The “Institutional Turn” in Jurisprudence: Critique and Reconstruction.

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I. Overview

This paper engages in a inquiry into the roles that courts play within the legal system, given that judges are interdependent interpreters of legal rules that are boundedly rational and, arguably, politically biased. Contemporary authors claim that, although these two conditions play an important role in interpretation, contemporary theories in jurisprudence have not addressed them properly. Their assessments raise legal issues that are very significant; given the fact that judges are boundedly rational and tend to display political biases, how should they interpret legal rules? Is it best for them to interpret these rules in a formalist fashion, without resorting to resources such as legislative history? Or should they be faithful agents of legislatures, interpreting legal rules according to the changing conditions of society? Given these conditions, how should we assess the institutional performance of courts in the legal system?

The stakes related to how judges choose to interpret legal rules given their bounded rationality and political biases are very high as well as diverse. They include issues that range from wealth redistribution throughout society to the allocation of power through government. Assessing how these two conditions influence interpretation is key to determining the place of courts as institutions within the legal system, and to enhancing or curbing the consequences that result from their interpretations. I will group the contemporary analyses that focus on the relationships between interpretation and institutional performance of courts under the label of “the institutional turn”. (Hereafter “IT approach”)

Here I will briefly explore and assess the IT approach against an historical background, evaluate its claims, and suggest an alternative theory of interpretation given determined institutional capacities and conditions. To do so, my thesis will be divided into four main parts. In the first part, I will provide a thorough and concise account of the emergence and reemergence of arguments regarding the place that courts have within the legal system throughout modern and contemporary American legal scholarship. Since the IT approach addresses a variety of issues that

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1 By interdependent interpreters, I mean that the interpretations of legal rules that courts, agencies and legislatures produce in the present affect the future interpretations that they can produce in the future. The interpretations that these institutions produce shape the legal rules that they all work with, and given that they can constrain the interpreters, a new interpretation (or enactment) of a legal rule by a court can change the scope of interpretations that an agency can produce. See Hans Kelsen, Pure Theory of Law, University of California Press Berkeley (1978).

have been addressed in the past, it is useful to have an historical background to trace how these issues have changed over time. My aim with this first part is to show that the institutional role of courts has been a very important topic in American legal scholarship.

In order to present the arguments about interpretation and institutional performance, I will place them along a continuum of positions that ranges, roughly, between two poles: a pole in which courts should interpret statutes narrowly and be extremely deferent to other institutions, and a pole in which courts interprets statutes broadly and never defer to the views of other institutions. This setup is useful to summarize and map the different accounts presented, for developing a critique of the indeterminacy that produces the different positions, as well as for developing my alternative theory of interpretation.

After providing this background, I plan to describe the IT approach critically, but candidly, in terms of the continuum presented in the first part of my thesis. Within the IT approach, I (also) identify positions about the conditions that affect interpretation when considering courts as interdependent institutions within the legal system. In order to characterize them adequately, I will pay special attention to two particular strands of literature that are key to the IT approach. The first strand is composed of contemporary studies that define and assess judicial behavior empirically and statistically. My analysis of this strand of literature will focus on how biases and bounded rationality are defined and measured for empirical purposes – an apparently methodological question, but with other implications as well. The second strand is composed of the normative implications, presented by different authors, which stem or are related to the empirical studies suggested above. This strand gathers the different answers to the question of how judges should interpret legal rules, given the conditions mentioned above. Different authors assess differently the influence of bounded rationality and biases in judicial interpretation and, in particular, assess differently what these two conditions should amount to given the interdependent nature of courts and other institutions.

By placing along the continuum the different positions that are part of the IT approach, in the third part of my thesis I will develop a detailed comparison and critique of them. Such critique is based on the premise that an assessment of the role that bounded rationality and biases play in interpretation is insufficient to suggest a particular interpretive approach for courts. Arguments about efficiency, information costs and error costs regarding interpretation by courts with regard to particular cases, as well as to their interdependent role within the legal system, are inconclusive because they point in different, and usually contradictory, directions.
Finally, in the fourth part of my thesis I present my theory of interpretation, which represents a reconstruction project. In spite of the indeterminacy that the critique suggested implies, I will argue that there are justifications for adopting a particular position, which I will elaborate. My position is founded on the premise that just as theories of interpretation benefit enormously from assessing the institutional capacities of the interpreters, so can institutional theories benefit enormously from theories about interpretation. Based on a concept of law as integrity, I will suggest that the interdependent roles of courts should not follow from a blank statement that stresses judicial deference or dynamic interpretation due to the pervasive role of bounded rationality and biases in interpretation. Quite the contrary, courts, as well as agencies, are imperfect interpreters that compete between themselves for the monopoly of regulatory power. Their success depends on how well they fit and justify the legal rules that determine the issues at hand according to what Congress, or the Supreme Court, considers adequate. In other words, courts and agencies have competing and imperfect interpretations of particular domains of law, which await sanction by the institution with the authority to declare the prevailing interpretation.

II. Critique and Reconstruction – Development.

a. The relationships between the topics within the IT approach

In American jurisprudence, a complex topic dominates the landscape of arguments regarding interpretation of legal rules within an institutional context. This topic is the relationship between judicial interpretation and the interdependent role of courts within the legal system. Courts interpret legal rules when they decide cases; in doing so, they change (by restraining or enhancing) the scope of the legal rules that other government bodies work with. This suggests that interpretation cannot be studied without taking into account the legal context in which it takes place. Every time concerns related with how judicial decisions affect the performance of other institutions reemerge, they arise from a perceived “deficiency” in how judges interpret statutory and constitutional rules. The judiciary, it is argued, should interpret legal and constitutional provisions according to a view that comports with their legitimacy or their capacities with regard to the other branches of government. These two considerations work in

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tandem; as soon as biases in interpretation become evident, arguments regarding the role of courts vis-à-vis other governmental institutions are presented as a means to curb the perceived negative consequences that such biases have produced.\footnote{An example of this relationship can be found in: L.L. Fuller & Kenneth I. Winston. *The Forms and Limits of Adjudication*, 92 Harv. L. Rev. 353 (1978).}

For the purpose of my thesis, I suggest that the relationship between interpretation and institutional consideration produces a set of positions that can be placed along a continuum, which is determined by two poles, which represent contradictory positions.\footnote{The idea that these positions can be placed along a continuum can be found in William N. Eskridge, Jr. and Kevin S. Schwartz, *Chevron and Agency Norm-Entrepreneurship*, 115 Yale L. J. 2623(2006). (From now on, *Eskridge & Schwartz*). Commenting on the *Chevron* and *Oregon* decisions, these authors state: “(…) [T]his brief analysis of *Oregon* suggests that there is no sharp demarcation between ordinary judicial review (under which agencies often lose) and deferential *Chevron* review (under which agencies almost always win). Instead, there is a continuum.” (Pg. 2630). The decisions discussed here are: Chevron, U.S.A Inc. v Natural Res. Def. Council, Inc. 467 US 837 (1984), Gonzales v. Oregon, 126 S. Ct. 904 (2006).} The pole to the far right represents a position in which courts produce narrow and non-ambitious interpretations of legal rules, which are highly deferential to the views adopted by administrative agencies and legislatures about a particular domain of law. The pole to the far left represents a position in which courts produce “creative” and ambitious interpretations of legal rules, which challenge constantly the interpretation produced by administrative agencies and legislatures about a particular domain of law.\footnote{In terms of Supreme Court decisions, pole A represents an extreme version Steps 2 and 3 of the *Chevron* rule and the *Oregon* reassessments of it, while pole B represents an extreme version of Step 1 of the *Chevron* rule and the *Caminetti v. United States* rule regarding textual interpretation. (Caminetti v. United States, 242 U.S. 470 (1917))} Such a continuum would look like this:

\begin{tabular}{ll}
A. Ambitious, non deferential interpretations. & B. Non ambitious, deferential interpretations. \\
\end{tabular}

This setup will be useful for my thesis for three main reasons. First, it will allow me to explain the different positions that have been presented in American legal scholarship regarding this topic, because it enables me to explain their similarities and differences. Second, because it shows that institutional considerations, by themselves, have been unable to present a determinate account of the role of courts as interdependent, institutional actors. As mentioned before, this is a major theme in my thesis. An third, because it will make easier for me to explain my reconstruction
project, which has as a premise that courts and agencies compete among themselves to offer the best account of a domain of law.\(^7\)

b. Emergence and reemergence of the concerns present in the IT approach.

The relationship between judicial interpretation and the interaction of the judiciary with the other branches of government can be traced back to John Marshall’s arguments for judicial review and presidential independence in *Marbury v. Madison*.\(^8\) Other well known examples, including James B. Thayer’s perspective on judicial review, are based on institutional considerations, such as the relative indeterminacy of what is required by the Constitution to override Congress judgments.\(^9\) Legal Realists like Karl Llewellyn argued that the legal rules were not determinate enough to decide cases, and that the incoherence and contradiction in these was due to the influence of the judges’ “personality”.\(^10\) Henry Hart and Albert Sacks, the fathers of the Legal Process School, also considered that courts, when interpreting statutes, should either interpret them taking into consideration the changing conditions of society, or defer to the specialized view of administrative agencies.\(^11\) The image of the judge as a boundedly rational actor who cannot perceive all the complexities involved in his task appears in the legal literature in the middle of the nineteen sixties,\(^12\) and has expanded since then.\(^13\) During the eighties, Public Choice scholars suggested that judges often engage in Condorcetian voting cycles, which renders their decisions inconsistent,\(^14\) and that administrative agencies were unreliable because they were captured by well-organized interest groups.\(^15\) Today, some authors within the IT approach use statistical methods to define and measure judicial activism in the Supreme Court when it reviews

\(^7\) I acknowledge that this may be a reductionist approach of the different approaches presented by the authors; however, as my research advances I do plan to better justify and characterize the continuum in itself. In spite of this, I do believe that this scheme is adequate because of the advantages mentioned before.

\(^8\) *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803)


\(^13\) A quick research in the WestLaw – Journals and Law Reviews database produced 1443 results for the words “bounded rationality” (Search done March 28, 2008).

\(^14\) See, for example, Frank H. Easterbrook, *Ways of Criticizing the Court*, 96 Harv. L. Rev. 802 (1982).

the constitutionality of legislation,\textsuperscript{16} while others claim that courts should interpret legal rules dynamically, that is, with special attention to the changing conditions of society, but also having in mind the interdependent role of courts and the particular legal context of the case at hand.\textsuperscript{17}

Each of these positions reflect a prevailing interest in (i) differentiating proper interpretations of legal rules from others that are not, (ii) developing an interpretative approach regarded as adequate because it is based on principles, policies or purposes (such as fairness, legitimacy, fidelity, or efficiency), and (iii) arguing that that approach assigns a particular institutional role in the legal system to courts. This is necessary, it is argued, because “unorthodox” interpretations produce negative consequences regarding the legal system in general, consequences that could be avoided if other approaches are adopted.\textsuperscript{18}

For the purpose of my thesis, I would (roughly) place some of the above mentioned positions in the continuum presented before like this:

A. \begin{center} \text{- - - - - - - (4) - - - - - - - (3) - - - - - - - (2) - - - - - - - (1) - - - - - - -} \end{center} \\
Ambitious, non deferential \\
Interpretations.

B. \begin{center} \text{- - - - - - - (2) - - - - - - - (1) - - - - - - -} \end{center} \\
Non ambitious, deferential \\
Interpretations.

Position No. 1 represents Marshall’s argument in \textit{Marbury v. Madison},\textsuperscript{19} according to which within their spheres of autonomy each branch of government is entitled to interpret the legal rules how it sees it fit Position No. 2 represents Thayer’s deferential position, which argues that Courts should be mindful when exercising judicial review given that the Constitution is to some extent indeterminate, and Congress is entitled to act within that indeterminacy. Position No. 3 represents Hart and Sack’s position, who acknowledge that courts should defer in some cases and take a stand and interpret “dynamically” in other cases. Finally, position No. 4 represents Richard Posner’s, who is confident of the capacity of courts to interpret legal rules and suggests a less deferential, more challenging position towards administrative agencies.

C. The empirical assessment of judicial conditions

\textsuperscript{18} The assessment of what represents an “unorthodox” interpretation is, of course, a much contested one. Since there is little agreement of what a “correct” method of interpretation is, all the mentioned positions try to assert that all the other ones are, in one way or the other, deficient.
\textsuperscript{19} \textit{Marbury v. Madison}, 5 U.S. (1 Cranch) 137 (1803)
Recent developments in legal scholarship attempt to assess empirically the roles of bounded rationality and political biases in legal interpretation by using empirical methods and statistical analyses. The interest in finding more about these roles today is seen by authors like Cass R. Sunstein and Thomas J. Miles as a renewed interest in the arguments proposed by the school of American Legal Realism.\textsuperscript{20} Realist proponents like Karl Llewellyn suggested that the indeterminacy and incoherence of legal rules was due in part to the judge’s “personality”; the American government was not a government of law, but rather, of laws through men.\textsuperscript{21} The new developments, some of which claim to take Llewellyn’s remark seriously, try to assess how particular institutional arrangements affect how judges interpret legal rules in order to make decisions.\textsuperscript{22} The focus has been on topics such as the judges’ voting patterns, given conditions like court composition (panel or single decision-makers),\textsuperscript{23} and cognitive distortions (including bounded rationality and political biases).\textsuperscript{24} In particular, an issue that has received much attention is the influence of the judge’s political biases – commonly characterized in terms of party affiliations as proxies for liberal or conservative positions – in their decisions. Questions regarding how much Republican and Democratic appointees differ when voting controversial issues, and how consistent their positions turn out to be across time, are at the heart of this field.\textsuperscript{25} Since studies about judicial behavior in general are produced in large numbers today, I will focus on those studies that claim that aspects such as political affiliation determine the voting patterns of the judges that sit in Federal Courts and on the Supreme Court. This body of empirical research is highly relevant to my thesis, because it provides arguments for considering courts more or less competent for interpreting legal rules narrowly or ambitiously with regard to other institutions.\textsuperscript{26}

\textsuperscript{20} Id. \textit{The New Legal Realism}. Pg. 3
\textsuperscript{21} Karl Llewellyn. \textit{Some Realism About Realism: Responding to Dean Pound}, 44 Harv. L. Rev. 1222, 1243-1244 (1931).
\textsuperscript{22} Id. \textit{The New Legal Realism}. Pg. 6.
\textsuperscript{23} See, for example, Frank B. Cross, \textit{Decisionmaking in the US Circuit Courts of Appeal}, 91 Cal. L. Rev. 1457 (2003).
\textsuperscript{24} See, for example, Frank H. Easterbrook, \textit{Do Liberals and Conservatives Differ in Judicial Activism?}, 73 U. Colo. L. Rev. 1401 (2002).
c. Judicial capacities and systemic effects.

A second field within the IT approach focuses on the normative issues that stem from the empirical assessments of bounded rationality and political biases, and attempts to determine how judges, given these two conditions, should interpret legal rules. As in the past, here we find several positions offered by different authors. Adrian Vermeule’s position asserts that the common mistake of contemporary theories of interpretation is that they are chains of reasoning that move from abstract principles to concrete applications, without considering the institutional conditions or capacities of the judges as interpreters. Such conditions include cognitive deficiencies, biases and time constraints. Given these theories’ “institutional blindness”, their deductive process fails because the assessment of these conditions is necessary for translating such principles into workable conclusions. This type of failure suggests the existence of second-best effects: particular judges, when implementing any of these theories of interpretation, will commit mistakes due to the fact that they are not perfect interpreters.

The problems posed by “institutional blindness” can be explained in terms of uncertainty and bounded rationality. The uncertainty of adjudication is a result of the lack of information the judiciary has regarding its own institutional capacities, the determination and measurement of errors produced by decisions, the costs of reaching decisions and the costs of coordinating other courts to realize those decisions, when necessary. Given the complexity of these variables, the judges will never have the relevant information to interpret legal rules adequately given the limited time they have for deciding cases. On the other hand, bounded rationality poses a problem because it suggests that judges have a limited capacity to understand and process the information that is available to them and that they use to make decisions.

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27 Id, Vermeule Pg. 2 It is important to acknowledge that the author, with his analysis of the different theories, does not intend to discuss the historical background of these theories, nor to provide a full jurisprudential analyses of their premises. See Pg. 9.
28 Id. Vermeule Pg. 9.
29 Id. Vermeule Pg. 2.
30 Id. Vermeule Pgs. 36-39. (Discussing the problems with first best theories of interpretation, Vermeule classifies them in three categories: (i) theories that attempt to move directly from abstract principles to workable conclusions without ever dwelling with institutional capacities (“out-and-out philosophizing”), (ii) theories that present a stereotypical account of institutional capacities (“stylized institutionalism”) and (iii) theories that combine a romantic vision of one institution with a negative vision of another (“asymmetrical institutionalism”). Ronald Dworkin’s theory of interpretation is an example of the first category, while examples of the second include Henry Hart and Albert Sacks’ theory, and examples of the third include the theories of John Hart Ely and Richard Posner. Id. at Pgs 9-17, see for more detail Chpt. 1.
31 Id. Vermeule, Pg. 9
32 Id. Vermeule, Pgs. 154-155.
33 Id. Vermeule, Pg. 155
Furthermore, bounded rationality is exacerbated by the particular nature of adjudication. Since it is a case-by-case procedure, the salience of particular issues is accentuated while the systemic consequences that their interpretations produce are minimized.\textsuperscript{34} Uncertainty and bounded rationality are also aggravated by the limited time frame that judges have to decide cases, as well as by the workload that comes with their particular position.\textsuperscript{35}

Given this assessment of the judiciary, Vermeule suggests that judges should limit the amount of information they collect to reach decisions, because the extra costs of information outweigh the gains obtained, which usually are speculative.\textsuperscript{36} Therefore, they should interpret statutes according to their literal meaning without inquiring into their legislative history; if the legal rules are vague, they should then defer the authority to interpret them to administrative agencies (in the case of statutes), or to legislatures (in the case of constitutional provisions).\textsuperscript{37} This interpretative approach displaces, or at least reduces, the authority of courts with regard to administrative agencies and legislatures given the lack of knowledge of the former and the expertise and legitimacy of the latter.\textsuperscript{38}

William N. Eskridge suggests a different position. In an article in which he reviews Vermeule’s book,\textsuperscript{39} he acknowledges the importance of taking into account the institutional capacities of courts, but then shows that administrative agencies suffer from analogous shortcomings. If the boundedly rational and biased character of judges influences their interpretations, it is not clear that other institutions, like administrative agencies, fare better regarding their interpretations. These institutions are subject to political biases (in terms of capture by well-organized groups), are interested in further developing their own interests (as opposed to further the public interest), their members are prone to overconfidence and egocentrism, and even pressures from other governmental institutions like congressional subcommittees and White House organs.\textsuperscript{40} To suggest, without detailed qualifications, that administrative agencies are better drafters of public policy than judges follows from an uncritical

\begin{footnotesize}
\begin{itemize}
\item[\textsuperscript{34}] Id. Vermeule, Pg. 155
\item[\textsuperscript{35}] Id. Vermeule Pgs. 153-154 (Comparing time scales between judges and academics)
\item[\textsuperscript{36}] Id. Vermeule Pg. 4
\item[\textsuperscript{37}] Id. Vermeule Pgs. 4, 183. This rule-bound interpretative approach – a variant of formalism – is defensible on consequentialist grounds, in the sense that it is justified because it produces the best overall consequences for the legal system, not just of the case at hand. In this sense it is a rule-consequentialist account of interpretation: “(…) judges should interpret legal texts in accordance with rules whose observance produces the best consequences overall.” Id. at Pgs. 5-6.
\item[\textsuperscript{38}] This is a position that is quite contested within the IT approach. For an example, see William N. Eskridge Jr. Dynamic Interpretation of Economic Regulatory Legislation (Countervailing Duty Law), 21 Law & Pol’y Int’l. Bus. 663 (1990).
\item[\textsuperscript{39}] William N. Eskridge, Jr. No Frills Textualism 119 Harvard Law Review 2041 (2005-2006) (Hereafter, Eskridge)
\item[\textsuperscript{40}] Id. Eskridge, Pgs. 2058-2060.
\end{itemize}
\end{footnotesize}
assessment of how these institutions work.\textsuperscript{41} Too much faith in administrative agencies can exacerbate the problems created by bad judicial decision-making, depending on the context.\textsuperscript{42}

Following a similar line of reasoning, Richard Posner argues that the relative specialization of particular institutions is context-dependent and usually, although not always, follows from assumptions that may not accord with the structure or reality of the legal system.\textsuperscript{43} In this sense, assumptions of specialization are not good enough to determine under which conditions there should be judicial deference to other institutions.\textsuperscript{44} So, for example, some judges are experts on particular fields (for example, Judge Breyer is a co-author of the federal sentencing guidelines, and Judge Easterbrook is an authority in the field of securities), but this does not mean that they should be allowed to interpret legal rules in less conventional ways than other judges when deciding cases.\textsuperscript{45} To do so might imply, for example, a violation of the due process rights of the litigants. It makes sense to have judges who, within particular contexts, are willing to overturn or not follow the decisions of administrative agencies, as a way to counterbalance the negative consequences of the agencies’ biased interpretations.

By showing that the shortcomings of these bodies are somehow analogous to the ones inherent in judges, the arguments of these two authors undermine Vermeule’s by lessening the comparative advantages that agencies might have with regard to courts. This, in turn, strengthens the arguments that courts can and should interpret legal rules “dynamically” by taking into account changing social conditions and the context in which particular rules are applicable. According to the setup presented above, these two positions can be presented like this:

\textbf{A.} \hspace{2cm} \textbf{B.}

\begin{tabular}{l}
Ambitious, non deferent \hspace{4.5cm} Non ambitious, deferent \\
Interpretations. \hspace{4.5cm} Interpretations. \\
\end{tabular}

In this graph, No. 5 represents Vermeule’s position, since he argues in favor of deference and textual interpretations of legal rules, while No. 6 would represent Eskridge’s and Posner’s

\textsuperscript{41} Id. Eskridge, Pg. 2058.
\textsuperscript{44} Consider, for examples, this quote: [T]hink only of the Immigration and Naturalization Service, which repeatedly in the cases that come before us display its ignorance of foreign countries” Id. Posner Pg. 964.
\textsuperscript{45} Id. Posner, Pg. 964.
positions, since they offer a more critical account of judicial deference to other government bodies and are more confident in the interpretations that courts can produce.

D. Critique and reconstruction

The main critique that I will present in my thesis is that the institutional capacities of courts, when assessed in the light of the institutional capacities of other government bodies, are not enough to determine with certainty how judges should interpret legal rules. The institutional arguments are relevant because they are necessary to avoid second-best effects; however, they can and are used to suggest different approaches to interpretation. In my thesis, I plan to show how this is analogous to the argument-counterargument structure that Karl Llewellyn pointed more that six decades ago regarding the “classical” canons of interpretation.

In spite of the bite of this critique, I do not consider it strong enough to render arbitrary the choice of any position. On the contrary, I think that it is important to make a formal choice, one that is guided by an assessment of the advantages and shortcomings that courts and agencies offer. I plan to offer in my thesis a theory of interpretation based on institutional capacities, according to which a “dynamic”, competitive role for courts is preferable to a passive, deferential role. What follows now is a brief description of such theory.

Just as theories about interpretation benefit from an institutional analysis, so too these analyses can benefit from particular theories of interpretation – a normative argument can have institutional bite as well. The account I offer here plans to combine a view of law as integrity with the institutional dynamics in which courts and agencies are constantly engaging. Since administrative agencies and courts have different institutional capacities and a different perspective of their roles, they can and usually do offer different perspectives of the same domain

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46 Regarding the new canons produced by the Chevron decision, Eskridge and Schwartz acknowledge their lack of determinacy: “Our analysis suggests that the canons are a weak constraint. First, especially since in the norm-charged cases, cross cutting canons may apply. Second, the canons themselves evolve, as new ones are created and old ones come to be ignored. Third, all canons are subject to clear statements by Congress – but the clarity required varies over time and by judge.” Id. Eskridge & Schwartz, Pg. 2631.

47 For yet another example, see Cass R. Sunstein, Beyond Marbury: The Executive’s Power to Say What the Law Is, 115 Yale. L. J. 2580 (2006).


49 The view of law as integrity that I plan to develop in my thesis is based on Ronald Dworkin’s theory of interpretation. See Dworkin, Ronald. Hard Cases. 88 Harvard Law Review 1957 (1975), and specially, Ronald Dworkin, Taking Rights Seriously, 1977. Ch. 13 Are Rights Controversial?
of law. This, in turn, implies that conditions such as bounded rationality and political biases affect how both types of institutions interpret legal rules, although in different ways. Both courts and agencies, however, have to offer the best interpretation of the same legal rules in terms of fit and justification. When an agency interprets a set of legal rules in a particular way, and a court steps in and challenges that interpretation, it has to offer an alternative account that fits and justifies better the rules of the controversy at hand. This challenge shows that both institutions are competing to determine who should maintain the regulatory power over the legal domain that concerns the dispute. As the challenge between these two competing institutions, and their interpretations, ascends through the federal system of courts, their positions become more refined, and each of them benefits from the information offered by the other. Finally, the dispute is solved either by the Supreme Court or by Congress, who, acting as a closure institution, decides which of the competing interpretations better fits and justifies the disputed domain of law.

If the continuous line represents the contested dominion of law and the dotted one the positions that are contested, then a representation of the competition between interpretations can be presented like this:

A. ________________________________________(x)________________________(y)________________________ B.

Court’s interpretation                                      Agency’s interpretation

50 Id. Eskridge & Schwartz, Pgs. 2624-2627. (Making the case for administrative agencies as competent interpreters in terms of constitutional discourse, fundamental values, republican virtues and accountability.)

51 A common argument against a judicial challenge of an agency’s interpretations is that courts lack the expertise to determine whether the agency is adequately interpreting the legal rules at hand or not. According to this argument, judges are generalists, and agencies have a comparative perspective due to their specialization. However, this argument is defused if we take into account that even generalist judges face disputes in which the evidence laid before them is highly technical; it is expected of them, and they usually do, that they understand such evidence. In the case of federal judges, who are more experienced than others, this is even more the case, since their years of service (and the staff that helps them) have given them enough experience to decide the cases that they are called to solve regularly.

52 I take my project to be consistent with the claims of contemporary authors that study empirically the patterns of judicial decisions, like Mathew Stephenson. Discussing the model created by the Linda R. Cohen and Matthew L. Spitzer, he comments: “Cohen and Spitzer advance the claim that broad patterns in deference doctrine are explicable as the Supreme Court’s deliberate transfers of decisionmaking power back and forth between the executive agencies and the lower federal courts, depending on which decisionmakers the Supreme Court finds more ideological congenial at a given point in time.” Matthew C. Stephenson, Mixed Signals: Reconsidering the Political Economy of Judicial Defe rence to Administrative Agencies, 56 Admin. L. Rev. 657, 659 (2004). That the Supreme Court alternates between courts and agencies in terms of the interpretation that it considers adequate suggests that both institutions can, and often do, compete among themselves for regulatory power. Stephenson, however, disagrees with the findings of Cohen and Spitzer. See ftnt. 26.

53 This representation of a domain of law, and the relationship between a principle that fits and justifies the legal rules contained by it, are based on the handouts provided by Prof. Sargentich during his Jurisprudence course during the 2007 fall semester.
Once closure has taken place, one of the competing views is subsumed by the other. A court’s interpretation may engulf the one presented by the agency, or vice-versa. These two possibilities can be presented like this:

A. ------------------(x)------------------------- B. or A. -------------------------------(y)------------------ B.

(y)                                                              (x)

(Court’s interpretation prevails)                           (Agency’s interpretation prevails)

But, what determines if a court should or should not step in and challenge an agency’s interpretation of a particular set of legal rules? Courts constantly hear challenges raised against these interpretations by different actors, and they step in when they feel confident enough that the arguments presented before them suggest a different, and better interpretation than the one challenged.\(^{54}\) And agencies, following the doctrine of nonacquiescence,\(^{55}\) interpret legal rules according to the purposes that best suit them, even against holdings that are contrary to their views.\(^{56}\) Both institutions risk prestige and influence when engaging in this race for defending or increasing their regulatory power. At the same time, the process through which this mutual challenge takes place allows both institutions to be particularly aware of the mistakes that the

\(^{54}\) This can easily evolve into the *Chevron* rule. This rule is very important for my thesis because it is highly cited in many of the literature that I plan to review, and also because it articulates in which situation should courts defer to administrative agencies (step 1), in which can courts override an agency’s interpretation, (step 2) and in which *Chevron* is not applicable because Congress did not delegate authority to enact rules (step zero). See Thomas W. Merril & Kristin E. Hickman, *Chevron’s Domain*, 89 Geo. L. J. 833 (2001).

\(^{55}\) The doctrine of nonaquiescence can be described “(…) the selective refusal to conduct their internal proceedings consistently with adverse rulings of the courts of appeals”. Samuel Estreicher & Richard L. Revesz, *Nonaquiescence by Federal Administrative Agencies*, 98 Yale L. J, 679, 681 (1989). Although this doctrine has lost some of the prominence it had during the decade of 1980, it attempts to articulate the conditions in which an agency can fight back an adverse ruling, by, for example, denying the benefits that were awarded in one case to actors that are in identical position in similar cases. (See *infra* Lopez v. Heckler, and Stieberger v. Heckler.) Some courts consider that nonaquiescence serves as a way to produce a closure in the debate by the Supreme Court. See for example, *infra*, Holland v. National Mining Association.

other might make given the effect of bounded rationality and political biases. A judicial challenge of an agency’s interpretation that gives disproportionate weight to some decisions and shrinks others because of the judges’ bounded rationality or because of their biases is bound to be discarded. An interpretation that is tailored to the needs of influential groups and that creates unnecessary burdens to poorly represented groups is viewed with suspicion and will surely be challenged. By the time that the dispute reaches a conclusion, the arguments that both courts and agencies present have to take into consideration each others’ position, and one could expect that the winning interpretation is that which presents a more coherent account of the disputed legal domain.

IV. Contributions to legal scholarship

The contributions of my thesis to legal scholarship will be mainly three. The first is to document the emergence and reemergence of the arguments regarding the institutional competence of judges as interpreters with regard to other governmental institutions. Although the emergence and reemergence of arguments regarding judicial decision-making has been researched in the past, there is no contemporary study that I know of that places judicial decision-making in an institutional context throughout the history of American jurisprudence. Furthermore, an account of these arguments that does not trace the emergence of the concept of bounded rationality, its application to judges as decisionmakers, and its connections with political biases, would remain incomplete. The first part of my thesis, which will provide an historical background of the role of judges as boundedly rational and biased interpreters within an institutional context, aims to fill that gap.

The normative claims of the IT approach that stem from or are related to empirical analyses of judicial behavior need to be assessed as well. They represent a valuable contribution of the IT approach to the scholarship on legal interpretation because they incorporate in their analyses the importance of bounded rationality and political biases in interpretation. However, the analyses of institutional capacities are not determinate enough to suggest, without involving an abuse of deduction, a particular interpretive approach that corresponds to a particular role for courts within the legal system. The fact that analyses of institutional capacities are indeterminate

suggests that at least two theories of interpretation can stem from them. Since there is no study that develops this critical claim that I know of, the second and third parts of my thesis will contribute to legal scholarship precisely by filling this gap.

As mentioned before, the fact that there is indeterminacy regarding institutional approaches to jurisprudence should not suggest that any choice is arbitrary. The fourth part of my thesis will contribute to legal scholarship by presenting an institutional theory of interpretation that departs from institutional analyses and incorporates some elements of the theories about interpretation that are part of the IT approach. I take this contribution to be a significant one, since it represents an effort to combine institutional analyses with traditional jurisprudence in a way that is satisfactory to both accounts.

Regarding the comparative scope of these contributions, it is important to take into account that the IT approach is currently being used to study how judges make decisions in other legal systems.\textsuperscript{58} I expect that my thesis will be useful to determine the strengths and weaknesses in those explanations as well, given that the methodology and normative claims that stem from them are borrowed from the ones developed in the American context. Furthermore, I hope that my work provides a background that allows future researchers on these topics to assess the comparative viability of the IT approach given the contextual analysis that it incorporates.\textsuperscript{59}

Bibliography

Articles

\textsuperscript{58} See, for example, Gretchen Helmeke The Logic of Strategic Defection: Court-Executive Relations in Argentina Under Dictatorship and Democracy, 96 Am. Pol. Sc. Rev. 291 (2002)


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