil Rights Commission addressed the baker’s religious beliefs, under the guise of the requirement of neutrality,. Instead of providing a comprehensive view on cases similar to this one concerning requests by individuals to discriminate, the US Supreme Court read the religious argument narrowly: it focused on how, in the Court’s view, the Commission should have been neutral (and not hostile) to the baker’s religion. Justice Kennedy writes that hostility here occurred because some comments by a couple of commissioners during public hearings for the case. For instance, the hostile commissioners’ comments were:

“One commissioner suggested that Phillips can believe ‘what he wants to believe,’ but cannot act on his religious beliefs if he decides to do business in the state.” (...) A few moments later, the commissioner restated the same position: ‘[I]f a businessman wants to do business in the state and he’s got an issue with the—the law’s impacting his personal belief system, he needs to look at being able to compromise.’ *Id.*, at 30. Standing alone, these statements are susceptible of different interpretations.”<sup>730</sup>

Taking into consideration that the Commission has, in the Supreme Court’s view, applied inconsistently the “state law (...) [that] afforded storekeepers some latitude to

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<sup>729</sup> UNITED STATES, US Supreme Court, *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission*, p. 12.

<sup>730</sup> UNITED STATES, US Supreme Court, *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission*, p. 12-13.

decline to create specific messages the storekeeper considered offensive.”<sup>731</sup> In Justice Kennedy’s words, writing for the majority of the Court:

“The Commission’s hostility was inconsistent with the First Amendment’s guarantee that our laws be applied in a manner that is neutral toward religion. Phillips was entitled to a neutral decisionmaker who would give full and fair consideration to his religious objection as he sought to assert it in all of the circumstances in which this case was presented, considered, and decided.”<sup>732</sup>

Hostility was also addressed by the dissenter Justice Ginsburg. Justice Ginsburg weighted in the hostility of the comments by a couple of Commissioners against “Phillips’ refusal to sell a wedding cake to Craig and Mullin.”<sup>733</sup> “for no reason other than their sexual orientation, a cake of the kind he regularly sold to others.”<sup>734</sup> Justice Ginsburg then found in favor of the same-sex couple..

Hostility was central to the reasoning in *Masterpiece*. By focusing on hostility, the Court killed a couple of birds with one stone. First, hostility provides a platform (or a framework) on the basis of which constitutional harm (harm from not being served on the basis of one’s sexual orientation versus the harm from suffering hostility on religious grounds) can be measured in cases involving complicity. Nevertheless, this case focused mainly on the hostility by the state officials in the human rights body, not

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<sup>731</sup> UNITED STATES, US Supreme Court, *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission*, p. 11.

<sup>732</sup> UNITED STATES, US Supreme Court, *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission*, p. 18.

<sup>733</sup> UNITED STATES, US Supreme Court, *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission*, p. 7 (Justice Ginsburg dissenting).

<sup>734</sup> UNITED STATES, US Supreme Court, *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission*, p. 5 (Justice Ginsburg dissenting).

by private persons. At the same time, hostility allowed the Court to paint the case as being a narrow one, whose reading is not easily transposed to future cases where the same level of hostility would not necessarily be present. This dissertation argues that this kind of harm-talk will likely be the future of equal protection jurisprudence in the United States, especially if businesses – in addition to individuals - continue to present claims of harm.

Hostility worked as a way to shift attention from competing personal harms to state action. The state action came into picture through a hostility language built on a state neutrality requirement. By doing that, the US Supreme Court crafted a new kind of harm that was not in the picture before: a harm caused to the baker by the state, sidelining any serious discussion on the harm to or by the couple at stake. This line of argumentation chosen by the majority of the Court is indeed narrow, because it is situational: it is too focused on the state hostility, while leaving the debate on private discrimination and the harm to LGBT couples out in the cold.

*Masterpiece* represents how the future of equality litigation will look like. The case uses the idea of ‘hostility’ in an individualized way, functioning argumentatively as dignity-based arguments - mentioned in the previous Chapter - did. When constitutional litigation on equality turns into a debate on how people *feel* in relation to different others, then constitutional litigation becomes an arena where courts are left with the task of balancing opposing conceptions of harm. This perspective becomes clear when in the US Supreme Court showed caution in relation to future cases:

“The outcome of cases like this in other circumstances must await further elaboration in the courts, all in the context of recognizing that these disputes must be resolved with tolerance, without undue disrespect to sincere religious beliefs, and without

subjecting gay persons to indignities when they seek goods and services in an open market.”<sup>735</sup>

*Masterpiece* offers a scenario where old players in new business clothing (religious groups supporting companies, rather than religious individuals or organizations) make new claims of harm (complicity-based conscience claims) under First Amendment freedoms of speech and religion. *Masterpiece*’s holding is technically limited for two specific reasons. First, the Court does not decide about the baker’s speech claim due to factual uncertainties regarding the customization of the cake itself (which Justice Thomas in his concurring opinion addresses). Second, the Court relies on hostility towards the baker by the administrative body of Colorado, which will not easily occur in future cases. Nevertheless, *Masterpiece* is another example of “weaponizing the First Amendment in a way that unleashes judges, now and in the future, to intervene in (...) policy” – to use an expression from Justice Kagan’s dissenting in *Janus v. American Federation of State, County, and Municipal Employees, Council 31*<sup>736</sup>, decided in June 2018.

As seen in Chapter 2, US scholars – such as Kenji Yoshino – have called attention to an increasing ‘pluralism anxiety’<sup>737</sup> in the US Supreme Court, i.e. the judicial fear of a rising number of groups seeking heightened protection from the court. Other authors such as William Eskridge<sup>738</sup> have seen pluralism in constitutional litigation of equality not only as a matter of fact, but also as a normative ideal of how

<sup>735</sup> UNITED STATES, US Supreme Court, *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission*, p. 18.

<sup>736</sup> UNITED STATES, US Supreme Court, *Janus v. American Federation of State, County, and Municipal Employees, Council 31*, 585 U. S. \_\_\_\_ (2018), p. 26 (Justice Kagan dissenting). Available at: [https://www.supremecourt.gov/opinions/17pdf/16-1466\\_2b3j.pdf](https://www.supremecourt.gov/opinions/17pdf/16-1466_2b3j.pdf). Last time accessed on: Sept. 30<sup>th</sup>, 2018. There, the First Amendment claim, in particular associational claims, was belligerent enough, capable of bringing the Court into dismantling the financial support to unions allowing nonmembers to not pay the union fees.

<sup>737</sup> Yoshino, “The New Equal Protection.”

<sup>738</sup> Eskridge Jr, “Pluralism and Distrust: How Courts Can Support Democracy by Lowering the Stakes of Politics.”

the future of constitutional litigation on equality should look like in a plural democracy. A future, argued here, where there will be a proliferation of new claims, even by old litigators, as well as courts bringing in new angles (i.e. prohibition of *hostility*), partially contributing to generation of new claims.

## 1.2. Change 2: Proliferation of harm-based clashes inside and outside courts

### 1.2.1. Clashes inside courts

Constitutional change also occurs when courts at least recognize the underlying tensions derived from remedial measures, because by doing that they recognize that measures aiming at promoting substantial equality can rise to harm on people who do not benefit from them. As seen above, in the US, such tension has been recognized since *Bakke* decided in 1978, being the solution of the US Supreme Court to treat all race-based measures (being that affirmative actions or detrimental measures) equally by applying the same strict test. In contrast, in South Africa, *Barnard* is a clear example of such tension. *Barnard* is part of a line of cases since *Walker* decided in 1998 where the impact of racially conscious measures on White people is questioned before the Court. There, in the concurring opinion by Justice Cameron and others, the Court recognized the existence of “transformative tensions”<sup>739</sup> between those beneficiaries and non-beneficiaries of affirmative action programs:

*“The Constitution commits us to recognising and redressing the realities of the past. And it is committed to establishing a society that is non-racial, non-sexist and socially inclusive.<sup>65</sup> These two commitments can create tension. And there is a tension between the equality entitlement of an individual and the equality of*

<sup>739</sup> *Barnard*, Justices Cameron, Froneman and Majiedt, para. 77.



*society as a whole. A tension also arises when our laws attempt to advance multiple groups of previously disadvantaged persons that do not fully overlap. The resolution of this case should address these tensions and provide a framework that permits these constitutional goals to be read harmoniously”*<sup>740</sup>

With such tensions being recognized in South African jurisprudence, one might expect in the future further challenges to affirmative action programs. It is important to remember, however, that Barnard lost the case, which for some scholars has been praised as “an important victory for substantive racial equality in liberal constitutional democracy.”<sup>741</sup> Even so, the recognition of tensions opened the doors of constitutional litigation to future challenges to affirmative action (of which *Solidarity* is the more recent example).

In the Brazilian debate on affirmative action, such tensions also have been recognized, in particular in relation to the racial component of affirmative action programs. In two cases, Justice Gilmar Mendes raised this tension in his concurring opinions. In the 2012 affirmative action case *ADPF No. 186*,<sup>742</sup> presented by a right-wing congressional political party questioning the racial quota of 20% for Afro-Brazilians in the admission process for the University of Brasilia, Gilmar Mendes doubted the objectivity of racial quotas. According to him, “the adoption of the criterion of analysis of the phenotype for the confirmation of the veracity of the information provided by the university candidate raises serious problems. In fact, most Brazilian universities that adopted the system of 'racial' quotas followed the criterion of self-

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<sup>740</sup> *Barnard*, Justices Cameron, Froneman and Majiedt, para. 77.

<sup>741</sup> Tendayi Achiume, “Transformative Vision in Liberal Rights Jurisprudence on Racial Equality: A Lesson from Justice Moseneke,” 2017, 11.

<sup>742</sup> BRAZIL, Supreme Federal Court (S.T.F.), *ADPF No. 186*, Órgão Julgador: Tribunal Pleno, Relator: Ricardo Lewandovsky, 26.04.2012 (Braz.).

declaration associated with the income criterion.”<sup>743</sup>

In another case, the so-called PROUNI case (acronym for Program University for All),<sup>744</sup> decided in the same year, and presented by the national confederation of education institutions questioning racial quotas, Justice Gilmar Mendes praised the affirmative action program at stake there for being primarily focused on socioeconomic grounds, in addition to the racial component. Again, Justice Gilmar Mendes recognized the tensions stemming from racial quotas between white and black applicants who are otherwise equally poor since they are differentiated on the basis of skin color and not wealth for the purposes of racial quotas:

“Thus, we are led to believe that exclusion in access to public universities is determined by the financial condition. At this point, there seems to be no distinction between ‘whites’ and ‘blacks,’ but between rich and poor. In this discussion, some people point out that the poor in Brazil have all the ‘colors’ of skin. In this way, we cannot help but wonder how racial quotas policies will reduce prejudice. Is it appropriate, here, to treat unequally persons who may find themselves in equal situations, solely on account of their phenotypic characteristics?”<sup>745</sup>

While being a clear minority among Brazilian judges, by recognizing such an underlying tension in affirmative action, Justice Gilmar Mendes illustrates how the doors could be opened for future challenges to those programs if the Court focuses on eventual harms those programs might generate to white applicants or to racial minorities eventually not

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<sup>743</sup> BRAZIL, Supreme Federal Court (S.T.F.), ADPF No. 186, p. 189.

<sup>744</sup> BRAZIL, Supreme Federal Court (S.T.F.), ADI 3330, Órgão Julgador: Tribunal Pleno, Relator: Ayres Britto, 03.05.2012 (Braz.)

<sup>745</sup> BRAZIL, Supreme Federal Court (S.T.F.), ADI 3330, p. 115.

benefited from them due to, in Gilmar Mendes' terms, lack of objectivity of racial quotas.

In the Brazilian debate regarding the constitutionality of race-based affirmative action programs, one of the recurrent issues was the matter of fraud in the self-identification of one's racial identity. Responding to cases of fraud in selection processes for universities reported in the national media, in particular to a 2007 case in which twin brothers were considered of different race by the University of Brasilia,<sup>746</sup> in 2014, the federal government in Brazil adopted a law that established a 20% racial quota for black people in federal public employment.<sup>747</sup> The main parameter for a candidate to be considered black in his/her self-identification in the application, according to the 2014 law. In response to this law, the Ministry of Planning in 2016 issued an administrative rule that, while reaffirming the prevalence of racial self-identification, established that in cases of fraud: "The forms and criteria for verifying the veracity of self-declaration should only consider the phenotypic aspects of the candidate, which will be verified with the presence of the candidate".<sup>748</sup>

In 2017, the Supreme Court stressed that, in addition to the racial self-identification, the public institutions' practice of establishing commissions to verify such self-identification – e.g. through personal interview with candidates, and/or analysis of phenotype through photographs – is constitutional as long as this practice respects the candidates' human rights and guarantees their right to due process.<sup>749</sup> This

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<sup>746</sup> O Estado de São Paulo, "Para UNB, Um Era Branco e Outro, Negro: Idênticos e Filhos de Casal Inter-Racial, Eles Foram Separados Pelo Sistema de Cotas Em 2007 [For UNB, One Was White and the Other Black: Identical and Interracial Couple Children, They Were Separated by the Quota S,]" *O Estado de São Paulo*, October 28, 2012.

<sup>747</sup> BRAZIL, Law Number 12.990/2014, available at: [http://www.planalto.gov.br/ccivil\\_03/\\_ato2011-2014/2014/lei/112990.htm](http://www.planalto.gov.br/ccivil_03/_ato2011-2014/2014/lei/112990.htm).

<sup>748</sup> BRAZIL, Ministry of Planning, Instructive Norm 3/2016, <https://www.siop.planejamento.gov.br/sioplegis/sof/detalhe;jsessionid=AGudbWQIT4mnF9ew2m+BfSwu.undefin ed?id=2204334>.

<sup>749</sup> BRAZIL, Supreme Federal Court (S.T.F.), ADC 41, Órgão Julgador: Tribunal Pleno, Relator: Roberto Barroso, 08.06.2017 (Braz.), hereafter quota in public procurement.

case was presented by the Federal Bar Association, which in order to resolve different interpretations across the country regarding the constitutionality of affirmative action in public employment, asked the Supreme Court to affirm the constitutionality of such programs. In response to this case, in April 2018, the Ministry of Planning issued an administrative rule setting the following directives for such verification commissions in public employment selections:<sup>750</sup>

“I - respect for the dignity of the human person;

II - observance of the adversary, ample defense and due process of law;

III - guarantee of standardization and equal treatment between candidates submitted to the heteroidentification procedure promoted in the same public competition;

IV - guarantee of publicity and social control of the procedure of heteroidentification, safeguarding the hypotheses of secrecy foreseen in this Rule;

V - compliance with the duty of self-regulation of legality by the public administration; and

VI - assurance of the effectiveness of the affirmative action of reserve of vacancies to black candidates in the public competitions of entrance in the federal public service.”

(Article 1, paragraph 1).

Given this rule, several universities and public bodies across the country established

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<sup>750</sup> BRAZIL, Ministry of Planning, Instructive Norm 4/2018, [http://www.lex.com.br/legis\\_27634767\\_PORTARIA\\_NORMATIVA\\_N\\_4\\_DE\\_6\\_DE\\_ABRIL\\_DE\\_2018.aspx](http://www.lex.com.br/legis_27634767_PORTARIA_NORMATIVA_N_4_DE_6_DE_ABRIL_DE_2018.aspx).

commissions as part of their selection processes tasked with verifying the authenticity of the racial self-identification of the candidates for a place in the university or position in public employment, in order to avoid fraud in such application processes.<sup>751</sup> Privileging racial self-identification is particularly important given the context of racial miscegenation in Brazilian society. Black identity has been constantly challenged by countermovements claiming that race-based remedies are not legitimate in a racially diverse country such as Brazil.<sup>752</sup>

While these cases are a win for social movements pro-affirmative action, they also highlight the underlying tensions between white and black applicants in selection processes in universities and public employment. Those cases also leave the doors open for future cases where the STF might be willing to recognize the harm of fraud in affirmative action programs, because the Justices recognized that commissions established to avoid fraud should respect human rights and due process rights of the applicants. This might mean in practice that commissions of verification of self-identification should be careful in not harming white applicants who might think of themselves as of mixed race and thus eligible for racial quotas. It is also another way for the STF to recognize the underlying tensions of implementing racially conscious programs in racially diverse country such as Brazil.

In the US, the way Justice Kennedy wrote *Fisher I* and *Fisher II* in sharp contrast with the way Justice Powell wrote *Bakke*. In the *Fisher* cases, Justice Kennedy writes in a much more subtle way about race than Justice Powell does. There are at least

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<sup>751</sup> I have written elsewhere about it here: Thiago Amparo, “Analysis: Legal Uncertainties and Brazilian Racism,” *Jornal Estado de São Paulo*, January 12, 2018. See more here: <https://educacao.estadao.com.br/noticias/geral,incertezas-juridicas-e-racismo-a-brasileira,70002147804>. Last accessed on: September 14, 2018.

<sup>752</sup> Antonio Sérgio Alfredo Guimarães, “Depois Da Democracia Racial [After Racial Democracy],” *Tempo Social* 18, no. 2 (2006): 269–87; Alexandre Emboaba Da Costa, “Confounding Anti-Racism: Mixture, Racial Democracy, and Post-Racial Politics in Brazil,” *Critical Sociology* 42, no. 4–5 (2016): 495–513.

two instances of evidence of that. First, *Fisher I* puts race consciousness at the end of line of available options for achieving diversity by setting the judicial standard that: “reviewing court must ultimately be satisfied that no workable race-neutral alternatives would produce the educational benefits of diversity.”<sup>753</sup> This downplays the role of race as a factor in achieving diversity, not only as one among other components (Bakke’s standard). It becomes an option of last resort. Second, *Fisher II* celebrates, rather than regrets, that race actually played a small part in achieving diversity in the University of Texas:

“In any event, it is not a failure of narrow tailoring for the impact of racial consideration to be minor. The fact that race consciousness played a role in only a small portion of admissions decisions should be a hallmark of narrow tailoring, not evidence of unconstitutionality.”<sup>754</sup>

While downplaying the importance of talking about race, this way of talking about race can further harm members of racial minorities, rather than promoting their rights. In her dissent in *Fisher I*, Justice Ginsburg made this concern clear: “I have said before and reiterate here that only an ostrich could regard the supposedly neutral alternatives as race unconscious.”<sup>755</sup>

There are also clashes of claims of harms in education cases, such as in *Parents Involved*. In fact, stigmatization and thus harm talk in education cases comes all the way from *Brown*.<sup>756</sup> As discussed earlier, the case concerned with the use of race as

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<sup>753</sup> THE UNITED STATES, US Supreme Court, *Fisher v. University of Texas* [*Fisher I*], 570 US \_ (2013), p. 11.

<sup>754</sup> THE UNITED STATES, US Supreme Court, *Fisher v. University of Texas at Austin*, 579 US \_ (2016) [*Fisher II*], p. 15.

<sup>755</sup> THE UNITED STATES, US Supreme Court, *Fisher v. University of Texas* [*Fisher I*], 570 US \_ (2013), p. 2 (Justice Ginsburg dissenting).

<sup>756</sup> THE UNITED STATES, US Supreme Court *Brown v. Board of Education of Topeka (I)*, 347 U.S. 483 (1954).

one of the main tiebreakers in assigning students to schools in order to maintain racial diversity in the sense of racial balancing. There, the plurality Court found a harm being imposed on school children because they were assigned to the schools entirely or partly because of their race. This was done, the plurality found, not for remedying past discrimination, nor for promoting diversity in a broad sense of plurality of opinions and backgrounds. However, it is only in the Part III-B of the Justice Roberts' concurring opinion, not supported by the plurality court, that he discusses at length racial balancing as not being a compelling interest because more racial diversity does not entail, for the Justice Roberts, diversity in a broader sense.

By providing a plurality decision where its main rationale is actually located in a separate part not supported by the plurality of the Court, as well as by debating over the legacy of one of the most solid foundations of equal protection jurisprudence in the US, *Brown*; *Parents Involved* provides little clarity over the constitutional standards applicable to claims presented by white students of harms derived from school reassignment.

Furthermore, when faced with the clashes of harm-based claims, the way the US Supreme Court reads such claims of harm by white students as racially unequal, as noted by Maureen Carroll:<sup>757</sup>

The *Parents Involved* Court's recognition of the educational disadvantage caused by assignment to a particular public school must now extend to disciplinary transfer claims, a context in which courts have shown a great deal of reluctance to acknowledge that same injury.

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<sup>757</sup> Maureen Carroll, "Racialized Assumptions and Constitutional Harm: Claims of Injury Based on Public School Assignment," *Temp. L. Rev.* 83 (2010): 903–40.

Because white students bring most challenges to school desegregation plans, while exclusionary school discipline disproportionately affects students of color, it is likely that implicit racial bias has affected judicial approaches to the harm involved in the two types of claims. Failing to apply the same view of the injury caused by assignment to a particular public school in each context implicates the courts in perpetuating racial subordination. Because the *Parents Involved* decision characterized school assignment as a competitive system that can result in educational disadvantage, courts should now apply that same competition-based model of educational resource distribution in all education claims.<sup>758</sup>

In other terms, Carroll recalls that, when *Parents Involved* is compared to cases where students of color sought to contest disciplinary school transfers, racial bias is verifiable. In the later cases, courts, including lower ones, are not as sympathetic to claims of harm in terms of educational deficits from such transfers as they are to claims of harm by white students due to race-conscious school reallocations.

From the proliferation of claims of harms before courts, as a result there are clashes between different concepts on what it means to be harmed in a constitutionally relevant way. Courts then have to mediate between warring claims of harms presented by opposing movements. Legal scholars then have to pay attention to which harms courts favor over others and what kinds of inequalities such judicial preferences address.

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<sup>758</sup> Carroll, 940.



### 1.2.2. Clashes outside courts

One way courts have dealt with redefinition of harm through countermovements' litigation is by pushing certain claims outside the judicial sphere. First, apex courts can do this by **not providing a clear remedy for the harm alleged**. That leaves few options to opposing groups besides taking the issue to political branches. By unclear remedy, I refer to grand statements of rights (e.g. declaring full equality for same-sex couples), but without a clear order to the political branches on which institution and/or how to remedy the constitutional violations found by the court.

This was not the case, for instance, of the Brazil's same-sex marriage saga. As discussed in Chapter 5, due to the fact that the remedy offered by the STF in the same-sex union case did not impose any real constrain on the political branches to move towards marriage equality, LGBT movements had to find other avenues to give effect to legal change. As described in Chapter 4, this strategy led ultimately to the National Council of Justice's resolution. Thus, the lack of a dialogical remedy that would start a conversation between political branches in Brazil – traditionally averse to LGBT rights in Brazil – and the apex court pushed the debate outside judicial sphere ending up at the CNJ. By avoiding providing an effective remedy to overcome political powerlessness of LGBT people, STF showed that, despite the rhetoric of transformative constitutionalism, it did not understand in its entirety the institutional harm suffered by LGBT people from the omission of political branches. To be clear, this might have been a strategic move by the STF in terms of its institutional legitimacy: granting a bold statement of unconstitutionality for LGBT people (thus preserving the transformative

promise of the Constitution) without creating further tensions with the political elites in parliament (by allowing them implicitly to not enact any legislative change).

Dialogical remedies are not always better than a clear judicial order on what the right or the law at stake is. Dialogical remedies work better in contexts such as the Brazilian one where the very harm suffered by LGBT people stems from political rather than judicial silence on their rights. A dialogical remedy also does not mean necessarily that much discretion is left for the legislature. *Fourie* is a case in point. There, the Constitutional Court of South Africa gave one year for the Parliament to correct the unconstitutionality of the Marriage Act.<sup>759</sup> Had it failed to do so, the judicial order would enter into force directly. Clearly, *Fourie* did not leave much room for Parliament to decide what kind of legislation it would need to pass. Yet, unequivocally, *Fourie* gave this time period of one year for Parliament in order to allow a way to remedy the institutional harm stemming from lack of political action in favor of LGBT rights. This would be particularly relevant in the context of Brazil, where there is no statute at the federal level on LGBT rights.<sup>760</sup> Legislative silence imposes in itself an institutional harm which courts could address by moving the legislature forward, rather than simply replacing the legislative will with a detailed judicial order.

There are other institutional reasons for this outcome in the case of Brazil. As mentioned previously, STF Justices decide cases by individual opinions which do not as a general rule talk to each other.<sup>761</sup> This leads to cases being decided under a plethora of different methods of interpretation, as the same-sex marriage case was decided.<sup>762</sup>

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<sup>759</sup> SOUTH AFRICA, Constitutional Court, *Minister of Home Affairs and Another v Fourie and Another* (CCT 60/04) [2005] ZACC 19; 2006 (3) BCLR 355 (CC); 2006 (1) SA 524 (CC) (1 December 2005), p. 101.

<sup>760</sup> Santos, “Movimento LGBT e Partidos Políticos No Brasil [LGBT Movement and Political Parties in Brazil].”

<sup>761</sup> da Silva, “Deciding without Deliberating.”

<sup>762</sup> Dimitri Dimoulis and Soraya Regina Gasparetto, “Sacredness of the Constitutional Text and Interpretative Heresy: The Brazilian Supreme Court Decision on Same-Sex Civil Unions,” *Direito GV Research Paper Series*, no. 91 (2014).

This institutional aspect of the STF makes it a weak interlocutor with the other branches and social movements at large: One cannot say technically that there is such a thing as a majority reading of the constitutional equality of same-sex couples among the STF Justices, neither one can say that an overall standard in equality cases is inferred from a decision that (as Dimoulis and Gasparetto clarify) mixes textualist, originalist, structuralist, teleological, sociological arguments in individual judicial opinions of equal value from legal authority standpoint. If liberty does not find refuge in a jurisprudence of doubt, as argued by Justice O'Connor from the US Supreme Court in the opening lines of *Casey*,<sup>763</sup> equality – whose constitutional meaning several actors seek to influence, from legislature to social movements and conservative lawyers – calls for a clearer and more unified framework, if the Court wants to remedy harm suffered by LGBT people in Brazil. Furthermore, by not presenting remedies in order to establish a dialogue with political branches, the STF indirectly allows countermovements to continue preventing LGBT rights from advancing in the legislative branch, through a containment strategy which further harms LGBT people.

In certain cases, courts granting remedies in a gradual manner leaves room for more solid constitutional changes because by promoting changes gradually often public opinion changes gradually. This gradual strategy by courts has a specific context: social movements pushing for such gradual changes with carefully crafted litigation strategies and a court institutionally open for their claims of harm. As clarified by Marco Morini:

“In the four landmark decisions advancing gay rights in the last two decades: *Romer v. Evans*, *Lawrence v. Texas*, *United States v. Windsor*, and *Obergefell v. Hodges*, the

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<sup>763</sup> US Supreme Court, *Planned Parenthood v. Casey*, 505 U.S. 833 (1992).

Court has always been divided and in the last two sentences it was always Justice Anthony Kennedy who cast the crucial fifth vote, invalidating portions of the Defense of Marriage Act in *Windsor*, and in *Obergefell* striking down state rules barring same sex marriage. The Court is inevitably influenced by the world around it. As social mores have evolved, so have the justices' beliefs, on issues ranging from abortion to segregation: (...) **What changed, in other words, was not the Constitution, it was the country. And what changed the country was a social movement.** *Obergefell v. Hodges* was the product of the decades of activism that made the idea of gay marriage seem plausible and right (Ball). In just about a decade, public opinion on same-sex marriage has radically turned, now accepting something that was previously harshly ostracized. (emphasis added).<sup>764</sup>

With countermovements winning in this gradual (though strategic) approach, is this problematic more generally? Yet, in contexts such as in Brazil where social movements and countermovements alike face challenges regarding direct access to the apex court, a similar gradual litigation strategy continues to be hard to implement consistently.

Another way apex courts can push claims outside the judicial sphere is by **leaving constitutionally permissible options open for the political branches**, rather

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<sup>764</sup> Marco Morini, "Same-Sex Marriage and Other Moral Taboos: Cultural Acceptances, Change in American Public Opinion and the Evidence from the Opinion Polls," *European Journal of American Studies* 11, no. 11–3 (2017): para. 10.

than deciding on a given matter through judicial means. By considering *different constitutional options equally valuable* (e.g. states recognizing or prohibiting race-based affirmative action programs), courts contribute to keep the contestation outside courts alive. Judicial ambiguity as regards to constitutional foundations of affirmative action generates in response to countermovements' mobilization outside courts (e.g. banning affirmative action by popular initiatives at the state level).

Affirmative action programs in the United States have to face two problems. First, affirmative action is not required by the US Constitution. Thus, countermovements could easily – as they did in Michigan with Proposition 2 as described in Chapter 4 – mobilize themselves to ban affirmative action, since the court would not stop them from doing so. Second, dubious judicial standards on what makes affirmative action constitutional (being it, racial neutrality, diversity promotion, remedying past discrimination) provide a foundation as firm as quicksand, thus allowing white applicants to claim white innocence to challenge affirmative action measures.

On the first problem, consider *Schuette*. As shown in Chapter 4, *Schuette* found constitutionally permissible the Michigan's Proposition 2 or Michigan Civil Rights Initiative, a popular initiative adopted by a majority of 58%,<sup>765</sup> which effectively banned affirmative action programs in the realm of public employment, education or contracting, including on the basis of race. One of the central issues in *Schuette* was the fact that, by constitutionalizing the ban on affirmative action, Michigan made it more difficult to enact political change (e.g. to adopt more affirmative action programs), because before the Amendment, administrators such as university boards could decide

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<sup>765</sup> Hutchinson, "Affirmative Action: Between the Oikos and Cosmos Review Essay: Richard Sander & Stuart Taylor, Jr., Mismatch: How Affirmative Action Hurts Students It's Intended to Help and Why Universities Won't Admit It," 140.

to adopt affirmative actions, and now only another Amendment would allow them to do it again. Justice Breyer, who wrote a concurring opinion in *Schuette*, disagrees with this view, because he believes that the Amendment move the process of political change from unelected bodies such as university boards to an elected one.<sup>766</sup>

In Chapter 4 it was mentioned that the most outstanding aspect of *Schuette*, which academics criticized,<sup>767</sup> is how easily the Court accepted such policy choice of the Michigan's voters rejecting affirmative action as a valid policy choice among others. Thus, US Supreme Court does not see affirmative action as a right, but rather a political option available under the Constitution, though not mandated by it (different from freedom to marry for that matter). Because of this judicial framework that does not see affirmative action as a necessary remedy for historical injustice, the Court becomes more permissive on states banning affirmative action programs altogether.

When *Schuette* confirmed the porous standard of *Grutter/Gratz*, which left considerable room for counter-arguments by individuals harmed by affirmative action programs, the US Supreme Court made it clear that it does not find constitutionally relevant the *institutional harm* imposed on members of Afro-American social movements by the general prohibition of affirmative action on the state level. Yet, the Court found constitutionally relevant the individual harm imposed on white applicants represented by countermovements by the lack of individualized assessment in selection

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<sup>766</sup> "(...) one cannot as easily characterize the movement of the decision-making mechanism at issue here—from an administrative process to an electoral process—as diminishing the minority's ability to participate meaningfully in the political process. There is no prior electoral process in which the minority participated." (J. Breyer, *Schuette*, p. 5).

<sup>767</sup> See e.g. "This leaves Justice Kennedy's opinion vulnerable to the following criticism: it makes little sense to hold that (1) a referendum invalidating a ban on private housing discrimination as in *Mulkey* and *Hunter* inflicts a constitutionally cognizable injury on minorities even though private action is not covered by the Equal Protection Clause, but (2) when a referendum invalidates a policy that allowed state universities to adopt admissions policies that mitigate the vast 'underrepresentation' of black and Hispanic students in public colleges, no constitutionally cognizable injury can be recognized. Justice" (David E Bernstein, "Reverse *Carolene Products*, the End of the Second Reconstruction, and Other Thoughts on *Schuette v. Coalition to Defend Affirmative Action*," *Cato Sup. Ct. Rev.*, 2013, p. 269).

process for universities. This constitutional standard allowed countermovements to both continue their legal mobilization for passing laws prohibiting affirmative action as well as bringing constitutional cases against affirmative action of which *Fisher* is an example.

Nevertheless, in the terms of the social movements' literature, what the Michigan constitutional amendment does is to close the legal structure opportunity for social movements – in particular civil rights movement – while conceding a tactical victory to countermovement opposing affirmative action.

While the plurality in *Schuette* tries to downplay the underlying debate on access to power, the defensive terms in which the reasoning is formulated is revealing of a particular, deferential conception of the role of courts vis-à-vis contestation outside courts, tending to respect the result of the ballot. *Schuette* thus constitutes an example of the US Supreme Court pushing an issue to the political sphere for not considering it a matter of constitutionally problematic harm deserving judicial remedy.

Another way courts leave constitutionally permissible options open for the political branches is simply *by delaying the decision of a case*. One way of doing so is to deny certiorari in the US, delaying the decision on a case.<sup>768</sup> Also, a systematic delay of decision-making is key to understand Brazil's STF relationship with political branches and the public opinion at large. One way the STF might delay a decision in a given case is by allowing Justices to ask the plenary of the Court to stop the judgment of a given case in order to reexamine the case files. The so-called *pedido de vista* – when a Justice requests more time to reexamine a case – means according to the rules of the Court that a case should be put back for continuation of the judgment proceedings

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<sup>768</sup> Hersel W Perry, *Deciding to Decide: Agenda Setting in the United States Supreme Court* (Harvard University Press, 1991).

at the second subsequent ordinary session of the Court (which varies according to the Court's agenda, but it is generally a matter of weeks).<sup>769</sup> Yet, it is often the case that *pedidos de vista* might last for over three years, especially in sharply divided cases.<sup>770</sup> In an empirical study analyzing all *pedidos de vista* from 1988-2013 at Brazil's Supreme Court, Diego Werneck and Ivar Hartmann found that the:

“vistas mechanism functions as an individual veto power by which justices can simply remove “wrong” cases from the agenda or prevent the “right” cases from being judged at the “wrong” time. Be it for concerns with the Court's legitimacy in a delicate political context (i.e., for institutional concerns) or because they know that a current composition of the Court would not agree with their preferred position (i.e., for personal concerns), or maybe even a combination of both kinds of concerns, STF justices can use vistas to indefinitely suspend deliberation on unwanted cases, without ever having to announce or admit they are doing so.”<sup>771</sup>

One of the cases this has happened in is the still pending case on the right of trans people to use public toilet facilities according their own gender identity.<sup>772</sup> Although

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<sup>769</sup> **Article 134.** *If any of the Ministers request a hearing, they shall present them for the continuation of the vote until the second regular session.* Available at: <http://www.stf.jus.br/arquivo/cms/legislacaoRegimentoInterno/anexo/RISTF.pdf>. Last accessed on 18 June, 2018.

<sup>770</sup> Fabiana Luci de Oliveira, “When the Court Is Divided: Minimum-Winning Coalitions in Brazil's Supreme Court,” *Revista Direito e Práxis* 8 (2017): 1863–1908, [http://www.scielo.br/scielo.php?script=sci\\_arttext&pid=S2179-89662017000301863&nrm=iso](http://www.scielo.br/scielo.php?script=sci_arttext&pid=S2179-89662017000301863&nrm=iso).

<sup>771</sup> Diego Werneck Arguelles and Ivar A Hartmann, “Timing Control without Docket Control: How Individual Justices Shape the Brazilian Supreme Court's Agenda,” *Journal of Law and Courts* 5, no. 1 (2017): para. 108.

<sup>772</sup> BRAZIL, Supreme Federal Tribunal (STF), Extraordinary Appeal (REX) 845.779 (pending), hereafter called *public toilet case*.



this case was admitted by the Court in 2014, it has never been decided, falling into the *labyrinth* of the STF's tactics of delaying the decision of a controversial case:

*“The first case [on trans people’s rights], RE 845.779, by the rapporteur of the Justice Barroso, originated in a case of prohibition of use of bathroom by a trans woman. Amid arguments about how she looked like to have evoked diverse gender stereotypes, the trial was paused for almost two years by a request from Justice Fux. It never went back to trial. For unknown reasons, even with two votes in favor of the appellant, this case seems to have been abandoned in practice by the Supreme Court.”*<sup>773</sup>

By delaying the decision of a given case violating its own rules of procedure, Brazil's STF allows implicitly certain issues to continue to be discussed at the political arena.

Regarding South Africa, it is key to recall what is mentioned in Chapter 3: South African Constitutional Court jurisprudence both in terms of the same-sex marriage saga and the affirmative action has inhibited contestation outside courts, because the Court has kept for itself the task of managing different types of claims of constitutionally relevant harms. When the South African Constitutional Court opted to use a dialogical remedy in *Fourie*, giving 1 year for Parliament to enact change towards recognizing same-sex marriage, the Court did not properly push the issue of same-sex marriage outside court, but in fact kept the Court's prerogative over the process of constitutional change setting that the Parliament's decision should recognize the equal status of same-

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<sup>773</sup> Juliana Cesario Alvim Gomes and Ligia Fabris Campos, “Rights of Trans People and the Labyrinth of the Supreme Court: Three Cases, Two Years of Waiting and No Sentence,” *JOTA* (São Paulo, September 2017), <https://www.jota.info/stf/supra/direitos-de-pessoas-trans-e-o-labirinto-do-supremo-19092017>.

sex marriages. Also, contestation in South Africa often occurs before the lower courts, because the Constitutional Court of South Africa rarely<sup>774</sup> grants direct access to litigators, thus leading them to litigate before lower courts in order to eventually reach the Constitutional Court by appeal if a constitutionally order is issued before the lower courts.

Additionally, as far as affirmative action is concerned, *Barnard* and *Solidarity* cases show what in Chapter 3 was called a partial opening of the Constitutional Court of South Africa to countermovements' claims, thus giving the legal incentive to countermovements' organizations such as the Solidarity union to continue litigating matters of affirmative action testing the limits of the Courts' view on remedial measures. Thus, because the Constitutional Court of South Africa has kept for itself such task of navigating opposing claims of harm in LGBT rights as well as in race conscious affirmative action programs, those issues are not yet being pushed outside courts to the political sphere in South Africa.

Courts can influence contestation outside courts. As shown above, courts can decide not to provide a clear remedy for the harm alleged, thus letting contestation outside courts to go on; courts can consider different options constitutionally permissible thus fueling contestation before the political branches, and finally courts can delay the decision of a case. While courts take up those strategies, as shown above, in cases where there is contestation between opposing movements, movements and countermovements will likely continue the proliferation of harm-based claims fostering clashes outside courts. The difference, however, from an ordinary political battle

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<sup>774</sup> Gargarella, Domingo, and Roux, *Court. Soc. Transform. New Democr. An Institutional Voice Poor?*, 111–12.

between opposing movements is that often – without the interference of the court – such battles will take place in terms of a constitutional language of harm.

### 1.3. Change 3: Fostering radically different notions of competing frames of harm

Framing is a key element of this dissertation's conceptual framework for countermovements' mobilization. As mentioned in Chapter 2, **reframing of constitutional harm serves the purpose of *focusing, articulating and transforming meanings of equality***. Framing is the package in which countermovements and social movements present their grievances of harm. Depending on whether countermovements are able to redefine what it means to be harmed in a constitutionally relevant way, countermovements will be able to interfere with the direction of equality jurisprudence, making courts listen to their arguments as *equality* arguments.

This dissertation has shown different ways in which harm has been argued. One way countermovements have employed this argument is through individualization of harm in equality jurisprudence, thus downplaying the role of more radical notions of historical harm.

As shown in Chapter 3, apex courts in South Africa and in the United States have incorporated aspects of individualization of harm into their equality jurisprudence. In South Africa, dignity-based equality jurisprudence leaves room for those opposing remedial measures to argue dignity-related harms before the Court. *Walker* is an example of this kind of harm talk. In the United States, equality jurisprudence – both in the realm of race and sexual orientation – has shown the decline of the notion of

political powerlessness as a foundation for equality jurisprudence. Neither in race jurisprudence (with an increasingly tougher standard for race-conscious remedial measures), nor in sexual orientation jurisprudence (with the use of dignity and liberty rather than equality), has the US Supreme Court addressed harm in terms of historical discrimination in recent years. In Brazil, the redefinition of political powerlessness has not come into effect yet at the level of Brazil's apex court only because countermovements have used their political capital at the legislature to advance a proactive agenda seeking to revert victories of the Black and LGBT movements. Nevertheless, as shown in Chapter 4, contestation outside courts in Brazil by countermovements is more about containing judicial constitutional changes rather than successfully counterstriking. This means that, in Brazil, while the apex court has maintained a radical discourse of political powerlessness, the resistance by countermovements in the legislature has shut down legislative channel for movements to argue more radical notions of harm from historical discrimination.

What is the cost of downplaying notions of historical discrimination and political powerlessness in equality jurisprudence? Individualization of harms lead to larger protection to historically advantaged group members, because in the competition of harms courts run the risk of leaving more radically progressive notions of harm at the margins of the reach of mainstream constitutional equality law. Critical Race Theory (CRT) is one way of casting light on what might be lost in the translation from historical discrimination and powerlessness to individualized harms.

Take, for instance, the CRT critique of the liberal discourse on race, which goes to the core of the debate on harm. Among CRT critics, Charles R. Lawrence III provides

one of the most comprehensive analyses of the link between harm and diversity.<sup>775</sup> He argues that such approach is not enough to transform racially unjust societies such as the US. Furthermore, he suggests that racial affirmative action programs should not only be based on diversity arguments, but also on the commitment to end what he qualifies as “American apartheid”.<sup>776</sup>

The CRT critique argues that race (not diversity or resources) is what fundamentally matters as far as power and law are concerned. Furthermore, this critique shows that racism is not only an exceptional phenomenon but an institutionalized ordinary practice. Current US jurisprudence on race – as evidenced in this dissertation by sidelining historical arguments and individualizing harm – has shut down these critical discourses of law, especially because they depend on a historical account of law to make sense.

Critical race theorists often complain about the current stage of race jurisprudence in the United States and in Brazil, because it has shut down substantial debates on racial justice for historically discriminated and structural racism. In this line, Adilson Moreira connects US history on *colorblindness* with Brazilian judicial discourse of what he calls *racial transcendence*, i.e. the attempt of erasing the significance of race as a difference marker in present Brazilian society.<sup>777</sup> More clearly, Alexandre Da Costa defines racial transcendence, as a concept opposed to racial consciousness, as “belief that racial divisions of past generations have been curtailed

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<sup>775</sup> Lawrence Lawrence III, “Two Views of the River: A Critique of the Liberal Defense of Affirmative Action.” According to Lawrence in this article: “*The liberal defense of affirmative action is often called the “diversity defense.” Both the appellation and the argument have their origins in Justice Powell’s opinion for the Court in Regents of the University of California v. Bakke. n11 When Justice Powell found that the University of California medical school affirmative action program violated the Equal Protection Clause of the Fourteenth Amendment and Title VI of the 1964 Civil Rights Act, he suggested that universities might successfully defend race-sensitive admissions policies if they were necessary to achieve racially diverse student bodies.*” (p. 931)

<sup>776</sup> Lawrence III, 964.

<sup>777</sup> Moreira, “Discourses of Citizenship in American and Brazilian Affirmative Action Cases”; Moreira, “Racial Justice in Brazil: Building an Egalitarian Future.”

or overcome and, as such, race-thinking and race-based policies are no longer necessary.”<sup>778</sup> According to this view, race-based affirmative action would only further prejudice in society, and should be replaced with racially neutral measures such as class-based affirmative actions for poor people or for students that attended public schools. Comparatively, more recently, the US Supreme Court has sidelined arguments for substantial racial equality, e.g. favoring race-neutral justifications – such as diversity rather than historical discrimination – for affirmative actions.<sup>779</sup>

In Brazil, the 2012 STF decision recognizing the constitutionality of affirmative action in universities rejected notions of racial transcendence. Yet, before this decision, several lower courts endorsed racial transcendence striking down the racial component of affirmative action programs, thus closing the door for a substantial debate on racial justice in courts. In Moreira’s words:

“Before the 2012 Supreme Court decision that affirmed the constitutionality of race-based initiatives, Brazilian courts frequently contended that affirmative action programs violate the idea of proportionality, a scrutiny test they frequently utilize to consider the legality of racial classifications. These courts classified affirmative action programs as inappropriate means to promote inclusion of racial minorities because extensive racial mixing prevents the identification of the beneficiaries of these policies. According to them, the Brazilian tradition of racial amalgamation produced a population with a great variety of skin color; most individuals do not think about themselves in racial

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<sup>778</sup> Da Costa, “Confounding Anti-Racism: Mixture, Racial Democracy, and Post-Racial Politics in Brazil,” 499.

<sup>779</sup> Hutchinson, “Undignified: The Supreme Court, Racial Justice, and Dignity Claims.”

terms, but actually through a combination of cultural meanings and physical traits. Moreover, racial mixing expresses social integration and absence of patterns of racial discrimination, which these courts interpret as evidence of assimilation of racial minorities. More than evidence of racial harmony, the argument of miscegenation in the Brazilian discourse of race transcendence derives from the common belief that race makes little or no difference to life outcomes.”<sup>780</sup>

Moreira advocates, in a 2017 book on the concept of discrimination, for a concept of discrimination that does not rely on individual intention but rather focuses on structural elements such as hierarchical positions of power and antistatutory discourse.<sup>781</sup> Those elements constitute one of the foundations of Brazil’s substantial equality jurisprudence.

A radically different concept of harm emerged when courts allowed **institutional harms** to be argued by countermovements. Institutional harms mean the injury derived from the improper application of laws, rather than a personalized injury, which is often the standard for standing. For instance, when the US Supreme Court allowed popular referenda on same-sex marriage to continue – until *Obergefell* – by not deciding *Perry* on its merits, or when it allows popular initiatives to continue banning affirmative action at the state level (in *Schuetz*), the US Supreme Court is favoring the institutional harm of an eventual prohibition of such popular initiatives rather than the

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<sup>780</sup> Adilson José Moreira, “Discourses of Citizenship in American and Brazilian Affirmative Action Court Decisions,” *The American Journal of Comparative Law* 64, no. 2 (2016): 455–504.

<sup>781</sup> Moreira, *O Que é Discriminação?* [What Is Discrimination?], 187.

concrete injuries against those discriminated individuals discriminated by those initiatives.

#### 1.4. New Judicial Roles in Light of Constitutional Changes

“It is of course one thing to say that the Constitution with its values and rights reaches everywhere, but quite another to expect the courts to make rulings and orders regarding people’s private lives and personal preferences. Courts are not necessarily the best instruments to balance competing rights and values in intimate spheres where emotions and convictions determine choices and association.”<sup>782</sup> These are the words of Justice Van der Westhuizen from the Constitutional Court of South Africa in a concurring opinion in the *De Lange* case. As mentioned above, in this case, the Court declined to hear a claim of unfair discrimination by a church minister who was fired after revealing her intentions to marry her same-sex partner. While delivered in the context of a claim of unfair discrimination in a private setting (Methodist Church), the quote above addresses a broader issue: how courts can police different claims of harm by opposing groups? If the claim of harm from state interference in church affairs is comparable to a harm from discrimination based on one’s sexual orientation, as *De Lange* suggests, courts need to find ways to mediate those claims.

In this sense, what are the roles of courts in general and courts conducting constitutional review in particular in light of a changing constitutional scenario of proliferation of claims of harm and of claimants who often clash with each other inside and outside courts? In defining their judicial roles, this dissertation argues apex courts should be aware of ongoing constitutional changes fostered by legal mobilization of

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<sup>782</sup> SOUTH AFRICA, Constitutional Court, *De Lange v Presiding Bishop of the Methodist Church of Southern Africa for the time being and Another* (CCT223/14) [2015] ZACC 35; 2016 (1) BCLR 1 (CC); 2016 (2) SA 1 (CC) (24 November 2015), para. 79.



countermovements in two senses **situational awareness** and **awareness of competing claims**. The following judicial roles can be read as insights, based on the research for this dissertation, for future research projects.

### 1.5. Judicial Roles vis-à-vis situational awareness

Legal mobilization by opposing social movements is shaped by specific local actors leading those movements and the local constitutional framework at their disposal. In this sense, generalizations about countermovements' legal mobilization and constitutional changes in different countries are to be made with cautious. Yet, as far as the country-specific studies presented in this dissertation are concerned, it is fair to argue that, **despite the local idiosyncrasies of each legal system, courts conducting constitutional review have to be increasingly aware that they are being seized by competing strategic actors.**

This dissertation has shown, in particular in Chapter 4 on contestation outside courts, when one looks at countermovements' litigation from the angle of legal mobilization, it becomes clear that politics and courts are part of the same legal structure. In one sense, there is no way out for courts. Claims made by countermovements outside courts – often made in constitutional terms – will come back to courts, if legal opportunity structure so allows. Being situationally aware means that courts will be mindful of the claims waiting outside the courtrooms – possibly in public debates, referenda, legislatures – which courts had pushed those claims out.

In the opposite direction, in cases where apex courts are resistant to countermovements' claims (as regarding to abortion in the US or LGBT rights in

Brazil), Noah Feldman<sup>783</sup> argues that social movements run the risk of downplaying the importance of political strategies such as lobbying the legislatures and gaining public opinion. By relying too heavily in the judiciary to advance their claims, movements might in the long term lose the legal victories they had obtained when, for instance, a court changes its composition. This tells much also about the role of courts: courts often do not lose sight of the claims that the courts themselves keep outside the realm of litigation. When the winds of constitutional change move in their direction – e.g. from a progressive to a conservative court – courts can pick up those claims and decide them. In a contentious environment where opposing movements wait at the courts’ doorstep to present a case that can give them a legal victory, courts must be situationally aware of the strategies of those opposing movements outside of their doors. This was the case of the saga towards same-sex marriage in the US. In the main cases on same-sex relations, Justice Kennedy carefully crafted the words of the majority opinions to say he was doing only what the case required, not more; referring implicitly to the situation of legal mobilization for/against same-sex marriage happening outside the courtroom. Consider Justice Kennedy’s words speaking for the majority in *Lawrence*:

“The present case (...) does not involve whether the government must give formal recognition to any relationship that homosexual persons seek to enter. The case does involve two adults who, with full and mutual consent from each other, engaged in sexual practices common to a homosexual lifestyle.”<sup>784</sup>

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<sup>783</sup> Noah Feldman, “Tipping the Scales,” *The New York Review of Books* (New York, July 2018). Available here: <https://www.nybooks.com/articles/2018/07/19/supreme-court-tipping-scales/>.

<sup>784</sup> UNITED STATES, US Supreme Court, *Lawrence v. Texas*, 539 U.S. 558 (2003), p. 578.

This dissertation has shown that contestation outside courts is not a monolithic phenomenon, as Chapter 4 has proved. Apex courts can be situationally aware of the countermovements' strategies outside courts and decide to act accordingly, in different ways. In this sense, the judiciary can, for instance, be called to act against the omission of the legislature in giving effect to the rights courts had recognized before or a logical consequence of the rights courts had recognized. In the terms of Chapter 4, this would mean to act against a countermovements' containment strategy.

From the perspective of the roles of courts vis-à-vis a countermovement's strategy of containment, **courts can cope with such situational awareness by deciding to recognize a legislative omission or let it continue.** Brazil's STF is at this stage now regarding the criminalization of hate crimes against LGBT people. In light of the legislative omission of passing a legislation criminalizing hate speech against LGBT people, the National LGBT association has presented in 2012 a case<sup>785</sup> before the STF (still pending) seeking from the court an order extending the crime of racism to LGBT people. In 2013, Justice Ricardo Lewandowski declined to hear the case for lack of standing since for the Justice the applicant organization – a key player in the LGBT movement in Brazil:

“there is no subjective right specifically enshrined in the Magna Carta whose enjoyment is being hindered by the absence of legal regulations, but rather a legitimate and well-articulated social

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<sup>785</sup> BRAZIL, Supreme Federal Tribunal (STF), Mandado de Injunção 4733 (Injunction Mandamus), hereafter *criminalization of LGBTphobia case*. More info, see: Cardinali, *A Judicialização Dos Direitos LGBT No STF [The Judicialization of LGBT Rights in before the STF]*, 164–70.

movement advocating for an even stricter criminal legislation regarding the punishment of homophobic conduct.<sup>786</sup>

After an appeal from this interim decision on standing, in 2016 the STF reviewed its previous decision and allowed the case to continue through the chosen procedural avenue which tackles legislative omission, granting standing to the social movement in question. Since then, the case has not been decided yet. This example shows the reluctance with which the STF has reacted to calls to be more proactive vis-à-vis the legislative branch.

In a similar fashion, courts can cope with situational awareness of countermovements outside courts seeking a place to channel their claims through **judicial avoidance**<sup>787</sup> whenever that is legally possible. As shown in the first part of this dissertation, structural elements of how apex courts in South Africa and the United States can be reached by countermovements reveal that in both countries apex courts have the power to grant leave (or certiorari in the US case). This means that being aware of a controversial case, courts can decide not to take a case. That was the issue in *De Lange*. “Is there, somewhere in our churches, temples, mosques and synagogues – or for that matter our kitchens and bedrooms – a ‘constitution-free’ zone?”,<sup>788</sup> writes Justice Van der Westhuizen in his concurring in *De Lange*. While the Supreme Federal Tribunal in Brazil does not have the power to deny leave on a given case, as shown in this dissertation, procedural rules and practices in Brazil such as *pedido de vista* (i.e. asking to revise individually a case stopping the voting procedure) has given power to

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<sup>786</sup> Interim decision, October 28<sup>th</sup>, 2013, available at:

<http://www.stf.jus.br/portal/jurisprudencia/listarJurisprudencia.asp?s1=%28MI%24%2ESCLA%2E+E+4733%2E+NUME%2E%29+NAO+S%2EPRES%2E&base=baseMonocraticas&url=http://tinyurl.com/btxwyd9>.

<sup>787</sup> Iain Currie, “Judicious Avoidance,” *S. Afr. J. on Hum. Rts.* 15 (1999): 138–65.

<sup>788</sup> SOUTH AFRICA, Constitutional Court,

*De Lange v Presiding Bishop of the Methodist Church of Southern Africa for the time being and Another*, para. 70.

individual justices<sup>789</sup> at the STF to sit on a case for years, waiting for changes in contextual elements – such as changing of public opinion.

Judicial escapism of this nature will likely not last long when countermovements exponentially approach courts or promote contestation outside courts to a degree judges cannot but police such contestation given that much of it is done in constitutional terms, including in terms of constitutionally relevant harm. Judicial escapism in cases of contestation between opposing movements will fuel the proliferation of clashes outside courts (if all other conditions for legal mobilization apply, such as existence of allies).

In other instances, courts can be situationally aware of contestation outside courts by **offering a constitutionally permissible playfield in which countermovements can attack proactively** – or in Chapter 4’s terms counterstrike – movements’ claims in the political sphere. For instance, this is case where the US Supreme Court considers that banning affirmative action by referendum is permissible under the Constitution. It thus allows countermovements to keep counterstriking, getting hearts and minds to support the abolition of race-conscious measures by popular ballot or other political means.

A contentious perspective of constitutional change, one that affords a place for movements-countermovements dynamics in the understanding of constitutional equal protection, reveals that claims made outside courts have the potential of come back to being debated before courts. They are part of the legal structure opportunity of which courts are also part of, in particular apex courts. Often, the cases shown in Chapter 4

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<sup>789</sup> Diego Werneck Arguelles and Leandro Molhano Ribeiro, “Ministocracia : O Supremo Tribunal Individual e o Processo Democrático Brasileiro [Ministrocracy: The Individual Supreme Court in Brazilian Democracy],” *Novos Estudos CEBRAP* 37 (2018): 13–32, [http://www.scielo.br/scielo.php?script=sci\\_arttext&pid=S0101-33002018000100013&nrm=iso](http://www.scielo.br/scielo.php?script=sci_arttext&pid=S0101-33002018000100013&nrm=iso).

have revealed claims are kept outside courts because courts have pushed them there either reacting to a containment strategy by not deciding to fulfill the omission created by political sphere, or by creating a constitutional playfield in which countermovements proactively counterstrike movements' claims before the political branches.

### 1.6. Judicial Roles vis-à-vis awareness of competing claims

There are several ways courts can cope with the awareness of proliferation of claims of harms or what other scholars have called “pluralism anxiety”.<sup>790</sup> One of the ways of doing so is **by using other standards – such as hostility or dignity or liberty – to make claims of harms presented by countermovements and movements at least comparable**. The problem with equality that it is by its very mechanics a comparative concept, which is to say that equal protection law and also antidiscrimination law<sup>791</sup> is legally framed as setting comparators based on who is more politically disadvantaged or who has an immutable characteristic vis-à-vis someone else who has been historically discriminated, who has been treated unfairly or suffered from a disparate impact in a worse way than someone else, thus deserving a higher level of protection.

Of course, even if one considers that litigation involving opposing movements brings comparison into the picture, the difference with harm claims other than those based on equal protection is that they blur the mechanical comparison which is structural to how equal protection works. Arguments such as hostility do not offer much insight on how to weight one claim against another, leaving the possibility of courts **deciding on fuzzy concepts for one movement or another**. This dissertation has shown, in particular in Chapter 3, how dignity and sometimes liberty arguments have

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<sup>790</sup> Yoshino, “The New Equal Protection.”

<sup>791</sup> Tarunabh Khaitan, *A Theory of Discrimination Law* (OUP Oxford, 2015), chap. 3.

been used as frames for countermovements' claims of harm. Hostility is the newest kid on this block of frames, distancing attention from the violation of LGBT rights and thus ultimately favoring countermovements.

For instance, hostility is vague enough as a judicial standard so it leaves room for a wide judicial discretion. In *Masterpiece*, the US Supreme Court found hostility in words delivered by a couple of commissioners in Colorado in public hearings. One of the Commissioners described religious arguments to justify discrimination as “one of the most despicable pieces of rhetoric that people can use to use their religion to hurt others.”<sup>792</sup> For this language, it becomes clear that hostility towards religion in this case harms (or hurts) in a constitutionally relevant way.

Yet, in other context, the judicial standard to find hostility towards religion was much more forgiving. In *Trump v. Hawaii* decided in 2018, the US Supreme Court ruled in favor of President Trump's policy of entry restrictions to particular countries – 5 out of 7 of them are Muslim countries. For the Court, the “entry suspension has a legitimate grounding in national security concerns, quite apart from any religious hostility, [thus] we must accept that independent justification.”<sup>793</sup> The majority did not consider the Islamophobic tweets of the candidate Trump, which is relevant for assessing the motivation behind the travel ban.

In contrast, Justice Sotomayor, in her dissenting in *Trump v. Hawaii*, quoted a series of presidential statements (tweets) revealing such hostility towards Muslim faith. This contrast only reinforces that hostility is too vague a standard to mediate between opposing claims of harm.

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<sup>792</sup> UNITED STATES, US Supreme Court, *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission*, p. 13.

<sup>793</sup> UNITED STATES, US Supreme Court, *Trump v. Hawaii*, 585 U. S. \_\_\_\_ (2018), p. 34. Available at: [https://www.supremecourt.gov/opinions/17pdf/17-965\\_h315.pdf](https://www.supremecourt.gov/opinions/17pdf/17-965_h315.pdf). Last time accessed on: Sept. 30<sup>th</sup>, 2018.

It is not argued here that hostility towards religion is not harmful. *De Lange* in South Africa, *Masterpiece* in the US and *same-sex union case* in Brazil recognize real harms religious people suffer or might suffer from constitutional changes of equality. Thus, this dissertation does not attempt to trivialize such harm claims. What it is argued here is that, when read in light of apex courts' history of addressing historical disadvantage and by comparing to claims presented by several opposing movements based on the wounds of historical suffer, several claims by countermovements might be seen as real harms not severe enough to be recognized as constitutional harms.

Social movements can be hurt by courts not only when they lose, but also when they win. There are instances where social movements have gained courts' empathy but in a way that **courts reinforce a harmful judicial discourse**, rather than an empowering one (e.g. rights of LGBT couples in South Africa and the US). On certain occasions, social movements might even win cases before apex courts, as LGBTs before the US Supreme Court have acquired considerable victories since *Romer*, passing through *Windsor*, *Obergefell* and *Pavan*, but the language with which such decisions are penned further harm the members of those movements.

Calhoun in her monograph *Losing Twice: Harms of Indifference in the Supreme Court*, has defended the idea that judges can further harm litigators through the language they use.<sup>794</sup> One way of doing so is through a dignity-based language. From a harm perspective, one of the reasons why affirmative action cases in US and in South African can further harm members of Black community is through the use of dignity arguments as a way to develop empathy for the alleged individualized harm suffered by white people. This argumentative tactic of countermovements and courts of using

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<sup>794</sup> Calhoun, *Losing Twice: Harms of Indifference in the Supreme Court*.



dignity to redefine harm has been analyzed in relation to the redefinition of powerlessness in Chapter 4. As Hutchinson puts it in relation to the US:

“Although dignity-based claims look promising on the surface, a closer examination of Court doctrine reveals limitations. For example, the Court has invoked the dignity of whites and states to justify invalidation of race based remedies and civil rights measures. Furthermore, the Court's restrained equal protection analysis does not result from the lack of a good theory; instead, it reflects the conservative ideology of a majority of the Court. These Justices have created doctrines that mirror white majoritarian perspectives regarding race. Dignity-based claims cannot alter the Court's ideological balance.”<sup>795</sup>

As Chapter 4 revealed, dignity arguments can be instrumental in making the harms of historically discriminated minorities comparable to the harms suffered by privileged individuals, once the court defines that the later can be hurt as well by remedial measures such as affirmative actions. Meanwhile, dignity arguments can also be instrumental in blurring equality claims, because a fuzzy concept such as dignity can serve as an amalgam of liberty and equality claims (such as in *Obergefell*). Liberty frames then could shift the focus away from equality concerns and thus allow for comparison of harms against a particular freedom (e.g. freedom to marry) vis-à-vis the (already consolidated) freedom of religion or speech.

Another way judicial language can further harm members of social movements historically discriminated is by **seeking to conform them to the standards of the**

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<sup>795</sup> Hutchinson, “Undignified: The Supreme Court, Racial Justice, and Dignity Claims,” 61.

**society in which they have been discriminated.** In certain cases, this is done in a subtle way through the judicial language used. In one of the early victories for LGBT rights in South Africa,<sup>796</sup> the case *National Coalition 2*, the Constitutional Court addressed the question of “whether it is unconstitutional for immigration law to facilitate the immigration into South Africa of the spouses of permanent South African residents but not to afford the same benefits to gays and lesbians in permanent same-sex life partnerships with permanent South African residents.”<sup>797</sup> In order to determine whether a same-sex couple were in fact partners, the Court established a non-exhaustive list of factors<sup>798</sup> which defined what ‘ordinary’ partners would mean. For Jaco Barnard, for instance, these factors amount to constructing an identity of the ‘good homosexual’, by including defining factors of a same-sex partnership that were supposed to be equal to an ideal version of heterosexual marriage.<sup>799</sup> Such language harmed LGBT couples in South Africa by implying that for the Court they were only

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<sup>796</sup> SOUTH AFRICA, Constitutional Court, *National Coalition for Gay and Lesbian Equality and Others v Minister of Home Affairs and Others* (CCT10/99) [1999] ZACC 17; 2000 (2) SA 1; 2000 (1) BCLR 39 (2 December 1999).

<sup>797</sup> SOUTH AFRICA, Constitutional Court, *National Coalition for Gay and Lesbian Equality and Others v Minister of Home Affairs and Others* (CCT10/99), para. 1.

<sup>798</sup> “Without purporting to provide an exhaustive list, such facts would include the following: the respective ages of the partners; the duration of the partnership; whether the partners took part in a ceremony manifesting their intention to enter into a permanent partnership, what the nature of that ceremony was and who attended it; how the partnership is viewed by the relations and friends of the partners; whether the partners share a common abode; whether the partners own or lease the common abode jointly; whether and to what extent the partners share responsibility for living expenses and the upkeep of the joint home; whether and to what extent one partner provides financial support for the other; whether and to what extent the partners have made provision for one another in relation to medical, pension and related benefits; whether there is a partnership agreement and what its contents are; and whether and to what extent the partners have made provision in their wills for one another. None of these considerations is indispensable for establishing a permanent partnership. In order to apply the above criteria, those administering the Act are entitled, within the ambit of the Constitution and bearing in mind what has been said in this judgment, to take all reasonable steps, by way of regulations or otherwise, to ensure that full information concerning the permanent nature of any same-sex life partnership, is disclosed.” (SOUTH AFRICA, Constitutional Court, *National Coalition for Gay and Lesbian Equality and Others v Minister of Home Affairs and Others* (CCT10/99), para. 88).

<sup>799</sup> “The politics of passing came most explicitly to the fore when the Court provided a list of factors which would assist in the determination whether the same-sex life partnership was ‘permanent’ and thus worthy of protection. These factors were basically made up out of the characteristics of a heterosexual marriage. The use of these factors implied that the type of same-sex life partnership that the law would protect had to approximate as closely as possible the idealised, ordinary – and one is tempted to add mythical – heterosexual marriage.” Jaco Barnard-Naudé, “Sexual Minority Freedom and the Heteronormative Hegemony in South Africa,” in *Transformative Constitutionalism: Comparing the Apex Courts of Brazil, India, South Africa*, ed. Oscar Vilhena Vieira, Upendra Baxi, and Frans Viljoen (Pretoria: PULP, 2013), <https://ssrn.com/abstract=2835113>, p. 319.

respectable if they resembled what the Court perceived as an ordinary heterosexual marriage.

In the post-*Obergefell* scenario, the kind of language seeking to impose heterosexual standards to LGBT couples has been called as the politics of respectability<sup>800</sup> in the United States debate on same-sex marriage. Jeremiah Ho argues that *Lawrence* presented a politics of respect towards LGBT, while *Obergefell* revealed a focus on the respectability of marriage.<sup>801</sup> In other words, judicial language, even in decisions granting LGBT rights, can implicitly dictate that LGBT people are worthy of respect so long as they are similar to a socially respectful ideal of heterosexual couples. In Ho's words:

“What was problematic here was that the objective of marriage equality was preceded and affected by the politics of respectability. In turn, that respectability was being channeled by the animus-dignity connection to justify the worthiness of same-sex couples in seeking and obtaining marriage for themselves. Marriage, as Kennedy portrayed either knowingly or inadvertently, conferred not only dignity through respectability but heteronormative values and demands that might have expected same-sex couples to negotiate their

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<sup>800</sup> Jeremiah A Ho, “Find Out What It Means to Me: The Politics of Respect and Dignity in Sexual Orientation Antidiscrimination,” *Utah L. Rev.*, 2017, 463.

<sup>801</sup> In Justice Kennedy's words in *Obergefell*: “From their beginning to their most recent page, the annals of human history reveal the transcendent importance of marriage. The lifelong union of a man and a woman always has promised nobility and dignity to all persons, without regard to their station in life. Marriage is sacred to those who live by their religions and offers unique fulfillment to those who find meaning in the secular realm. Its dynamic allows two people to find a life that could not be found alone, for a marriage becomes greater than just the two persons. Rising from the most basic human needs, marriage is essential to our most profound hopes and aspirations. The centrality of marriage to the human condition makes it unsurprising that the institution has existed for millennia and across civilizations.” UNITED STATES, US Supreme Court, *Obergefell v. Hodges*, 576 U.S. \_\_\_\_ (2015), p. 3.

subjugation once marriage was available to them. This was not dignity as respect, which would have been ideal, but it was dignity as respectability, which deviated from Lawrence.”

Those cases show instances of losing through winning, i.e. cases where even winning the case, members of social movements can end up being harmed by the decision’s language or poor remedy that in the end of the day impact adversely at least part of the members of the movement, in particular those not part of the mainstream of the movement and thus with less political power.

In light of those cases, it is clear that judicial awareness of claims means that courts will look more closely at the different claims opposing movements make and in which frame. Courts can look for foundations other than equality – such as hostility, dignity or liberty – to balance those claims. Courts can give a strategic victory to social movements but use a harmful language that undermine their constitutional stature, including useful for future countermovements’ litigation. Courts can also push historically discriminated groups even more into conformability, seeking not necessarily to hurt them directly but to reduce the tensions within equal protection jurisprudence by pushing those movements into mainstream claim-making such as same-sex marriage equals to traditional marriage without questioning the centrality of marriage in the first place.

### 3. Conclusion

This Chapter accounted for 3 types of constitutional change related to the role of apex courts in managing harm, in the context of constitutional equality litigation. In an age of intense contestation over what it means to be harmed in a constitutionally relevant manner. It has showed that there is an ongoing proliferation of claims and claimants

which challenge courts to balance them. It has revealed that there is a proliferation of harm-based clashes inside and outside courts which challenge courts to police claim-making by countermovements, including in relation to political arenas. Finally this Chapter has revealed that courts have fostered radically different notions of constitutional harm which has made then equal protection if not fragile at least considerably unstable.

Is there a way out of such weaponization of equality jurisprudence by countermovements? This dissertation does not seek to provide an one-size fits all solution. It has mainly showed how countermovements' legal mobilization inside and outside courts, making use of the existing legal structure opportunity, has fostered constitutional changes, including of what harm means.

One way courts can address the present uncertain times is by returning to the fundamental underpinnings of constitutional equality protection, which varies in different country contexts. South African apex court can address private discrimination against LGBT people – as raised in *De Lange* – from the lens of the history of apartheid in upholding also physical, psychological and symbolic forms of violence against black people also in private or semi-public spaces. The US apex court can – as dissenters in affirmative action cases sometimes do, e.g. Justice Stevens in *Adarand vs. Peña*<sup>802</sup> – return to differentiate discrimination from remedial measures aimed at supporting rather than undermining the constitutional stature of Afro-Americans, including from a harm perspective since discrimination and positive measures do not harm in the same way. Brazilian apex court can return to its transformative foundations and realize that,

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<sup>802</sup> “the consistency that the Court espouses would disregard the difference between a ‘No Trespassing’ sign and a welcome mat.” UNITED STATES, US Supreme Court, *Adarand Constructors, Inc. v. Peña*, 515 US 200 (1995), Justice Stevens (dissenting), p. 245.

without a dialogue with the political branches, its decisions will have a limited effect because they will not necessarily result in legal change on the books.

Context matters. In certain cases, such as in the US, courts have at their disposal a long constitutional history to consult and tell from the eyes of the oppressed if they want to, being faithful to the values of the constitutional order. In other cases, courts can seek to deliver on the constitution's transformative mission where there is one such as in Brazil and South Africa. This is no easy task. It will require courts to be actively aware – both in terms of situation surrounding them and in terms of claims made to them.

## CONCLUSION

This dissertation's focus on legal mobilization by countermovements has offered a series of analytical approaches. First, and most obviously, incorporating countermovements into the analysis is not so much of a choice as it is a necessity. As the case studies have shown, countermovements have as a matter of fact used courts as well as political branches in the three jurisdictions to oppose social movements' advancements. Any analysis that fails to include countermovements therefore runs the risk of painting an incomplete picture of non-textual constitutional change. This perspective, by looking at countermovements more generally, also allows us to zoom out from a focus on a specific organization or interest group and their litigation strategy to being able to identify (and perhaps make sense of) the waves of constitutional change and dynamics between opposing social groups.

Second, in a related manner, as seen in this dissertation, much of the literature on social movements and law has focused on legal mobilization by progressive social movements, in particular equalizing public interest litigation with leftist lawyering, largely downplaying the importance of conservative groups and their use of courts. The main advantage of the present analysis where constitutional change is seen in a dynamic way, taking into account countermovements, is that it presents a fuller, more holistic, perspective on jurisprudential changes in constitutional equality in the three jurisdictions. Looking at this topic from countermovement lens has enabled the author to develop an original account about the otherwise much studied topic of the relationship between social movements and legal change.

Third, a focus on countermovements inevitably opens the door to an interdisciplinary analysis where legal cases are not only seen as such, but rather as one

piece of paper at one moment in inevitably messy and contentious political discourse. From this view, a certain legal victory (or loss) of opposing movements' legal mobilization can foster non-textual constitutional change in one or more directions through porous constitutional standards. By incorporating a social science analysis, it became clear that courts are able to alter the opportunities and threats presented to those opposing movements through changes in their jurisprudence.

Fourth, and finally, by studying countermovements' legal mobilization, this work has interrogated existing pluralism in modern constitutional democracies in moral, legal and social terms. This study questioned the roles that courts have performed in light of such pluralism. Scrutiny of claims of harm presented to courts has shed light on the various roles that courts (perhaps unwittingly) have played in advancing rights.

From a contentious perspective, this dissertation asked: how does the judicial understanding of constitutional equality change when lawyers of groups organized in opposition to social movements 'have their day in court' seeking a reversal of judicial landmarks previously achieved by social movements and their clients? For example, such previously acknowledged rights can be of "innocent white" applicants to be treated in a colorblind manner in university selection processes (as opposed to race-inspired affirmative action), or the 'right of religious associations to discriminate' against same-sex couples (as opposed to same-sex marriage as a right).

The introduction to the dissertation set out the claim that changes in constitutional interpretation of equal protection are best understood as a product of contention involving opposing social movements and countermovements. In this work, it has been argued that the legal arguments of countermovements – of which religious objections to same-sex marriage and race-based reverse discrimination are primary



examples – have enlarged the boundaries of what it means to be harmed by a discriminatory act in a constitutionally relevant matter.

Rather than providing a ‘one-size-fits-all’ here of judicial decision-making, the dissertation has sought to offer an in-depth analysis of an aspect that informs judicial discourse when deciding cases involving social mobilization by opposing groups. When white university applicants claim reverse discrimination resulting from race-based affirmative action programs, or when private individuals or officials seek a right to religious exemption from anti-discrimination laws in order to refuse serving same-sex couples, the resulting constitutional adjudication opens an arena where opposing movements make competing constitutional claims of harm before courts.

An argument presented in the dissertation is that amid a heated environment of legal-political contention, apex courts are expected to meet the often frustrated ideal of inserting principle into politics. Thus, apex courts should not assume that constitutional principles are separated from ordinary politics. This dissertation has suggested that there is no way out for courts: they decide cases involving countermovements within the context of often intense legal mobilization made in terms of constitutional harm. They must respond decisively by choosing one route or the other.

Countermovements affect apex courts at least in three ways. Judges react to countermovements by firstly providing a space where struggles over the meaning of equality can take place. Courts provide countermovements with access to constitutional litigation. Secondly, courts conciliate varying conceptions of constitutional harm whenever they see such accommodation as appropriate. Thirdly, by taking sides on the contention between social movements and countermovements whenever their constitutional narratives clash, courts might leave little room for compromise.

## 1. Summary of Chapters' Conclusions and Overall Findings

This section summarizes the main findings of the previous Chapters then offers a general conclusion for the overall project.

**Chapter 1** reviewed the relevant literature on non-textual constitutional change in order to identify the roles performed by apex courts in managing contentions promoted by social movements' and their respective countermovements' involvement with non-textual constitutional changes. It mapped the existing literature on non-textual constitutional change – in particular in the US through Bruce Ackerman and Jack Balkin - in order to tease out the extent to which the body of literature makes sense of the contentious environment in which apex courts decide equality cases involving social movements and countermovements. Although theories of non-textual constitutional change do not place countermovements in their core (since they are more focused on social movements as triggers of change), it concluding by highlighting how such literature offers insights for a contention-based concept of constitutional change. It set out that constitutional law can be seen as a collective frame for social movements and countermovements alike and that therefore their debate can go around constitutional idea of harm. It pointed out how constitutional norms have consistently been open for contestation due to their open-textured nature. Furthermore, Chapter 1 asked whether Brazil's neoconstitutionalism and South Africa's transformative constitutionalism – both grounded on social mobilization – are able to explain countermovements' proactive equality litigation. It concluded they are not: countermovements do not fit neatly into the transformative rhetoric of Global South Constitutionalism, because they often seek to revert constitutional changes promoted on behalf of social movements.

This left room for the task of **Chapter 2** which was to design a conceptual framework that gives due weight to the legal mobilization of countermovements. After analyzing the accounts by social scientists about countermovements, Chapter 2 offered three elements for the conceptual framework: (1) a disharmonic open constitutional texts that often serve as legal framing for opposing movements, (2) an increasing plurality of actors as constitutional litigators with the rise of countermovements' legal mobilization, and (3) a growing anticipatory countermobilization by countermovements claiming to redefine notions of constitutional harm.

Bearing that in mind, **Chapter 2** presented a **conceptual framework** that offered three **hypotheses** guiding the remaining chapters of the dissertation in its case studies (**Chapter 3-5**):

- **Institutional openness proposition (Chapter 3).** This chapter presented the hypothesis that the courts' institutional openness enables social movements to engage dynamically with countermovements in a way that courts serve as a permanent forum for competing claims, becoming spaces of contention. A key way through which courts become more institutionally open to countermovements is through a redefinition of what it means to be powerlessness. When countermovements convince courts that they are 'victims' in equality terms, by shifting the discourse on powerlessness from historical disadvantage to individualized harm, they can more easily access apex courts.
- **Contestation proposition (Chapter 4):** This chapter postulated that, whenever courts foreclose certain aspects of countermovements' claims, they are expected to sustain their legal strategy elsewhere, for example in the political branches and in other venues that are at their disposal. Chapter 4 examined the interplay between constitutional standards and countermovements' contestation outside

courts. It found that when apex courts leave room for constitutional politics to happen outside courts (including by not deciding resolutely on a constitutional matter), they leave room for contestation by countermovements to play out elsewhere. This happens either through a proactive take by countermovements in promoting changes through political branches even in an anticipatory way (counterstrike strategy), or through a strategy to primarily resist change promoted by social movements outside courts (containment strategy).

- **Harm-management proposition (Chapter 5):** The conjecture that the more porous the standard developed by courts conducting constitutional review, the more likely that contestation between social movements and countermovements will turn constitutional litigation into debate on what it means to be harmed was examined in Chapter 5. Three constitutional changes countermovements have promoted in constitutional equality were then unraveled: (1) the proliferation of claims of harms, (2) an aggravation of tensions both inside and outside courts in equality terms and (3) the impossibility of courts getting away with such tensions as long as different conceptions of harm are built on diverse and changing conceptual foundations that further hurt historically disadvantaged groups.

## 2. Agenda for Future Research

What has been gained and lost when harm began to be redefined in constitutional equality jurisprudence? Where does this harm-based account leave historically discriminated groups? The research carried out in furtherance of this dissertation's objectives have raised a number of points of tension in this debate that should be addressed in future research as well as litigation:

**Are there degrees of violation according to harm standards?** Scholars can push courts to be clearer on how far they are willing to go to remedy alleged violations of equality by countermovements without undermining the previous gains of social movements. A question not only for scholars but courts is whether complicity claims matter differently than other kinds of more direct, face-to-face violations. Is it possible both conceptually to provide a degree of the most severe harm to the least severe ones and then balance it? It is possible to do so in test-case litigation?

**How can social movements best create litigation opportunities in the future?** New equality will not necessary mean that social movements will largely lose against their countermovements opponents in court. It may simply mean that equality arguments will change to a competition of harms rather than a minority-majority juxtaposition. Of course, such change favors countermovements that do not have a sound historical claim of oppression. It does not follow, however, that social movements will always be on the losing side. It means that a different strategy of bringing and defending cases will be required, one that convinces the court that one group suffers harm to a greater degree or of a more fundamental nature than the other group. For example, religion-based hostility to objectors of same-sex marriage in private settings imposes a greater harm than the harm of being denied services on the basis of one's sexual orientation as in *Masterpiece*.

**Will there be a core basis for equal protection?** In the context of emerging countermovement litigation, courts would be well advised to clarify the core basis of equal protection: if animus standard, or dignity, for instance. Harm, without attaching it to historical discrimination or another more solid ground to give it context, will only make legal discourse more confusing and unpredictable, without a clearer standard of animus or dignity attached to it.

This project is based on the underlying assumption that differences (between social movements and countermovements) can be addressed by courts with respect, as Audre Lorde puts it in the epigraph of this dissertation. It is hoped that the ideas set out in this dissertation will play a part in helping courts, immersed in a harm-based jurisprudence, to reframe and adjudicate these claims in a respectful and equality-upholding manner.

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