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Constitutional Interpretation and Institutional Perspectives: A Deliberative Proposal

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I. Introduction

This article argues for perspectives from which legal interpretation in general, and constitutional interpretation in particular, should be theorised and institutionalised. It re-evaluates the centrality the judiciary has with respect to these issues and, in matters of constitutional interpretation, it advocates for an alternative based on deliberative democracy. It may be said that no institutional consequences are entailed by the concept of legal interpretation. This claim needs scholarly scrutiny, for several legal scholars choose the judges' perspective as the viewpoint from which they reflect about interpretation. Instead, I will argue that the institutional paradigm from which interpretation in law should be theorised ought to vary in accordance with criteria external to the idea of interpretation itself, namely, the nature and normative strength of legal and constitutional sources and the capacity of the interpreter to include and consider every possible affected person when interpretations are authoritatively imposed on individuals.[1]

The application of these criteria places the discussion in the domain of democratic theory. Agents holding the final word in constitutional interpretation must then be inclusive, must keep their activity within the limits of an interpretive practice, and their procedures must be sensitive to the societal nature of the context within which they interpret. An analysis of contemporary democratic theories shows that those conditions are better met in a deliberative democracy. I proceed as follows. Section II discusses Dworkin as the exemplar of someone who methodologically adopts the viewpoint of a judge as the internal perspective from which the interpretive practice of law should be theorised. His is not the only account adopting this viewpoint, but it is the most sophisticated one

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1. Two caveats about the focus of this article are in order. First, I will not address problems unrelated to the relationships between the notion of interpretation, institutions and democracy when that meaning has effects over the whole society. For instance, I do not address here the likely objection that giving the final word in constitutional interpretation to the same agents who should be limited by the constitution raises a rule of law problem. This is a legitimate objection, but this is not the place to tackle it. Second, it is also necessary to reflect on the specific institutional mechanisms that would make my argument empirically feasible. This essay, however, is centred on theoretical consideration and does not offer concrete institutional proposals. This endeavour deserves separate examination.

justifying such adoption. I do this to describe the sort of position I argue against. The remainder of the article builds alternative institutional perspectives for legal and constitutional interpretation.

Section III surveys different ways in which scholars use the notion of interpretation in law and concludes that nothing at this level of analysis entails a necessary institutional viewpoint from which one may theorise legal interpretation. Sections IV and V claim that the choice for institutional paradigms from which interpretation in law can be theorised must vary according to criteria that operate heuristically: the hierarchy of the source of law being interpreted, and the number of individuals potentially affected by the interpretive standards being applied in the adoption of a decision.

By relying on Marmor's notion of *conversational context*, section IV argues that the combination of the aforementioned standards increasingly justifies a judicial perspective when the interpreted sources carry less normative strength and/or when decisions affect a limited number of individuals. The choice for institutional paradigms for constitutional interpretation is, then, a matter that must be dealt with by engaging with democratic theory. Section V analyses market, pluralist, agonist and deliberative democratic theories, and asks which of them squares better with the elements of interpretation at the constitutional level. To do this, I abstract three elements of constitutional interpretation derived from the preceding sections: inclusion, interpretive justification and context. Section VI concludes that interpretation in law relates to institutional considerations in a more flexible, non-binary way, than a single paradigm can account for. I conclude that deliberative democracy appears as the most suited option to theorise and institutionalise constitutional interpretation.

II. The Exemplar: Dworkin on Jurisprudence and Interpretation

Scholars often associate legal interpretation in general, and constitutional interpretation in particular, with the judiciary as the institutional instantiation of that practice. Among these scholars, Dworkin's account is the most sophisticated and serves to describe the sort of position I argue against. His approach champions a judicial perspective in legal interpretation on grounds which employ an appeal both to the nature of jurisprudence and to legal interpretation. I thus take his as the exemplar of someone making an association that is often made implicitly and explicitly.[2]

According to Dworkin, "legal practice is an exercise in interpretation not only

2. E.g., Richard Fallon Jr, "A Constructivist Coherence Theory of Constitutional Interpretation" (1987) 100:6 Harv L Rev 1189; Joel Bakan, "Constitutional Arguments: Interpretation and Legitimacy in Canadian Constitutional Thought" (1989) 27:1 Osgoode LJ 123; Robert Post, "Theories of Constitutional Interpretation" (1990) 209 Faculty Scholarship Series 13; Frederick Schauer, "Judicial Supremacy and the Modest Constitution" (2004) 92:34 Cal L Rev 1045; Victor Ferreres Comella, *The Constitution of Spain. A Contextual Analysis* (Hart, 2013) at 210. For a full treatment of this sort of accounts, see Donald Bello Hutt, "Against Judicial Supremacy in Constitutional Interpretation" (2017) 31 Revus 7.

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when lawyers interpret particular documents or statutes but generally".[3] With this he meant not only to provide scholars with tools to grasp the meaning of norms, clauses or rules but also to offer an answer to the question of what law is.[4] Dworkin developed his theory as an alternative to "semantic theories of law",[5] of which, Hart's positivism was the most prominent example.[6] They debated various themes, including: the types of standards that constitute the law,[7] whether jurisprudence is an explanatory or a normative enterprise,[8] and, the perspective from which jurisprudence is to be theorised. This article focuses on the last of these issues.

Dworkin insisted that legal theory should be undertaken from the internal perspective of a specific participant of the practice of law: the judge. The interpretive practice that law consists in, what law is, hinges upon what judges make of it. Legal interpretation is interpretation by judges.[9] So, why *judges*? Dworkin answers in this important passage:

> [N]o firm line divides jurisprudence from adjudication or any other aspect of legal practice.… Any practical legal argument, no matter how detailed and limited, assumes the kind of abstract foundation jurisprudence offers, and when rival foundations compete, a legal argument assumes one and rejects others. So any judge's opinion is itself a piece of legal philosophy, even when the philosophy is hidden and the visible argument is dominated by citation and lists of facts. Jurisprudence is the general part of adjudication, silent prologue to any decision at law.[10]

This reasoning is problematic. Dworkin avows that judges' opinions exhaust both adjudication and "any other aspect of legal practice". For this to be true, however, adjudication would have to be representative of the full array of practices and institutions that constitute the law. But this is hardly the case. Put differently, even if "[a]ny judge's opinion is itself a piece of legal philosophy" it is not equally true that legal philosophy is limited to providing grounds for the judges' opinions, let alone that it should be. The problem runs deeper, however. Law is often theorised as if scholars asked themselves whether their accounts explain and/or justify what judges do in practice and how they could influence the practice of law inside the courtroom.[11] Yet, it is not obvious that the perspective of the judge should determine the perspective of legal theory.[12]

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3. Ronald Dworkin, "Law as Interpretation" (1982) 9:1 Critical Inquiry 179 at 179; Ronald Dworkin, *Law's Empire* (Fontana, 1986) at 50, 87. See also, George C Christie, "Dworkin's Empire" (1987) 157 at 159; Joseph Raz, *Between Authority and Interpretation* (Oxford University Press, 2009) at 47-48; Nigel Simmonds, *Central Issues in Jurisprudence* (Sweet & Maxwell, 2013) at 209.

4. Andrei Marmor, *Interpretation and Legal Theory* (Clarendon Press-Oxford University Press, 1992) at 3; Scott Shapiro, "The 'Hart-Dworkin' Debate: A Short Guide for the Perplexed" in A Ripstein, ed, *Ronald Dworkin* (Cambridge University Press, 2007) 22 at 22.

5. Dworkin, *supra* note 3 (1986) at 31-44; Raz, *supra* note 3 at 47-48.

6. Dworkin, *Taking Rights Seriously* (Harvard University Press, 1978) at 22.

7. *Ibid* at 22, 44-47; Genaro Carrió, "Professor Dworkin's Views on Legal Positivism" (1979) 55:2 Ind LJ 209 at 235.

8. Simmonds, *supra* note 3 at 210.

9. Michael Mandel, "Dworkin, Hart, and the Problem of Theoretical Perspective" (1979) 14:1 JL & Soc'y 57 at 61; Dworkin, *supra* note 3 (1986) at 14-15, 64; Avner Levin, "The Participant Perspective" (2002) 21 Law & Phil 567 at 569.

10. Dworkin, *supra* note 3 (1986) at 90.

11. Jan Wróbleski, "Legal Language and Legal Interpretation" (1985) 4:2 Law & Phil 239 at 246.

12. Marmor, *supra* note 4 at 44.

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This way of thinking about the problem is at odds with the usage legal scholars give to the concept of interpretation in law. That usage does not lend support to these Dworkinian stances. The following sections provide grounds for criticising these views and propose an alternative. I first survey how the notion of interpretation is used by legal scholars (III), and then provide tools for choosing institutional interpretive paradigms (IV and V).

III. Interpretation in Law: A Survey

This section examines how legal scholars conceptualise interpretation. It provides a framework for the assessment of an association between interpretation and some institutional perspective, such as the one exemplified by Dworkin. An overview of the literature shows two things. First, legal scholars generally define interpretation as the imposition of meaning on an object.[13] The definition is, in turn, ambiguous between two extremes: at one pole interpretation is similar to the notion of understanding or explaining. At the other, it is close to creation or invention. Whether someone is interpreting and/or creating or explaining is determined by a structure of constraints,[14] such as literal meaning of the text, the author's intention, the genre to which the object belongs, its purpose, among others.[15] Second, no depiction of what interpretation is carries with it an institutional commitment of any sort.

Most scholars consider that the interpretive process is determined by an interplay of semantic and pragmatic factors.[16] Exceptionally, some limit interpretation to either semantics or pragmatics. Solum argues, for instance, that "interpretation is the process (or activity) that recognizes or discovers the 'linguistic meaning' or 'semantic content' of the legal text",[17] and that "[o]nce we determine that the linguistic meaning of a text is vague, interpretation has done its work".[18] For

13. Stanley Fish, "Working on the Chain Gang: Interpretation in The Law and in Literary Criticism" (1982) 9:1 Critical Inquiry 201 at 211; Marcelo Dascal & Jan Wróblewski, "Transparency and Doubt: Understanding and Interpretation in Pragmatics and in Law" (1988) 7 Law & Phil 203 at 203-04; Dworkin, *supra* note 3 (1986) at 52-53; Marmor, *supra* note 4 at 14, 32; Raz, *supra* note 4 at 250, 268; Riccardo Guastini, "A Realistic View on Law and Legal Cognition" (2015) 27 Revus 45 at 46.

14. Fish, *supra* note 13 at 211-12; Dworkin, *Freedom's Law* (Harvard University Press, 1986) at 52; Timothy Endicott, "Putting Interpretation in its Place" (1994) 13 Law & Phil 451 at 451; Jeffrey Goldsworthy, "Raz on Constitutional Interpretation" (2003) 22 Law & Phil 167 at 190; Guastini, *supra* note 13 at 47.

15. For taxonomies of these sort of mechanisms, see Philip Bobbit, *Constitutional Fate: Theory of the Constitution* (Oxford University Press, 1982); Fallon Jr, *supra* note 2; Lawrence Tribe, *American Constitutional Law* (The Foundation Press, 1988); Bakan, *supra* note 2 at 123-27; Post, *supra* note 2; András Jakab, "Judicial Reasoning in Constitutional Courts: A European Perspective" (2013) 8 German LJ 1215.

16. Fish, *supra* note 13 at 211; Dworkin, "Law as Interpretation", *supra* note 3 at 68; Wróbleski, *supra* note 11 at 243; Dascal & Wróblesky, *supra* note 13 at 210-21; Marmor, *supra* note 4 at 22, 154; Andrei Marmor, *The Language of Law* (Oxford University Press, 2014) at 146-54; Randy Barnett, "Interpretation and Construction" (2011) 34 Harv J L & Pub Pol'y 65 at 66; Guastini, *supra* note 13 at 46-47.

17. Lawrence Solum, "The Unity of Interpretation" (2010) 92 Boston L Rev 551 at 568.

18. *Ibid* at 572.

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Solum, once we introduce pragmatic elements into the process of imposition of meaning, we abandon interpretation and enter the domain of "construction", that is, "the process (or activity) that translates linguistic meaning into legal effects (or 'semantic content' into 'legal' content)".[19]

On the other hand, Richard Fallon Jr. claims that it is pragmatics what ultimately determines meaning. He argues that in the legal context, there is frequently "no single, linguistic fact of the matter concerning what statutory or constitutional provisions mean".[20] Meaning is a folk concept that "depends heavily on how ordinary people use the term and would apply it in testing cases".[21] The difference with legal meaning is that it depends on standards that are "largely internal to law".[22]

Solum, however, is mistaken in equating interpretation exclusively with semantics, but right in claiming that interpretation has a semantic dimension. Individuals give meaning to objects placed in a shared net of communicative linguistic conditions without which they would likely talk past each other. This is exemplified by cases where we listen to or read a word or expression for the first time. Our usual reaction to these situations is not to say, like Humpty Dumpty, "when I use a word … it means just what I chose it to mean". Instead, like Alice, we become puzzled by our lack of familiarity with the term and feel compelled to search for *its* meaning before we can use it in any given context.

Yet, interpretation is interpretation of something, and objects are contextually situated entities. Like works of art, literature and other textual objects, law also has a contextual component. Without context, without pragmatics, interpretation is reduced to pure semantics. But this would turn interpretation into the analysis of categories such as syntax, lexicology, etymology and the like. Such reduction gets us closer to understanding an object, but not close enough as to impose a meaning on it.

Fallon Jr. is wrong as well. He is right in insisting that words are not infused with some intrinsic meaning independent of the context in which one makes use of them. Words indeed exercise on us what Wittgenstein called *psychological compulsion*. Yet, it is a mistake to think that the meaning of a word is *something* that we have in our mind "and which is, as it were, the exact picture we want to use". No, "the fact that one speaks of the *apt word* does not *show* the existence of a Something that …".[23] Rather, we are forced by a picture, a mental image created by a word, to think that words impose a particular application on us.[24] Our tendency to think that words carry intrinsic meaning that can be discovered without the inclusion of a context in which the interpreter participates, is misguided. The contrary would imply the possibility of fully determining meaning

19. *Ibid* at 568-69.
20. Richard Fallon Jr, "The Meaning of Legal "Meaning" and Its Implications for Theories of Legal Interpretation" (2015) 82 U Chicago L Rev 1235 at 1272.
21. *Ibid* at 1255.
22. *Ibid* at 1307.
23. Ludwig Wittgenstein, *Philosophical Investigation*s, 4th ed, translated by G Anscombe, P Hacker & J Schulte (Wiley-Blackwell, 2009) at §139 [emphasis in original].
24. *Ibid* at §140.

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through ostensive definitions. This possibility, however, has been successfully challenged by Wittgenstein.[25]

I submit that interpretation is better understood as a practice of imposing meaning to an object, with flexible constraints limiting the interpreters' abilities to either explain an object or create a new one. It is both a noun and a gerund, a fuzzy and procedural entity that culminates in the decisional act of imposing a meaning on an object.[26] Disagreements regarding what interpretation is take place within the limits of this group of elements. Moreover, the interactions between its elements constitute good reasons to abandon positions placed at the poles of the scope within which interpretation exists as a distinct notion. Coming back to my main question, it is fair to say that of all the considerations explored in this section, none supports the idea that there are institutional considerations inherent to the concept of interpretation. The idea, exemplified by Dworkin, but endorsed by other scholars, that legal interpretation should be theorised as if X agent is interpreting, must be justified by reasons external to its nature. The point is rather obvious—though not trivial—that any agent can interpret.

Now, the interpretation of some objects is better justified when performed by some agents, *better* being measured by standards *external* to the idea of interpretation itself. The adoption of an institutional perspective and the concession of authority to that agent to determine what words mean in law, ought to be championed on grounds that do not appeal to the nature of interpretation as such. What is the relationship between interpretation and its possible institutional forms found in law? The next section argues that the adoption of institutional perspectives depends on the sources being interpreted and depends, also, on the effects authoritative interpretations have on individuals. I then conclude that a more visible role of non-judicial agents in legal interpretation is called for at the constitutional level.

IV. Conversational Context and Institutions

The concept or nature of interpretation does not imply necessary institutional perspectives. Selecting the judge's as *the* internal perspective is not a conceptually necessary choice to adopt.[27] There are other standpoints from which legal theorists can view the interpretation of law. I submit that the choice for institutional viewpoints for legal and constitutional interpretation hinges on the hierarchy of the source of law being interpreted, and on the number of individuals potentially affected by the interpretive standards applied in a given decision. A combination of these standards progressively justifies judicial perspectives when the sources interpreted carry less normative strength and/or when the decision affects a circumscribed number of people because they have a chance to address the court. On the other hand, to the extent that decisions carry *erga omnes* effects, judicial paradigms become progressively less justified where legal standards carry higher

25. *Ibid* at 2009, §28, §32, §85.
26. Hereinafter, I use 'decisional' in a Schmittian sense, i.e., as unconstrained by rules/norms.
27. Marmor, *supra* note 4 at 44.

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strength, most prominently, where the standard being interpreted is the constitution, and where the individuals subject to authoritative interpretations are not parties at the trial. In such cases, the most suited repositories of constitutional meaning are agents whose *raison d'être* entails incorporating, either directly or representatively, as many individuals and groups as possible.

This heuristic does not lead courts to refrain from interpreting the constitution and other sources that, like statutes, are placed at the highest positions of the hierarchy of law. It means that, to the extent that they decide cases based on higher sources of law, the effects of their decisions should be limited to the case at hand and to the parties at that trial. In support, I rely on Marmor's notion of *conversational context*. He says that constitutional terms are *super-polysemous* and "tend to designate different types of concerns, depending on context, background assumptions, the speaker's intention, etc.".[28] The main problem with constitutions, Marmor claims, is their "*essentially thin conversational context*: constitutions do not form part of an ordinary conversation between parties sharing a great deal of background knowledge".[29] However, when the conversational context is *thicker*, when interpreters do share a great deal of background knowledge, they are better positioned to impose a meaning on an object that is coherent with the language game they are part of.

Marmor's contention is that the conversational context of constitutions *is* thin.[30] This is not necessarily the case. The conversational context of constitutions *can* be thin, and *usually* is, because their indeterminacy increases the difficulty to specify about what individuals are talking. But the problem is not that thinness in their conversational context is some intrinsic property of constitutions. It is, rather, that conversations about constitutional problems are usually framed in a relatively high level of generality, abstraction, and polysemy. This does not mean that speakers cannot be on the same page, as it were, when they discuss problems which have bearings on constitutional matters. It means that, for them to be on the same page, such context must be built upon more general, abstract considerations that all parties can identify as relevant for them. Still, and with this caveat, I believe Marmor's category to be useful.

The more the context generates relevant meaningful options, the less decisional the choice for the meaning ultimately imposed. Likewise, the further we are from context—or, what is the same, the more we interpret in the abstract—the greater the number of potentially imposed meanings, the less bound, the more decisional the interpretive practice. Other scholars argue along the same lines. The argument is similar, for example, to Sunstein & Vermeule's capabilities approach. In their view, one should focus on "how should certain institutions, with their distinctive abilities and limitations, interpret certain texts".[31] Although I do not discuss the value of their pragmatism, I highlight normative considerations

28. Marmor, *supra* note 16 at 149.
29. *Ibid* at 149.
30. *Ibid*.
31. Cass Sunstein & Adrian Vermeule, "Interpretation and Institutions" (2002) John M. Olin Law & Economics Working Paper 1 at 2.

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instead. Here, my choice for an institutional paradigm is primarily conceptual and normative rather than pragmatic.[32]

One must also disagree with Posner's 'pragmatic adjudication'. His pragmatist judge sees norms in novel cases "merely as sources of information and as limited constraints on his freedom of decision".[33] Unlike him, I take legal sources as authoritative standards judges are not authorised to disregard.[34] Waldron avers that judges face hindrances in the resolution of moral issues because the institutional setting in which they discharge their duties requires them to address such issues in a particular legalistic way.[35] I am sympathetic to this position but shall not delve here into the nature of the practical reasoning judges undertake. Rather, I focus on the more external relationship between the institutional position of judges, the sources with which they resolve cases, and the audience they are likely to affect when making decisions.

My proposal is not binary, i.e., judges or no-judges. Instead, I suggest that there are reasons to shift from a judicial paradigm to a different one when sources carry higher normative strength and when the number of potentially affected is higher. To see how this works, it is useful to examine how Supreme and Constitutional Courts' reviewing procedures are often regulated. Although this varies across countries, the dynamics between legal sources, audiences, semantics, abstraction and context can be examined, generally, according to whether the system under study is a diffuse or a concentrated one. It can also be examined according to whether courts perform concrete or abstract constitutional review.

Diffuse systems are those in which constitutional challenges are made through ordinary litigation.[36] The US Supreme Court is the best-known example, but other countries follow analogous patterns.[37] In these cases, the interpretive and

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32. My use of the term *pragmatic* does not refer to the philosophical construct *pragmatism*, understood as an alternative to realism, idealism, transcendentalism, utilitarianism, positivism, etc. Here I use the term in the way Posner does when discussing what he calls "applied pragmatism". See Richard Posner, "Pragmatic Adjudication" (1996) 18:1 Cardozo L Rev 1 at 1. I express this caveat to anticipate the likely objection that pragmatism, understood in the first of these two senses, is also a principled alternative.

33. *Ibid* at 5.

34. I put aside the question of who determines which social facts count as legal sources. Judges are traditionally seen as members of what Adler calls 'recognitional community'. See Matthew Adler, "Popular Constitutionalism and the Rule of Recognition: Whose Practices Ground U.S. Law?" (2006) 100 Nw UL Rev 719 at 726. That is, a certain group of people whose patterns of thought and behaviour ground the ultimate criteria of validity of a legal system. Hence, judges' mental states and patterns of behaviour also count to determine which sources bind them and which do not. This problem needs more attention, however, than the one I can offer here.

35. Jeremy Waldron, *Law and Disagreement* (Oxford University Press, 1999); Jeremy Waldron, *The Dignity of Legislation* (Cambridge University Press, 1999); Jeremy Waldron, "Do Judges Reason Morally?" in G Huscroft, ed, *Expounding the Constitution: Essays in Constitutional Theory* (Cambridge University Press, 2011) 38.

36. Mauro Cappelletti, "Judicial Review in Comparative Perspective" (1970) 58:5 Cal L Rev 1017 at 1034; Danielle E Finck, "Judicial Review: The United States Supreme Court versus the German Constitutional Court" (1997) 20:1 BC Int'l & Comp L Rev 123 at 126; Gustavo Fernandes de Andrade, "Comparative Constitutional Law: Judicial Review" (2002) 3:3 U Pa J Const L 977.

37. Miguel Schor, "Mapping Comparative Judicial Review" (2008) 7:2 Wash U Global Stud L Rev 257 at 263. See, e.g., Article 138 Peruvian Constitution, Article 133 Mexican Constitution, Article 266 Guatemalan Constitution, Article 185 Salvadoran Constitution, Article 4 Colombian Constitution, Article 20 Chilean Constitution. The case is similar in

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reviewing process is ignited by specific individuals raising specific grievances. Context is initially determined by the facts of the case provided by the parties in their allegations and by the sources they claim that apply to the issue at hand. It is against the background of those facts and normative standards that allegations are made to convince the court that one party's story is better subsumed in the norms contained in the constitution.

Sometimes courts have competence to determine that a provision is unconstitutional in the specific context of a trial and thus ignore those sources as relevant for their decision. Consider, for example, the Chilean Constitution, whose article 20 prescribes that a person who by cause of arbitrary or illegal acts or omissions suffers privation, disturbance or threat in the legitimate exercise of a number of fundamental rights, can "resort to the respective Court of Appeals, which will immediately adopt the measures that it judges necessary to re-establish the rule of law and assure due protection to the affected [person] notwithstanding other rights which he might assert before the authority or the corresponding tribunals". The reviewing process is undertaken against the background of the facts provided by parties affected by the decision. In turn, the interpretations of both the challenged provision and the constitution are performed with the intention of solving the specific case. Context is thus built by parties who rightfully expect the court to adjudicate.

One should have no quarrel with this. The process determining to what extent those norms regulate the facts invoked by the parties, the adjudicative process, is one that courts are fit for undertaking. Moreover, the individuated nature of judicial decisions matters in at least two aspects. First, in terms of legitimacy. Decisions are more acceptable when reasons are provided for them. Second, individuation gives context to the interpretive exercise that needs to be performed by the court. Thus, the relation between interpretation and adjudication depends upon the ability of individuals to secure access to the court and make *their* claims, provide *their* evidence, and expect an *individualised* decision. There are systems, however, where the effects of the courts' decisions have *erga omnes* effects. That is, they extend beyond individual cases.[38] The context against which these courts decide is initially provided by the parties, although the decision affects non-litigants as well. As it happens, in some systems, the very possibility of access to the court hinges on the degree to which judges believe the decision will affect the public.[39]

Canada, Australia, Ireland and South Africa. See Luigi Pegoraro, *La justicia constitucional. Una perspectiva comparada*, translated by M León Alonso, M Salvador Crespo & M Zamora Crespo (Dyckinson, 2004) at 69-75.

38. For example, the following countries' constitutional courts: Bolivia (Article 58 of the Ley del Tribunal Constitucional), Colombia (Article 47 of the Ley Estatutaria de Administración de Justicia 1996, and article 21 of the Decreto 2067/1991), Ecuador (Article 22 of the Ley de control constitucional 1997), Peru (Article 204 of the Peruvian Constitution), Venezuela (Article 336 of the Venezuelan Constitution), Germany, Spain, among others. José Fernández Rodríguez, *La justicia constitucional europea ante el siglo XXI* (Tecnos, 2007) at 110-11.

39. See Humberto Nogueira, "Consideraciones sobre las sentencias de los Tribunales Constitutionales y sus efectos en América del Sur" (2004) 10:1 Ius et Praxis 113. In principle, this is why the US Supreme Court was given the faculty to grant *writs of certiorari*. See William H Taft, "Three Needed Steps of Progress" (1922) 8:1 ABA J34 at 35; Jonathan

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The problems motivating specific individuals to take their cases to the court may or may not coincide, however, with concerns affecting society as a whole. In order to justify a decision not only to their initial audience—the parties—, judges need to consider an additional set of affected agents to whom they need to give reasons for their decision. But, the sort of considerations they need to take into account to provide that sort of justification ought to include facts, claims, and arguments which are no longer the ones given by the parties. They are to be determined by the court, in abstraction.

What reasons are there to assume that the specific conversational context provided by the parties is the one that is relevant for every other individual or institution that had nothing to do with the trial in the first place? Three possible answers come to mind. First, that there is nothing, or at least little, in that conversational context that may be relevant for non-litigants that would lead them to accept a given meaning. They were not parties at the trial, and, *prima facie*, there are no reasons for accepting the decision adopted in that specific adjudicative process, unless the outcomes derived from the decision are seen to be satisfactory. However, outcome-based reasons do not justify giving courts a general competence affecting non-litigants.[40]

A second answer is that non-litigants would find reasons to accept the court's interpretive criteria in cases where they, either directly or as represented, contributed to the conversational context of the trial. Some legal systems, for instance, allow non-litigants to address the court when some issue affecting their legitimate interest is raised during the trial, for example, through interventions and submissions of briefs by *amicus curiae*.[41]

These are, however, examples of a limited extension of the capacity to be a party at a trial in circumstances where certain agents see their specific interests affected or whose opinion may be relevant for these courts' decision. These exceptions do not justify extending the effects of a decision to every member of a polity, particularly to those with no knowledge of or interest in the case. In the language of social sciences, the model lacks 'external validity'. It does not allow us to know whether "the results are generalizable to the whole population". Only a model that "maintains both internal and external validity … can speak credibly for 'we the people'".[42]

Sternberg, "Deciding Not to Decide: The Judiciary Act of 1925 and the Discretionary Court" (2008) 33:1 JSCH 1 at 9.

Litigants before the Spanish Constitutional Court also have to prove that their claims (*amparos*) may "involve a legal issue of social and economic repercussion" before the court hears the complaint (Article 49 of the Ley del Tribunal Constitucional). In practice, however, these mechanisms were introduced to reduce the courts' dockets.

40. Jeremy Waldron, "The Core of the Case Against Judicial Review" (2006) 115 Yale LJ 1346 at 1375, 1376-86.

41. For example, in the United States (US Supreme Court Rule 37), Argentine (Autoacordada 28/2004), Colombia (Article 13, Decree number 2067/1991; Constitutional Court C-513/1992), Brazil (Article 2.2., Act number 9868/1999; Article 103-A Federal Constitution and Article 3.2, Act number 11417/ 2006), South-Africa (Article 10 South-African Constitution; Rule 10 South-African Constitutional Court, Promulgated under Government Notice R1675 in Government Gazette 25726 of 31 October 2003), Canada (Subrule 61(4) of the Rules of the Supreme Court).

42. James Fishkin, "Deliberative Democracy and Constitutions" in E Frankel Paul, F Miller & J Paul, eds, *What Should Constitutions do?* (Cambridge University Press, 2011) 242 at 251.

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A third reason is that there are uncontroversial examples in other areas of law like private and administrative law, where courts' decisions affect non-litigants as well.[43] Consider private law as an example. Cases like bankruptcy or judicially declared nullity of certain contracts may have effects on non-parties. Yet, a claim to the illegitimacy of such decisions, in the same way that I object to constitutional judicial adjudication, seems out of place. Third parties who contracted with other persons who in turn contracted with bankrupted companies or individuals, may see their contracts annulled by the court. More generally, the effects of judicial decisions in private law also have societal effects. They are public instruments that can be made effective against any person, litigant or not. So, one may ask what is so special about constitutional law.

Yet, as much as the whole society may be affected by a judicial decision in private law, non-litigants are affected within the boundaries of the particular relationship put into question in court. One can trace the effects of the decision to specific relationships between individuals who directly relate to the trial at hand. In Marmor's terminology, they are part of the same conversational context. This is not the same with constitutional law.

Things are starker in models of abstract concentrated constitutional review, i.e., models where power is conferred to a single court to determine the constitutionality of a legal source. The decisions of these courts are not binding solely upon litigants: "in so far as they apply and interpret constitutional law, they generally bind all constitutional organs, courts, and authorities".[44] The archetype of this system is the Austrian Constitution of 1920, but it is also present in, for example, Germany, Italy, Cyprus, Turkey, Spain, Colombia, Chile, etc.[45]

In these procedures, courts review legal sources that allegedly conflict with the constitution. The task the court faces, however, is not of the same kind as are found with ordinary adjudicative processes, where context is provided by the parties and their facts. By contrast, in models of abstract constitutional review the courts review the constitutionality of legislation in absence of facts providing context.

One could still argue, however, that even in those cases there is context conditioning the meanings potentially imposed. The only difference, the argument would go, is in the nature of the facts considered by the court. Those facts are not specific disputes between individualised parties, but instead, concerns bearing on social questions, related, for example, to the likely consequences the decision could effect for some group, or to the impact on the stability of the legal system, or to the morality of the norm, or to its adequacy to constitutional principles, etc.

This is correct. There will be indeed a context limiting the interpretive activity. Yet, the facts and allegations delineating this contextual background are not offered by those affected by the eventual decision. It could be the case that some affected persons have the chance to make allegations, but this possibility is not of the essence of abstract *a priori* reviewing procedures. There is one possible

43. I thank Jeff King for his suggestion to address this point.
44. Finck, *supra* note 36 at 126-27.
45. *Ibid* at 125-26; Cappelletti, *supra* note 36 at 137.

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reply. Although the citizenry in its entirety does not participate in the provision of meaning of norms affecting them when interpretations are authoritatively performed by a constitutional court, it is usually their representatives who knock on the court's door. They are the ones offering allegations and interpretations of what they, *qua* representatives, think the constitution means. The court then, decides upon those competing visions, which ultimately are the visions of the citizenry.

But this is misleading. The tasks of constitutional courts are not best described and accounted for by saying that their judges participate in a representative procedure.[46] The ways in which abstract reviewing competences are framed in different countries show that what is expected from courts is the determination of constitutional meaning, not the resolution of political conflicts between factions. Their attributions are framed in terms of granting them powers to safeguard the constitution, not democracy or the representative system.[47]

The nature of the sources subject to interpretation is an additional criterion, combined with the inclusion of those affected, which generates a heuristic that helps to determine when courts are optimal constitutional interpreters for which cases. That nature results from a combination of features that include a norm's hierarchy within the legal system, and the indeterminacy of the provisions containing the norm. My suggestion is that the final authoritative interpretation of norms placed at the higher hierarchical positions of a legal system, and whose formulation is ambiguous and vague enough so as to demand a normative assessment of their collective effects, ought to be undertaken with reference to a context determined not by specific individuals; they ought to be determined by as many parties affected as possible. Because courts are generally oriented towards deciding individual cases, courts do not appear to be optimal as final constitutional interpreters.

The requirements of *interpretation* are better satisfied when final meanings are argued for by those potentially affected by a decision that hinges on that interpretive process. They are thus met when subjected to procedures of inclusive collective-decision making, that is, to democratic procedures. At the constitutional level, direct or representative democratic institutions hold better credentials to interpret authoritatively. They are oriented at gathering as many perspectives as possible in decision-making processes that affect large groups of individuals or an entire polity.

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46. This, *pace*, Robert Alexy, "Balancing, constitutional review, and representation" (2005) 3:4 Int'l J Const L 572 at 579, and Pierre Rosanvallon, *Democratic Legitimacy: Impartiality, Reflexivity, Proximity* (Princeton University Press, 2011) at 121-68. Similarly, Ely justified judicial review as a safeguard of the representative process. His view has been criticised, however, on grounds similar to the ones I here defend. Judith Koffler, "Constitutional Catarrh: Democracy and Distrust, by John Hart Ely" (1981) 1:2 Pace L Rev 403; Tribe, *supra* note 15 at 28; Roberto Gargarella, *La justicia frente al gobierno. Sobre el carácter contramayoritario del poder judicial* (Ariel, 1996) at 154-57; Richard Posner, *Law, Pragmatism and Democracy* (Harvard University Press, 2005) at 233.

47. See, e.g., the constitutions of Chile (Articles 93.1 and 93.4), France (Articles 61, paragraph 1 and 2, and 62 final paragraph), Bolivia (Articles 196 and 202.1), Colombia (Article 241.8 second paragraph).

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Picking up again on Marmor's idea, the interplay between participants at inclusive democratic institutions and the sort of information necessary to undertake interpretive processes at the constitutional level thickens the conversational context of constitutions. Because authoritative decisions at the constitutional level generate societal consequences, societal perspectives are the ones prevailing as sources of context in the determination of meaning of constitutional clauses.

These remarks move the examination towards the domains of democratic theory. We need further reflections on the sort of democratic theories that fit this heuristic. The next section offers guidance on what sort of democratic theory must underpin institutions laden with the task of interpreting constitutional provisions bearing on issues of societal scale. It claims that the imposition of meaning on polysemous, abstract, indeterminate constitutional norms is best made within a thicker conversational context; this takes place when inclusive conversations between parties give room for the exchange of arguments, information and preferences. Deliberative democratic mechanisms thus appear as ideal theoretical alternatives for the institutionalisation of authoritative constitutional interpretation.

V. Interpretation and Democratic Institutional Perspectives

This section champions deliberative democracy as a theoretical perspective from which constitutional interpretation may be instantiated in concrete institutions. Following Elster and Martí,[48] I contrast deliberative democracy with the following alternatives: market democracy, pluralist democracy and agonistic democracy.[49] One will find in these models different characteristics in the process of decision-making. Deliberative democrats advocate for the idea that collective decisions should be adopted via deliberation,[50] including every po-

48. Jon Elster, "The Market and the Forum: Three Varieties of Political Theory" in J Bohman & W Regh, eds, *Deliberative Democracy* (MIT, 1997); José Luis Martí, *La República Deliberativa* (Marcial Pons, 2006) at 66-73.

49. Of course, definitions of democracy vary. E.g., Aristotle, *The Politics*, translated by T Sinclair (Penguin, 1992) at 245, 1290b7; Albert Weale, *Democracy* (Macmillan Press, 1999) at 19, 25; Robert Dahl, *On Democracy* (Yale University Press, 2000) at 37-43; Manfred Schmidt, "Political Performance and types of democracy: Findings from comparative studies" (2002) 41 EJPR 147 at 147; David Beetham, *Democracy. A Beginner's Guide* (Oneworld, 2005) at 2. I here follow Elster, *supra* note 48 and Martí, *supra* note 48 at 66-73. For examples of typologies based on alternative criteria, see Arend Lijphart, "Typologies of Democratic Systems" 1:1 (1968) Comparative Political Studies 3; Weale, *ibid* at 24-36; David Held, *Models of Democracy* (Polity Press, 2006); Fishkin, *supra* note 42 at 245.

50. Bernard Manin, "On Legitimacy and Political Deliberation" (1987) 15:3 Political Theory 338 at 349-53, 359; David Miller, "Deliberative Democracy and Social Choice" (1992) 40:1 Political Studies 54 at 55; Joshua Cohen, "Deliberation and Democratic Legitimacy" in J Bohman & W Rehg, eds, *Deliberative Democracy* (MIT Press, 1997) 67 at 67; Joshua Cohen, "Reflections on Deliberative Democracy" in T Christiano & J Christman, eds, *Contemporary Debates in Political Philosophy* (Wiley-Blackwell, 2009) 247 at 248; Joshua Cohen, "Democracy and Liberty" in J Elster, ed, *Deliberative Democracy* (Cambridge University Press, 1998) 185 at 185; James Bohman, "Survey Article: The Coming of Age of Deliberative Democracy" (1998) 6:4 J Political Philosophy 400 at 400; Jon Elster, "Introduction" in J Elster, ed, *Deliberative Democracy* (Cambridge University Press, 1998) 1 at 5-6; Martí, *supra* note 48 at 39.

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tentially affected person.[51] Deliberation operates as a justification for and as a condition of the legitimacy of the decisions adopted.[52] They are adamant that democratic procedures should not be limited to aggregating preferences during elections. Decisions should be preceded by deliberation.[53] Market or economic models, on the other hand, promote the accretion of individuals' wills according to some interpretation of the principle of voting. I include here Schumpeter's elites competition account,[54] Downs' economic theory of democracy,[55] and accounts whose methodological bases endorse some version of social choice theory.[56] Although different in several aspects, they all value the political process instrumentally, as a device for expressing preferences,[57] and some regard democracy and the market as "special cases of the more general category of collective social choice".[58]

Pluralists share with market models, for example, a rejection of any notion of the common good,[59] and the assumption that individuals enter the political process with pre-selected interests they try to advance through dealing and compromise.[60] Dahl, the model's most prominent representative,[61] claims in a Madisonian vein,[62] that the aim of democracy is to distribute power to different centres that mutually check one another through peaceful dealing.[63] In short,

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51. Elster, *ibid* at 8.

52. Manin, *supra* note 50 at 359; Amy Gutmann & Dennis Thompson, *Democracy and Disagreement* (Belknap Press of Harvard University Press, 1996) at 4; James Bohman, *Public Deliberation. Pluralism, Complexity, and Democracy* (MIT Press, 1996) at 4; Bohman, *supra* note 50 at 401, 402; James Bohman, "Epistemic Value and Deliberative Democracy" (2009) 18:2 The Good Society 28 at 28; Cohen, *supra* note 50 (1997) at 67; Simone Chambers, "Deliberative Democratic Theory" (2003) 6 Annual Review of Political Science 307 at 308; Martí, *supra* note 48 at 22.

53. Manin, *supra* note 48 at 359; Martí, *supra* note 48 at 52.

54. Joseph Schumpeter, *Capitalism, Socialism and Democracy* (Routledge, 2003) at 269-302; Held, *supra* note 49, ch 5.

55. Anthony Downs, *An Economic Theory of Democracy* (Addison Wesley, 1997).

56. E.g., James Buchanan, "Social Choice, Democracy, and Free Markets" (1954) 62:2 J Political Economy 114; Friedrich Hayek, *The Road to Serfdom* (Routledge, 1944); William Riker, *Liberalism against Populism. A Confrontation between the Theory of Democracy and the Theory of Social Choice* (Freeman, 1982); James Buchanan & Gordon Tullock, *The Calculus of Consent. Logical Foundations of Constitutional Democracy* (Liberty Fund, 2004); Posner, *supra* note 46.

57. Buchanan, *ibid* at 117; Robert Nozick, *Anarchy, State and Utopia* (Basic Books, 1974) at 33; Elster, *supra* note 48 at 3.

58. Kenneth Arrow, *Social Choice and Individual Values* (Yale University Press, 2012) at 5. See also the literature cited by Arrow at 5-6.

59. Cass Sunstein, "Interest Groups in American Public Law" (1985) 38:1 Stan L Rev 29 at 32; Martí, *supra* note 48 at 68.

60. Sunstein, *ibid* at 32; David Truman, *The Governmental Process: Political Interests and Public Opinion* (Alfred A Knopf, 1951) at 15.

61. Martí, *supra* note 48 at 68; Held, *supra* note 49 at 170.

62. James Madison, "The Federalist X" in J Madison, A Hamilton & J Jay, *The Federalist, or the New Constitution* (Basil Blackwell, 1948) 41.

63. See Robert Dahl, *Pluralist Democracy in the United States: Conflict and Consent* (Rand McNally, 1967) at 24, 365; Robert Dahl, *Democracy and its Critics* (Yale University Press, 1989) at 221; Dahl, *supra* note 49 at 85, 113-14. Dahl's position, however, changed over the years. For example, the criteria set on Dahl 1989 *and* Dahl 2000 are more demanding in normative terms than in Dahl 1967. In favour of this assertion, Martí, *supra* note 48 at 68 and Held, *supra* note 49 at 170. Moreover, in "On Deliberative Democracy: Citizens Panels and Medicare Reform" (Summer 1997), Dahl championed a model that is highly compatible with deliberative democratic theory.

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Pluralists put premiums on association and negotiation or compromise among interest groups.

Agonists emphasise conflict and power and belittle rational dialogue.[64] They can be primarily associated with the work of Mouffe and Laclau,[65] but other authors have stressed the role that interests and power play in the political process as well.[66] They criticise liberal democracies and consider that power struggles and political conflict cannot and should not be overcome. They ought to be at front-centre of any political analysis.[67] The alternative is the abandonment of an individualism that renders impossible "the extension of the democratic revolution to an ensemble of social relations whose specificity can only be grasped by recognizing the multiplicity of the identities and subject positions that make up an individual".[68]

In my view, of the three models under consideration, deliberative democracy is the best alternative for an institutional paradigm for constitutional interpretation when that interpretation carries authoritative *erga omnes* effects. By keeping decision-making procedures within the limits of an interpretive practice, the democratic theory's constitutive features best allow for the generation of institutions with authority to impose meaning on all constitutional norms featuring collective consequences. To justify this assertion, I test to what degree the democratic theories considered meet the conditions imposed by three elements of constitutional interpretation; these are abstracted from the considerations made in the preceding sections, namely, inclusion, context, and interpretive justification. Meeting those conditions at the theoretical level serves as a justification for the design of democratic institutions in charge of providing authoritative meaning to a constitution.

Inclusion

This criterion is endorsed by most contemporary democratic theorists.[69] Yet, deliberative democracy guarantees it in a stronger fashion compared to alternative models. Deliberative scholars are generally adamant that deliberative democracy is strongly inclusive.[70] In Habermas formulation, valid norms have to meet with

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64. Martí, *supra* note 48 at 65.
65. *Ibid* at 71.
66. E.g., Ian Shapiro, "Enough of Deliberation: Politics is about Interests and Power" in S Macedo, ed, *Deliberative Politics. Essays on Democracy and Disagreement* (Oxford University Press, 1999) 28, and Michael Walzer, "Deliberation and What Else?" in S Macedo, ed, *Deliberative Politics. Essays on Democracy and Disagreement* (Oxford University Press, 1999) 58.
67. Chantal Mouffe, *The Democratic Paradox* (Verso, 1993) at 2; Martí, *supra* note 48 at 71.
68. Mouffe, *ibid* at 100.
69. With few exceptions. E.g., Friedrich Hayek, *New Studies in Philosophy, Politics, Economics, and the History of Ideas* (Routledge, 1978) at 160-61 and Philippe Van Parijs, "The Disenfranchisement of the Elderly, and Other Attempts to Secure Intergenerational Justice" (1998) 27:4 Philosophy and Public Affairs 292.
70. Manin, *supra* note 50 at 352; Cohen, *supra* note 50, "Deliberation and Democratic Legitimacy" at 74; Bohman, "Public Deliberation. Pluralism…", *supra* note 52 at 7, 9; Bohman, *supra* note 50 at 400, 408-10; Carlos S Nino, *The Constitution of Deliberative Democracy* (Yale University Press, 1996) at 144, 180-86; Martí, *supra* note 48 at 92-93, 211; Waldron, *Law and Disagreement*, *supra* note 35 at 105-06.

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the approval of all those potentially affected.[71] Or, as Manin puts it, a legitimate decision … is one that results from the *deliberation of all*. It is the process by which everyone's will is formed that confers it legitimacy on the outcome, rather than the sum of already formed wills".[72] Deliberativists generally consider that it is not only individuals who have to be present at the discussion, but their arguments as well;[73] the higher the number of inputs, the higher the number of arguments and reasons considered, the higher the tendency to increase the quality and/or the fairness of the decision.[74]

Some scholars, however, warn that increasing inclusion and participation may come at the cost of deliberation, and vice versa.[75] It could be objected then that two fundamental principles of the theory are irreconcilable. However, the requirements of deliberative democracy would not be satisfied in scenarios where optimal deliberation is achieved at the cost of exclusion. This does not mean that the tension between inclusion and deliberation is solved by appealing to principles. It means that part of the deliberative democracy agenda is to come up explicitly with institutional devices that ease this tension and make deliberation inclusive. Some deliberativists favour mass participation over rational dialogue.[76] Some, like Fishkin, are more agnostic about mass participation,[77] but insist that a balance can be achieved in institutional arrangements like deliberative polls.[78] Be that as it may, the point is that inclusion is not a principle to be sacrificed in favour of rational dialogue and vice versa.[79]

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71. Jürgen Habermas, *Theory of Communicative Action. Reason and the Rationalization of Society*, translated by Thomas McCarthy (Beacon Press, 1981) at 19; Jürgen Habermas, *Between Facts and Norms* (MIT Press, 1996) at 127.

72. Manin, *supra* note 50 at 352 [emphasis in original].

73. Cohen, "Deliberation and Democratic Legitimacy", *supra* note 50 at 74; Cohen, "Democracy and Liberty", *supra* note 50 at 203; Bohman, "Public Deliberation. Pluralism…", *supra* note 52 at 7, 9; Bohman, *supra* note 50 at 400, 408-10; Elster, *supra* note 50 at 8; Martí, *supra* note 48 at 42.

74. Cohen, "Democracy and Liberty", *supra* note 50 at 187; Manin, *supra* note 50 at 352-57; Gutmann & Thompson, *supra* note 52 at 43; Thomas Christiano, *The Rule of the Many. Fundamental Issues in Democratic Theory* (Westview Press, 1997) at 249-50.

75. Habermas, *Between Facts*, *supra* note 71 at 106; Bohman, *supra* note 50 at 400; Robert Goodin & John Dryzek, "Deliberative Impacts: The Macro-Political Uptake of Mini-Publics" (2006) 34:2 Politics and Society 219 at 20; Cohen, "Reflections…", *supra* note 50 at 257; John Dryzek, "Rhetoric in Democracy: A Systemic Appreciation" (2010) 38:3 Political Theory 319 at 326; John Parkinson, "Democratizing Deliberative Systems" in J Parkinson & J Mansbridge, eds, *Deliberative Systems. Deliberative Democracy at the Large Scale* (Cambridge University Press, 2012) 151 at 152; Cristina Lafont, "Deliberation, Participation, and Democratic Legitimacy: Should Deliberative Mini-publics Shape Public Policy?" (2015) 23:1 J Political Philosophy 40 at 42-43.

76. Iris Marion Young, "Justice, Inclusion, and Deliberative Democracy" in S Macedo, ed, *Deliberative Politics. Essays on Democracy and Disagreement* (Oxford University Press, 1999); Lafont, *ibid*.

77. James Fishkin, *When the People Speak* (Oxford University Press, 2009) at 98, 191.

78. *Ibid* at 96.

79. As some debates among deliberativists show. For example, Young has criticised Gutmann & Thompson for not emphasising enough the principle of inclusion. See *supra* note 76 at 155. Gutmann and Thompson replied that making inclusion explicit is not necessary, for they consider that their conception "already incorporates the basic values of inclusion in the principles of reciprocity, liberty and opportunity". See *supra* note 52 at 263. See also Martí, *supra* note 48 at 265.

The alternative models are more deficient in this regard. Market models would see their ideal of participation satisfied even when some individuals are not the subject of electoral offers made by competing elites.[80] Likewise, there is nothing in pluralist models indicating that their requirements would not be fulfilled if some individuals were unable to form associations and enter the political arena. I now explain why.

Economic democrats draw an analogy between democracy and the market. They see democratic decisions as resulting from a process of supply and demand, whereby elites compete for the people's votes. Citizens then obtain products that more or less satisfy their needs.[81] But, one must counter, the analogy between the political and the economic market is imperfect,[82] and at odds with inclusion. Information in political markets is usually insufficient and asymmetrical, which undermines the conditions of preference formation the model promotes. As a result, supply may end up altering the demand. Some demands are likely to go unsatisfied, excluding the interests of those who are not represented by elites,[83] because politicians lack the incentive to advocate for causes that will not give them votes.

Pluralist models are also at odds with full inclusion. The stress they put on competition and compromise between groups that pursue the interest of their members can lead to passive exclusion.[84] Pluralists see as natural and desirable that individuals associate to pursue the preferences they share. This extension of methodological individualism to the group level could increase the scope of potentially excluded individuals.[85] It fosters the inclusion of those with social capital, the ability, the power, and the money to form associations or to join them, if, and only if, those associations pursue their members' self-interest. Those lacking capital, abilities and so forth, will find it harder to form their positions, find others with whom they may associate, and have enough power as to enter the political field on an equal foot with the rest of their fellow citizens.

Interpretive justification

Agents must keep the imposition of meaning within the boundaries of an interpretive practice. Participants and institutional designs should strive to guarantee that what individuals do is to interpret, not merely explain or describe the object, nor create a new one. The conceptual apparatus of deliberative democracy is compatible with those conditions. Deliberative democracy is about formation,[86]

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80. Young, *supra* note 76 at 155.
81. Manin, *supra* note 50 at 358; Schumpeter, *supra* note 54 at 269; Richard Posner, "Smooth Sailing. Democracy doesn't need Deliberation Day" (January-February 2004) Legal Affairs; Fishkin, *supra* note 42 at 246.
82. See Félix Ovejero Lucas, *La libertad inhóspita. Modelos humanos y democracia liberal* (Paidós, 2002) at 165, and Buchanan's criticism of Arrow in *supra* note 56 at 121.
83. Ovejero Lucas, *ibid* at 167-70; Martí, *supra* note 48 at 67-68.
84. Young, *supra* note 76 at 155; Amartya Sen, S*ocial Exclusion: Concept, Application, and Scrutiny* (Asian Development Bank, 2000) at 15.
85. Martí, *supra* note 48 at 69.
86. Cohen, "Deliberation and Democratic Legitimacy", *supra* note 50 at 76-77, 78; Parkinson, *supra* note 75 at 159.

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expression,[87] justification,[88] and transformation of preferences.[89] Individuals will be subject to public scrutiny when they engage in deliberative procedures of interpretation; their preferences become political and defeatable by the force of better arguments. This fact compels individuals to offer good, bad, better, worse, self-interested, unselfish interpretations, but interpretations nonetheless.

To make this feasible, agendas can be set to include what could be called 'interpretive moments'. That is, spaces where participants are asked to justify why their preferences represent a better interpretation of a given legal or constitutional provision.[90] Consider, for example, deliberative polling. All deliberative polls start with a standard public opinion survey. Organisers reach out to a random sample of the population either through face-to-face interviews or through random-dialling. Participants are then asked closed-ended questions. At the end of the interview, they are invited to spend a weekend of face-to-face discussions".[91]

There is no reason why these procedures could not be arranged as to make the discussion about what legal and/or constitutional standards mean, instead of, or together with, evaluating policy proposals or any other issue. Surveys and discussions can be about the meaning of a constitution and some of its provisions. Moreover, organisers and participants usually rely on briefing documents, informing participants about the procedure and about the discussions they are about to engage in. These materials could include summary views of different alternative interpretations selected beforehand by the organisers. Like in ordinary deliberative polls, participants could be guided by trained moderators, who facilitate the discussion and encourage members to discuss alternative interpretations of a constitutional provision. Moderators themselves should have the skills to establish boundaries determining when a given question is an interpretive question.[92]

Self-interested or insincere interpretations are not discarded or even unwanted. Individuals can advance their own agendas. Yet, because they have to justify their preferences to others, they will have to disguise them as interpretations that happen to coincide with the results they seek.[93] They are thus subject to the same imperfection constraints individuals have in any deliberative procedure. If justifications of the interpretation of any normative standard correspond perfectly to the speaker's interest, "the disguise may be too transparent to work".[94] Self-interested or prejudiced speakers have an incentive to defend interpretations of constitutional norms that somewhat differ from their ideal point if they do not want to be seen as opportunistic. They have actual incentives to respect the

87. Martí, *supra* note 48 at 46.
88. Jürgen Habermas, *Legitimation Crisis*, translated by Thomas McCarthy (Polity Press, 1988) at 108; Habermas, *Between Facts and Norms*, *supra* note 71 at 107-08; Cohen, "Reflections on …", *supra* note 48 at 249.
89. Elster, *supra* note 48 at 4, 6; Susan Stokes, "Pathologies of Deliberation" in J Elster, ed, *Deliberative Democracy* (Cambridge University Press, 1998) 123 at 126; Cohen, "Democracy and Liberty", *supra* note 50 at 199; Martí, *supra* note 48 at 50, 90-92.
90. Cohen, "Deliberation and Democratic Legitimacy", *supra* note 50 at 73.
91. Bruce Ackerman & James Fishkin, *Deliberation Day* (Yale University Press, 2004) at 47.
92. *Ibid* at 48.
93. Cohen, "Deliberation and Democratic Legitimacy", *supra* note 50 at 77.
94. Jon Elster, "Deliberation and Constitution Making" in J Elster, ed, *Deliberative Democracy* (Cambridge University Press, 1998) at 102-04.

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interpretive boundaries of the text or practice under discussion. Deliberativists refer to this aspect of the deliberative procedure as impartiality, and they see it as essential to any definition of deliberative democracy.[95]

Like any democratic decision-making process, deliberative procedures are oriented to facilitate the transit from a set of individual preferences into a function of the collective preferences reflected in the decision. But, unlike its alternative models, deliberative democratic procedures distinguish between self-interested and impartial preferences. Note that this does not mean that only altruistic, common-good oriented inputs are the ones entering the process. Rather, it means that "[i]n order to increase its support, each party has an interest in showing that its point of view is more general than the others".[96]

These requirements are hardly met in Market, Pluralist and Agonistic democratic accounts. In the first two models, where aggregation and negotiation are the guiding principles, and voting and compromise the mechanisms by which preferences are expressed, no actual conversation between parties take place. Conversations *could* take place as a matter of fact, but those exchanges would not be better accounted for as resulting from the features of market and pluralist theories. Under market and pluralist conditions, it is virtually impossible to know what are the concerns individuals would have when voting for a given interpretation of a norm. Because preferences are exogenous to the decision making process,[97] there is little chance for interpreters to know whether the concerns they have in mind when voting for a certain interpretation are the same other individuals have when casting their votes.

In turn the Agonists' claim that it is conflict that drives the political process leaves, little room for discussions about something other than individuals and groups' struggle for recognition. The importance given to those power struggles leaves little room for the sort of impartiality that is necessary to argue for some interpretation rather than for some self-interested position. The problem is that these sorts of theories fall prey to objections that are analogous to the ones affecting the liberal and deliberative theories they themselves attack. The idea that politics is reduced to conflict is not that different from saying that politics is merely about self-interest. Assuming that it is impossible to reach sincere agreements entails that the very notion of political legitimacy makes little sense. If there is no possibility to discuss the correction or legitimacy of a proposal, then any chance of building up a rational normative political model disappears.[98]

Context

The context against which the interpretative process unfolds must be congruent with the societal effects produced by the meaning imposed on collective norms. Picking up again on Marmor's notion, we could say that the more contextual

95. Elster, *supra* note 50 at 8.
96. Manin, *supra* note 50 at 358; Bohman, *supra* note 50 at 405.
97. Nozick, *supra* note 57 at 325; Held, *supra* note 49 at 213; Martí, *supra* note 48 at 65-66.
98. Martí, *ibid* at 75.

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elements are inserted into discussion, the higher the possibilities of providing actual interpretations of a given norm. In individual cases, the context shall be determined by the specific allegations made by the individual party. The meaning imposed on the norm shall then be congruent with that specific case. Cases affecting society as a whole, on the other hand, will require the introduction of contextual elements of a societal scale. In a nutshell, thick conversational contexts emerge from a shared net of assumptions that are thematised, ventilated and argued for. They result from asking *what is the meaning of this norm in this particular case for this particular people?*

The thickening of constitutional interpretation depends on the possibilities of building common contexts among those affected by the result, so that discussants are on the same page, as it were. But the construction of that collective context requires the sort of publicity that allow individuals to reason why and how their arguments and preferences relate to the arguments and preferences of others who in turn should enjoy the same opportunities. For this exchange to take place, individuals must commit to a principle of publicity without which deliberative democracy is pointless.[99] A commitment to decide on collective matters affecting not only specific individuals but society as a whole entails a commitment to make those discussions public. Otherwise, there is little guarantee that individuals will think about collective problems or will think about how a decision would affect not only themselves, but other as well. This constitutes a reason for preferring institutions asking individuals to justify their claims and preferences, that is, deliberative democratic institutions.

Pure aggregation is antithetical with authoritative interpretation at the constitutional level when the meaning imposed affects society as a whole. Although helpful to explain market behaviour, the methodological individualism underpinning market and pluralist theories does not provide the conditions for the emergence of the societal sort of context needed to interpret constitutional norms. The individual perspective of the litigant raising grievances does not suffice to justify a decision with *erga omnes* effects. Societal perspectives become necessary to form the appropriate context for the interpretive process. These are, however, the viewpoints that methodological individualism rejects,[100] and deliberative democracy permits to adopt.

My point is analogous to Habermas' criticism of Rawls' recourse to the veil of ignorance in the original position. According to Habermas' interpretation, the parties in the original position are not in a position to fully comprehend the highest-order interests of their clients solely on the basis of rational egoism. Moreover, Habermas claims, impartiality of judgment cannot be guaranteed by the veil of ignorance. This is the case because the original position is not an instance where individuals are expected to abandon the perspective of a rational egoist. Other-regarding perspectives can be adopted only once the veil is lifted:

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99. Gutmann & Thompson, *supra* note 52 at 128-64; Habermas, *Between Facts and Norms*, *supra* note 71 at 183; Bohman, *supra* note 50 at 402; Martí, *ibid* at 93.

100. Christian List & Kai Spiekermann, "Methodological Individualism and Holism in Political Science: A Reconciliation" (2013) 107:4 American Political Science Rev 629 at 629.

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> At any rate, the parties are incapable of achieving, within the bounds set by their rational egoism, the reciprocal perspective taking that the citizens they represent must undertake when they orient themselves in a just manner that is equally good for all.[101]

For the same reasons, the premium pluralists put on association and competition is at odds with the portrayal of interpretation as an activity that determines the meaning of a constitution that is, ultimately, the constitution of the whole society. The problems raised by individualism are not solved by expanding the perspective from the individual to interest groups because they never have the incentives to abandon their private perspectives.

VI. Conclusions

To think about interpretation in the law, it is not necessary to limit oneself to the perspective of the judiciary. There is no necessary connection here. That is to say, when legal scholars choose an institutional paradigm, their choice cannot be justified by an argument from the nature of interpretation. If this observation is true, then legal and constitutional interpretation gives way to institutional considerations in a more flexible, non-binary way.

Relying on Marmor's notion of conversational context, the article provided a heuristic from which a choice for institutional paradigms can be made. The normative force of the different sources of a legal system, and the effects produced by the decisions adopted by courts in different reviewing procedures, *can* justify adopting the perspective of a judge; this is true when the context within which those sources are interpreted is provided and determined by those affected by the decision. On the other hand, when the conversational context in which sources are interpreted is thin, the courtroom does not appear as the most suited to impose meaning on them.

Given that constitutions are generally indeterminate, and given the supreme position of their norms, an authoritative determination of meaning ought to be left to agents capable of capturing and constructing the context that keeps this activity within the contours of an interpretive practice. The court-centric perspective runs short of this objective. One should think of interpretative practices as something that should be left to deliberative democratic institutions; when this is done, the aim will be to include every possibility affected by the meaning of constitutional norms.

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101. Jürgen Habermas, "Reconciliation Through the Public use of Reason: Remarks on John Rawls' Political Liberalism" (1995) 92:3 J Philosophy 109 at 112-13.

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