



NEW INSTITUTIONALISM, PARLIAMENTARY BEHAVIOR AND CONSTITUTIONAL INTERPRETATION

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Abstract: Parliamentary behavior is a subject that is under explored by jurists in Brazil. Commonly referred to as the object of political science, Brazilian constitutional theory was little concerned with analyzing its relationship with the constitutional interpretation performed on the daily basis of ordinary politics. Based on an interdisciplinary reading, using the exploratory method, the study intends to expose the theoretical paradigm of new institutionalism of rational choice, which appears as a central aspect of the theory of parliamentary behavior, using its contribution to evaluate the impact of institutions on legislative constitutional interpretation. It concludes, in the end, that legal studies are lacking to consider institutional implications in the interpretation of the Constitution.

Keywords: New institutionalism; Theories of Legislative Organization; Parliamentary Behavior; Legislative Constitutional Interpretation.

1 Introduction

New institutionalism is a label that contains very diverse versions. The movement, which brought a new meaning to the role of institutions in political and social life, spread to several branches of the human sciences². In common, the various currents of thought that call themselves new institutionalists present as an identity trait the institutional concern with human behavior, which at the same time influences and is influenced by the current institutional arrangement (TOSTA, 2019, p. 63).

In the Political Science, there are three clearly identifiable variants among theorists: historical new institutionalism, sociological new institutionalism and rational choice new institutionalism. Far from configuring a unified theory, the various “new institutionalisms” evolved independently – which is verified by the absence of cross-reference between the authors – and attributed to the central object of analysis – the institutions – imprecise definitions, which makes any attempt to theorize them together fail (HALL; TAYLOR, 2003, p. 193-194).

Nevertheless, although they follow interpretative lines that are quite divergent from each other, there are two points of contact between the three versions that allow their categorization under the same label: they emerge as a reaction to behaviorism and seek to unravel the influence of institutions on political and social results (SANTOS, 2006, p. 40).

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² “There are at least three areas of the humanities in which, in the last forty years, the resumption of institutional bias has taken place as an analytical premise – Economics, Sociology and Political Science” (PERES, 2008, p. 54).

These central characteristics make the study of new institutionalism the basis of any analysis of the parliamentary behavior of political agents.

In legal theory, this “institutional turn” is more recent, having Cass Sunstein and Adrian Vermeule’s article “*Interpretation and Institutions*” as a theoretical framework, written in 2002 (SUNSTEIN; VERMEULE, 2002).³ The argument of institutional capacities formulated by the authors inspired a pragmatic turn in the theory of interpretation, which absorbed the concern to consider real, non-idealized institutions, displacing the discussion on “how” to interpret for “who” should interpret (TOSTA, 2019, p. 68).

Based on these premises, the objective of this article is to address the influence of institutions on parliamentary behavior and how it affects the constitutional interpretation carried out by the legislator. In the US debate, the assessment of Congress' constitutional responsibility is permeated by institutional arguments that reveal the vices and virtues of a constitutional interpretation outside the Courts. The idea, therefore, is to bring an interdisciplinary approach that gives greater density to the study of the role of the Legislative Branch in pursuing constitutional purposes.

This work has an eminently descriptive-exploratory bias. The first part will be dedicated to a review of the different types of new institutionalism and how American political scientists developed the theory. Finally, the third part will seek to contribute to the development of a theory of legislative constitutional interpretation in the light of Political Science, considering the impact of institutional elements.

2 New institutionalism in the Political Science

There is a certain common sense in American political literature that representatives always prioritize reelection (LIMONGI, 1994, p. 4). David Mayhew (MAYHEW, 2004) owes the concept of electoral connection, according to which representatives act out of a desire to remain in power, preferring policies that directly benefit their voters, thus increasing the chances of reelection. This is the basic premise of the entire discussion that will follow; because it is practically unanimous among political scientists that reelection is the number one priority for any politician.

In this context, the thesis that the laws were simply collective decisions taken from the sum of individual preferences manifested from the possibility of maximizing the chances of reelection developed in the early 1960s among political scientists. This was the paradigm of behaviorism⁴, dominant before the advent of new institutionalism, which had its origin in studies formulated by rational choice theorists who began to question this premise.

³ Although it was not the first article to address the topic in Law, it was certainly the most influential. (TOSTA, 2019, p. 67).

⁴ Behaviorism, in turn, arose in reaction to the old institutionalism. By the way, this is the reason for the term “new institutionalism”, which emerged as a third way that mixes elements of behaviorism and elements of the old

Thus, new institutionalism emerged as a reaction to the “insufficiency of an explanation aimed exclusively at the action of individuals, in which a blank slate of the institutional context of the strictly political sphere is made.” (PERES, 2008, p. 54). Political agents act within an institutional structure that limits their possibilities for action. After all, after testing the hypothesis empirically, what would be the result of a policy chosen purely and simply from the sum of the individual preferences of each member of Congress?

One of the answers to this question that ended up leveraging the new institutionalist movement was elaborated by Kenneth Arrow, and became known as the Impossibility Theorem (ARROW, 1970). According to the author, it would be impossible to anticipate the result of the collective decision-making process exclusively through prior knowledge of individual preferences. With at least three voting individuals and three voting options, any social decision based on the majority rule would be intrinsically unstable and indeterminable *a priori*. The theory actually portrays a more sophisticated version of Condorcet paradox (ARROW, 1970, p. 93).

In the 18th century, the French mathematician Marquis de Condorcet identified the following paradox in the majority rule: if there are at least three voting agents (A, B and C), three voting options (X, Y and Z) and the individual preferences of agents do not match, it means that, in the voting by pairs, X can win against Y, Y can win against Z and Z can win against X. Thus, the choice of a policy through the application of the majority rule could lead to circular results and endless votes, which would make room for arbitrary decisions (ARROW, 1970, p. 94).

This scenario of indeterminacy applied to the political process reveals that, even if the individual preferences of each voter are well defined, the result of the collective decision will vary depending on the voting order, and it is not possible to establish a single collective decision by aggregating individual preferences. In summary, the voting cycles will define the result, opening space for manipulation of the decision by those who have the power of agenda (LIMONGI, 1994, p. 5-6). Therefore, the majority system would not lead to equilibrium, with no clearly identifiable collective preference.

It is observed, therefore, that the process of resuming the institutional bias in political analysis was strongly influenced by the behaviorism studied by the economy, “based on basic premises about the motivations and preferences of individuals and their rational mechanism – calculating and selfish – of making decision-making in the face of exclusionary alternatives” (PERES, 2008, p. 62).⁵ The economic analysis of human behavior ended up being partly

institutionalism (PERES, 2008, p. 54).

⁵ “In this regard, it is important to note that some economists - such as Schumpeter (1942), Arrow (1951), Downs (1957) and Buchanan and Tullock (1962) – have contributed enormously to this attraction, to the extent that, since the 1940s, they had already been using economic models of thought in the analysis of political behavior, and, thus, ended up being the starting point for the new institutional “revolution” in politics.” (PERES, 2008, p. 62).

absorbed by critics of behaviorism, who began to refute the individualist perspective of the theory.

With the redemption of the Condorcet paradox by Arrow, Political Science began to turn its eyes to collective decision-making based on the aggregation of personal preferences, showing the flaws in a purely selfish analysis of the performance of representatives. After all, the Impossibility Theorem points to the lack of an institutional arrangement based on the majority principle capable of providing a single solution and promoting stability (SANTOS, 2006, p. 32).

The second thesis that marked the origin of the new institutionalist theory was Richard McKelvey's Chaos Theorem (MCKELVEY, 1976). The second thesis that marked the origin of the new institutionalist theory was Richard McKelvey's Chaos Theorem (MCKELVEY, 1976). According to the author, if the sum of individual preferences can generate potentially cyclical results when confronted by majority voting, the agent who has the power of agenda can lead the process of choosing any result, simply ordering the alternatives intelligently.⁶ Based on this premise, the arrangement of voting cycles has a decisive influence on the outcome of the collective decision-making process.

Thus, depending on the voting order, any result is possible, even the option that occupies the last place in everyone's preferences can be considered a winner, because with an agent who exercises total control over the agenda, in theory this individual can manipulate it to build the scenario that brings him/her the greatest advantages (MCKELVEY, 1976, p. 480). McKelvey highlighted the problem of the intransitivity of social decisions, where whoever controls the agenda can guarantee any result within the alternatives that he/she himself/herself establishes, regardless of the voters' initial individual preferences.⁷

These two theoretical formulations had a significant influence on the study of decision-making within the US Congress. The conclusion that can be drawn from the theorems is that decisions made by a majority are intrinsically unstable. Therefore, these authors question the behavioral perspective of Political Science that, until then, focused on the individual preferences of each political agent. If taken seriously, the behaviorist view would lead to harmful instability for democratic institutions.

However, despite the disheartening scenario described by Arrow and McKelvey, in practice contemporary democracies are governed by the rule of the majority and, even so, have a high degree of stability. The famous Theorems of Impossibility and Chaos are not proven

⁶ "It follows from the above consideration that if any one voter, say the 'Chairman', has complete control over the agenda (in the sense that he can choose, at each stage of the voting, any proposal to be considered next) that he can construct an agenda which will arrive at any point in space, in particular at his ideal point." (MCKELVEY, 1976, p. 481).

⁷ "McKelvey's conclusion is that there may be no relationship between individual preferences and the end result. An astute agenda maker will be able to get any result, regardless of the initial configuration of preferences" (LIMONGI, 1994, p. 8).

empirically. Therefore, the perfect environment for the rise of new institutionalism is consolidated, which bets on institutions as a response to stability. Institutions not only induce balance, but also play a fundamental role in the substantive political outcome (LIMONGI, 1994, p. 9).

At this point, a brief aside is necessary. However, the centrality of institutions to the new institutionalist theory, there is no univocal definition of what is meant by an institution. Each strand defines it in its own way, but in a generic way, it is possible to consider such procedures, laws, norms and organizational structures that condition behavior, providing a rational explanation for the results taken collectively (LIMONGI, 1994, p. 9).

The three schools of new institutionalist theory are, in fact, three methods of analysis with different focuses on the impact of institutions on political behavior, ranging from their historical origin to the concept of institution and the weight attributed to personal preferences and individual rationality. The objective, however, is common to all of them: to seek to unveil the real extent of the influence of institutions in the collective decision-making by representatives.

Starting with historical new institutionalism, its authors consider that the organizational structure of social or economic institutions was the main determinant of the behavior of political actors and of the results derived from it, giving special emphasis to the asymmetries of power related to the development of institutions. Theorists of the historical strand place institutions “in a causal chain that leaves room for other factors, in particular socioeconomic developments and the spread of ideas” (HALL; TAYLOR, 2003, p. 201), and define the term institution as norms and conventions related to the organization of the community or the economy.

In turn, sociological new institutionalism has values and habits as central categories, with the individual's performance being conditioned by the cultural and social environment and by the institutions themselves, these being conceived as cultural benchmarks.⁸ According to Hall and Taylor, the institutional forms and procedures of modern organizations should be considered as cultural practices, which “would be incorporated into organizations, not necessarily because they increase their abstract effectiveness (in terms of ends and means), but as a result of the same type of transmission process that gives rise to cultural practices in general” (HALL; TAYLOR, 2003, p. 208).

Finally, the new institutionalism of rational choice deserves closer analysis. The two previous strands, of a markedly deterministic character, did not attract many followers, although they contributed to the development of a more realistic and contextual approach. Today, the new institutionalist theory has consolidated its hegemony in the Political Science (PERES, 2008, p. 53), with relative consensus regarding the adoption of the rational choice paradigm (SANTOS, 2006, p. 25). The theory of rational choice emerged in the second post-war period to account for the complexity of social phenomena, transposing the reasoning of the economic approach to the Political Science.

Thus, the rational choice is characterized by the importation of the “new economy of the organization” for the Political Science, whose main axis is the analysis of transaction costs for the functioning of the institutions (HALL; TAYLOR, 2003, p. 203). Therefore, it starts from the concept of *homo economicus* to try to offer an answer to the fundamentals of human actions in the face of complex social relations (SANTOS, 2006, p. 24). Not by chance, the theory presents public choice and social choice as main derivations (SANTOS, 2006, p. 26).

In general, new institutionalism theorists of rational choice emphasize the system of committees and the political leaders endowed with authority within Congress, seeking to face the way in which the internal rules of the US Legislative Branch shape the behavior of their agents. They start from the assumption that representatives share some preferences and are guided by utilitarian reasoning to maximize their own interests, acting usually in a strategic and calculated way (SANTOS, 2006, p. 204-205).

⁸ The problem with sociological new institutionalism is the difficulty of distinguishing between institution and culture when considering that institutions are social constructions that regulate the interactions of individuals. (LEONE, 2015, p. 94).

In this context, Peres (2008) precise analysis is interesting:

In the area of Political Science – almost entirely adept at the “institutionalism of rational choice” – what prevails is the conception that institutions interact with the preferences already given, causing a process of “transition” of these in relation to objects, of according to a “utilities scale”. That is, institutions, as forms of restricting decisions in favor of what would occupy the first place in a given scale of preferences, would cause this choice to shift to other objects that would occupy either the second, or the third, or the fourth place of their preferences, and so on. In this case, then, neither the socialization process nor the formation of preferences are relevant, as the problem is exclusively limited to the decision-making process in a context where preferences are already structured and which are restricted by a certain type of institutional arrangement (PERES, 2008, p. 64).

The deepening of studies within the theory of rational choice led to the emergence of three versions for the explanation of stability within the Parliament, which are the so-called theories of legislative organization: distributive, informational and partisan (SANTOS, 2006, p. 48). Theories maintain that the functioning of the US Congress is better understood in the light of the idea of transaction costs. They analyze, each in its own way, how institutions induce balance.⁹ The next section will be dedicated to them.

3 Theories of legislative organization

Theories of legislative organization are based on the assumption that politics within Congress reflect the gains arising from cooperation between representatives, orchestrated with the aim of amplifying their individual preferences. Each of the theories analyzes from a different perspective how institutions promote the stability of the political system in an environment of conflicting interests, sharing the same premise that the priority of all political agents is reelection.

Mostly, new institutionalists are divided between distributive theory and partisan theory, with a certain predominance of the distributive theory. In fact, the distributive version was hegemonic until it began to be questioned by authors who doubted the relevance of a clientelistic theory that emphasizes the role of committees. From the discussion, informational and party currents emerged, which shift the focus to the role of information and political parties in defining collective action (LIMONGI, 1994, p. 3).

Resistant to criticism, distributive theory retains its prevalence among rational choice theorists. In this model, Congress is seen as an exchange market where preferences produce balance (SANTOS, 2006, p. 50). The theory sees parliamentary committees as favorable environments for exchange gains, where political decisions are taken in a plural context, formed

⁹ “In general, the positive theories of legislative organization strive to explain how presumably individualistic and clientelistic individuals can establish contracts (logrolls) that are sufficiently stable and capable of overcoming the heterogeneity of their preferences towards achieving a common good or collective action” (NASCIMENTO, 2010, p. 366).

by heterogeneous preferences, which makes bargaining feasible (SHEPSLE; WEINGAST, 1994, p. 152). The committees bring representatives together and highlight conflicts of interest, which require reciprocal concessions to be satisfied on the largest scale possible.

In this scenario, the exchange appears as a necessary result of the heterogeneity of preferences. Given the majority rule, if all political agents are uncompromising in their preferences, none of them will achieve the desired result, because they are incompatible with each other. However, if, on the contrary, political agents follow a cooperative logic, making exchanges, everyone can win to some extent (NASCIMENTO, 2010, p. 370). The environment, therefore, induces the cooperation. In the words of Limongi (1994),

Although immersed in a conflictive situation, struggling to appropriate scarce resources, representatives can win if they cooperate, because the policies that interest the representative of district A will only be approved if they have the support of the representative of district B. In fact, it can be said that there is a voting market inside the Congress. Policies are approved through an exchange of votes: I vote for the policy that interests you as long as you vote for the policy that interests me. This exchange of votes is known in the literature as a logroll (LIMONGI, 1994, p. 12).

Thus, it is assumed that it is the electoral advantages that dictate the behavior of representatives, who act guided by the objective of meeting the demands of their electorate, with their eyes on the upcoming elections. In this system, committees play a fundamental role in allowing exchange gains, because they enjoy significant powers in defining political results. Committees are, therefore, the foundation of legislative organization in Congress (SANTOS, 2006, p. 54).

In this context, the distributive model emphasizes the mode of distribution of resources in view of the infinity of individual preferences and finds in the committee system the key to understand this dynamic, as they make the bargain convenient and guarantee the observance of the agreements (NASCIMENTO, 2009, p. 375). In short, the theory finds explanations about the functioning of the National Congress in the centralizing character of the committees, recognizing that the concentration of powers it represents is decisive in decision-making.

In common with distributive theory, committees recognize informational theory as the epicenter of legislative organization in Congress. However, the informational strand maintains that Congress promotes efforts to ensure that decisions are made after collecting as much information as possible, where it is not the preferences but the structures that induce balance (SANTOS, 2006, p. 50). The idea is that representatives organize themselves to reduce the uncertainty that arises in the face of imperfect information, and not to obtain exchange gains.

According to the theory, the role of committees is to produce and disseminate information, with the aim of reducing informational asymmetries and, consequently, uncertainties about the possible results of a given policy (SANTOS, 2006, p. 58). The core of the theory is that political agents act to reduce the information deficit to bring greater

predictability as to the result. Institutions are seen as instruments to promote information. The better informed the political agent, the lower the risks arising from uncertainty.

Therefore, the institutional arrangement can offer incentives for committees to specialize and acquire more powers through the concentration of information (NASCIMENTO, 2010, p. 380). In this theory, the debate has an instrumental value in disseminating knowledge. As Limongi states, “representatives have uncertainties and change their beliefs based on the exchange of information. The greater the amount of information made public, through debate and deliberation, the better the quality of the decision” (LIMONGI, 1994, p. 37).

In turn, partisan theory promotes a radical shift in perspective. In this model, political parties are the main character of the congressional organization, as they are the ones who solve the problems of transindividual action. In other words, the partisan version focuses on the role of parties in solving collective dilemmas, which are situations in which “the rational behavior of a part of individuals can lead to unanimously non-preferred results” (SANTOS, 2006, p. 63) through the concentration of powers in a specific authority. Within parties, these authorities are party leaders.

According to this strand, the most influential political actors are those who represent the majority party, who control the legislative process and the committees. Thus, the influence of the committees only occurs when they embody party interests. In this system, the secret to understanding parliamentary behavior is in the parties, which form a kind of “legislative cartel” (NASCIMENTO, 2010, p. 385), using institutional tools to unite representatives around common preferences.

It is noted, therefore, that positive theories of legislative organization attempt to identify the origin of the stability of the political system in the US Congress. Regardless of the strand adopted, the objective is common to all of them: to elucidate the question of how individuals with selfish motivations and conflicting claims reach consensus and prevent the transience of collective decisions, generating balance. Whether focusing on committees, information or parties, each theory seeks to find an institutional explanation for parliamentary behavior.

The distributive version, majority in the US context and imported by a large part of Brazilian political scientists, finds in clientelist policies the perfect electoral strategy to guarantee reelection. In search of individualized benefits, aimed at their voters, and diffuse costs, legislators find themselves in a situation of constant conflict, which can only be resolved through an agreement that generates the exchange of votes (LIMONGI, p. 1994, p. 12). Stability, therefore, comes from mutual aid, which is provided by structuring in committees.

This theoretical construction is the basis of the studies of many researchers in the US Congress. It is important to keep this information in mind when the purpose is to analyze the constitutional performance of the legislator. Especially due to the prominence that the distributive model gives to the committees and the institutional arrangement of the Congress,

the US academy offers valuable contributions to the analysis of institutional aspects capable of affecting the addressing of constitutional issues by the legislator. That is what will be treated.

4 Parliamentary behavior and constitutional interpretation

The new institutionalist theory and the rational choice paradigm are behind the most relevant academic productions on the Legislative Branch in the United States. Even when not explicitly recognized, the new institutionalism of rational choice remains as a backdrop for the political analyses of the US Congress. It is not by chance that studies on the relationship between Congress and the Constitution in that country often start from an institutional perspective, seeking to shed light on the institutional dimension of the interpretation of the Constitution by the legislator.

As it could not be otherwise, the premise of the search for reelection that underlies all positive theories of legislative organization contributes significantly to the constitutional interpretation. In the 2000s, surveys indicated that legislators tend to face constitutional discussions in the political areas closest to the concerns of their voters (PEABODY, 2005, p. 59). In this way, electoral accountability plays a decisive role in constitutional interpretation, given that voters may prefer a representative who takes constitutional considerations seriously when voting on projects (GARRET and VERMEULE, 2005, p. 246).

Currently, there is no doubt that the legislature's ability to act as a constitutional interpreter is shaped by the opinion of its voters, which directly influences the constitutional position that will be defended in Congress. For example, the electoral base of a political agent who was elected for raising a flag in favor of LGBTQI groups expects him/her to take firm positions on sexual and gender freedom. This representative is unlikely to be reelected if he/she disregards these aspects in the deliberations in which he/she participates.

Still in the 1980s, Abner Mikva and Louis Fisher had an intense debate about the institutional capacity of the Legislative Branch to carry out constitutional interpretation in a responsible and effective manner. Having professionally acted between Congress and the Judiciary, Mikva was very skeptical of this possibility and one of the arguments was that, in most cases, party leaders or political compromises that are the result of bargaining (MIKVA, 1983, p. 609) determine votes. This view, in particular, finds support in the distributive and partisan theories, which place the party's negotiation and position at the center of collective decision-making.

In response, Fisher argued that constitutional design never allowed Congress to shirk its duty to interpret the Constitution, highlighting the role of parliamentary committees in precisely the opposite direction. According to the author, in the United States, the Joint Committee was created with competence to deal specifically with matters of vital interest to Congress and the

effects of judicial decisions on its institutional prerogatives, revealing the importance of committees in assessing the constitutionality of the proposed measures (FISHER, 1985, p. 728).

The clash between the authors highlights the central position that the distributive perspective occupies in the discussion about the legislator's capacity for constitutional interpretation. Indeed, committees play a key role in deliberating on constitutional issues. In Brazil, the Constitution and Justice Committees are an example of the relevance of the concentration and specialization of functions within the Parliament. It would not be an exaggeration to say that committees are the most prominent institution in the constitutional interpretation carried out by the National Congress.

At least that is what the reading of the reports of the Constitution and Justice Committees of the House of Representatives and the Federal Senate suggests. See, for example, the opinions presented during the processing of the proposed amendment to the Constitution for Social Welfare Reform. Whether or not they agreed with the committees' constitutionality judgment, the reports adequately addressed several sensitive points in more than 50 pages of reasoning each. It is recognized that the National Congress has taken the constitutional interpretation seriously.

It could be argued that a distributive analysis of the committees charged with controlling the constitutionality of normative acts would insert the Constitution in the set of exchange currencies existing between legislators. If A intends to approve law X for the benefit of its voters and B intends to approve law Y for the benefit of its members, it would be enough for them to negotiate the votes for the constitutionality of the laws. However, there are two other institutional aspects to consider in this equation – the possibility of controlling judicial constitutionality and the need to substantiate the decision of the committee itself.

Starting with the latter, the reasoning for the committee's decision is related to the need for parliamentary deliberation within the committees. The deliberation itself brings concrete institutional and procedural benefits in increasing the interpretive capacity of the Congress.¹⁰ In Brazil, the discussions of the CCJ (Committee of Constitution and Justice and Citizenship) do not take place behind closed doors. On the contrary, an opinion is drawn up by the rapporteur, which must be voted on by the committee members. If the opinion is for unconstitutionality, the project is shelved, being able to appeal to the plenary. If the opinion is for constitutionality, the project will follow the regular procedure.

Therefore, even if there is an exchange of votes for the constitutionality or unconstitutionality of a given proposition, the constitutional reasons must be externalized and will be submitted to control by the other members of the House. Even if the hidden motivation

¹⁰ Among the benefits are the incentives to reveal private information, to expose extreme views to the moderating effect of several counter arguments, to increase the legitimacy of decisions made through the presentation of reasons and the presentation of public justifications for the proposals (GARRET and VERMEULE, 2005, p. 248).

of the vote is bargaining, sufficient arguments must be presented to support the constitutionality or unconstitutionality of the measure. Thus, the need for a constitutional basis for the project constitutes an important limit for political negotiation.

Second, the mere possibility of judicial review of constitutionality requires that the option chosen by the representatives can be brought back to constitutional grounds. In other words, a clearly unconstitutional bill is likely to be overturned in the Supreme Court. If legislators depend on the effectiveness of that measure for their re-election, at the very least they will be concerned with avoiding editing an unconstitutional law. It does not matter if the result is the result comes from a bargain, but if it is constitutionally adequate.

This circumstance gains even more relevance in a scenario of expansion of constitutional jurisdiction, in which the Court defines a large part of the country's political agenda. In this context, it is natural that political actors consider precedents of the Supreme Court or try to anticipate eventual positioning to avoid defeat in the future – it is the so-called “anticipated obedience” to the jurisprudence of the Constitutional Court (TUSHNET, 2005, p. 271). This strategic performance is largely explained by the theory of rational choice, according to which

It is plausible that an actor's behavior is determined not by impersonal historical forces, but by a strategic calculation, and, second, that this calculation is strongly influenced by the actor's expectations regarding the likely behavior of the other actors. Institutions structure this interaction by influencing the possibility and the sequence of alternatives on the agenda, or by offering information or adoption mechanisms that reduce uncertainty regarding the behavior of others, while providing actors with “exchange gains”, which will encourage them to address certain calculations or precise actions. It is a classic “calculating” approach to explain the influence of institutions on individual action (HALL; TAYLOR, 2003, p. 206).

In this sense, the strategic perspective employed by the Theory of Games to explain political behavior is interesting. Originally developed by economists Oskar Morgenstern and John Von Neumann to explain the use of rational strategies in the study of applied mathematics (NEUMANN; MORGENSTERN, 1972), the Theory of Games soon spread to other branches of science. Centered on the analysis of the strategic behavior of individuals in an uncertain cost-benefit scenario, strongly dependent on the choices of other agents, the formulation also left its mark on Political Science.

According to the theory, the political agents, seen as players, seek to elaborate a gains' matrix where they identify the preferences of each opponent and the resulting gains to, in the end, define which is the most advantageous result. Thus, when the number of rounds is undefined, agents usually adopt cooperative positions to induce the future cooperation of others. They are the typical “games of compromise”, whose reasoning applies both to purely political negotiations and to the interactions between Congress and the Supreme Court in the constitutional interpretation (DERBLI, 2015, p. 180-181).

Therefore, the theoretical tools of new institutionalism of rational choice contributes more to the consideration of constitutional arguments than to its denial. The political game is not incompatible with the seriousness that the discussion on constitutional issues must take. On the contrary, the role of the Supreme Court is capable of provoking the opposite effect to that of the judicial overhang¹¹ eared by Tushnet and causing lawmakers to act in a more serious and critical way regarding the constitutionality of the measures, in addition to encouraging the continuity of the interinstitutional debate, fostering a culture of dialogue.¹²

In this scenario, it can be seen that the constitutional interpretation carried out within the National Congress suffers a strong impact from the institutional arrangement. Whether in relation to internal institutional aspects related to the proper functioning of the Legislative Branch, or in relation to external institutional aspects related to the relationship between the branches, the fact is that institutions play a fundamental role in the constitutional performance of the legislator. Often, they guide the political action towards taking the constitutionality of the proposals seriously.

Thus, it is not difficult to see that the dynamics of parliamentary behavior has a lot to offer for constitutional theory, especially for legislative interpretation. In fact, there is a lack of studies that consider the institutional design of Congress in analyzing the performance of political agents as constitutional interpreters. The absence of interdisciplinary work creates a gap in the theory of constitutional interpretation that would not fit within the narrow limits of this article. It is only expected to have signaled a horizon to be unveiled.

5 Conclusion

Since the late twentieth century, new institutionalism of rational choice has been the point of reference for legislative studies in the USA. Although our legislative branch has peculiarities that make it impossible to fully import US production, the investigation of Brazilian parliamentary behavior has much to learn from what is considered the largest Congress in the world. The advanced stage of US Political Science contributes significantly to the development of any theoretical formulation of its own.

¹¹ Understood as the effect of encouraging certain irresponsibility of members of Congress in constitutional interpretation, because there will always be someone to oversee it. It is described by the author in the following passage: "Consider a situation in which members of Congress have a choice: They can enact a splashy statute that directly attacks a problem, albeit in a way that the courts will find unconstitutional, or they can enact a boring one, full of obscure details, that might be a bit less effective in achieving Congress's policy goals but that would be unquestionably constitutional. Presumably enacting a statute that advances policy goals is politically attractive, but sometimes enacting the splashy but unconstitutional statute may be even more politically attractive. Members then can take credit for trying to do something and blame the courts for their failure even though the other statute might have been both constitutional and nearly as effective in achieving Congress's policy goals" (TUSHNET, 2005, p. 271).

¹² "From this perspective, there is space for analyzing the interactions between the Branches in the light of Theory of Games and, thus, identifying the Nash equilibrium throughout the successive rounds: for the Legislative Branch, it will be, in general, in the edition of law that, considering the judicial control of constitutionality, will have greater chances of being preserved; symmetrically, for the Judiciary Branch, it will be verified, as a rule, in the judicial decision that, considering the legislative activity aimed at overcoming judicial precedents (for example, through constitutional amendment), it will have greater possibilities to remain healthy." (DERBLI, 2015, p. 183).

In Brazil, the approaches brought by the three versions of new institutionalism of rational choice have largely influenced the studies on the National Congress carried out since the 1988 Federal Constitution (PERES, 2008, p. 67). Here, political scientists are divided between distributive theory and partisan theory, disputing what is the best answer for the stability of our political system. In fact, Brazilian authors work with a certain hybridism between the two forms, resulting from an adaptation to the particularities of our political system, which makes the task of identifying which version prevails turbulent (SANTOS, 2006, p. 96-99).

However, more relevant than trying to fit Brazilian political scientists into the different strands constructed by US doctrine – after years of studies on a Congress that has more than two centuries of history, by the way – is to turn the eyes to the impact that the new institutionalist theory provoked in research on parliamentary behavior in Brazil: it has shifted the debate about the government system and form of government to the debate about institutions that shape collective political action.

In this context, the purpose of studying the constitutional interpretation that is carried out by the legislator does not dispense with an analysis of the factors that influence parliamentary behavior. In search of this framework, more political than legal, the research was faced with a vast academic production in the field of Political Science that seeks to understand what is behind the process of drafting Brazilian laws. One cannot fail to notice how the Law neglects Political Science in Brazil, as if it could be completely dissociated from it.

This is perhaps the most important legacy of legislative studies on the US Congress: the interdisciplinary character. In that country, the fruitful academic production on the role of the Legislative Branch as an interpreter of the Constitution is full of institutional and political arguments, revealing that the constitutional legislative interpretation is situated on the threshold between Law and Politics. It is not unlikely that in Brazil the independent evolution of the two areas is largely responsible for the absence of work on the relationship between the Brazilian Legislative Branch and the Constitution. It is time to review this relationship.

Among us, the study of the impact of institutions on Public Law is recent and is taking slow steps. The theme had never attracted much attention until the dissemination of the work of Sunstein and Vermeule (SUNSTEIN; VERMEULE, 2002), which raised the need to consider the institutional design of the state bodies responsible for interpreting the Law. Since then, the institutional capacities of real interpreters began to be questioned, inserted in a complex system of incentives and limitations, where the performance conditions are far from those considered ideal.

In this order of ideas, transposing the institutional context of parliamentary activity into legal theory implies scrutinizing the incentive structure inherent in the political decision-making process. A theory that lends itself to discussing the relationship between the Constitution and

the legislator without considering how the legislative process develops and what are the main factors that influence decision-making in Parliament would be completely detached from reality. If the objective is to see the Constitution through the lens of the legislator, you cannot make a blank slate of the institutional sphere.

When looking at constitutional interpretation carried out in the midst of the legislative process, the jurist will find an arsenal of institutions that condition the performance of political agents and shape their relationship with the Constitution. Therefore, integrating the varied range of research from Political Science to Law sounds like a promising way to understand the constitutional responsibility of the legislator. After all, the key to a realistic approach to the interpretation of the Constitution by the National Congress is at the root of legislative studies: institutions.

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