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How to Enforce Term Limits?
From Hard Deadlines to Golden Parachutes

Zachary Elkins
(University of Texas)

Abstract

In response to the pervasive evasion of term limits, some constitutional designers entrench term limits more deeply, often by making them unamendable. Call such a mechanism, "hard term limits." One objective of this paper is to theorize and document historical cases of such limits and assess their consequences. Do the limits work as expected in preventing term-limit evasion and the collateral damage caused to constitutions? I analyze a varying set of data on such limits and compare their efficacy to a set of other mechanisms, such as incentivized exit plans, intended to maximize term-limit compliance.

Partisanship as Group Identity Predicts Polarization in Political Beliefs

Michael Kosfeld
(Goethe Universität Frankfurt a.M.)

Abstract

Identifying the determinants of political polarization is a pressing issue across the social sciences. Through a nationally representative online experiment deployed the week prior to the 2020 US presidential election, we explore how group identity shapes the process of political opinion formation. We measure participants' ingroup favoritism in monetary allocations as a manifestation of group identity and incentivize them to predict policy-sensitive statistics one year later, conditional on which candidate becomes president. Ingroup favoring individuals exhibit a stronger partisan gap in initial predictions, spend more resources to avoid articles from politically-opposing news sources, and increase their prior gap more strongly after reading relevant news articles. Exogenously reducing the salience of group identity decreases partisan bias in information avoidance, especially for ingroup favoring individuals.

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In Defense of a Substantive Conception of the Rule of Law

Carmen Pavel
(King's College London)

Abstract

The rule of law has implications for how we evaluate in practice the acceptability of various legal systems. Yet the philosophical debate about the appropriate content of the rule of law has come to a dead end. The most popular view, one shared by Joseph Raz, HLA Hart, and others is that the rule of law must embody at most formal or thin rule of law criteria. I want to defend a conception of the rule of law which includes substantive individual rights as the appropriate way to understand the ideal of the rule of law and the ways in which it should serve as an evaluatory benchmark for various legal systems. I will argue that the only defensible conception of equality before the law, an essential formal criterion of the rule of law, is one that includes substantive rights such as sovereignty rights, freedom of speech, and due process rights among others.

Freedom of Expression and Collective Epistemology

Frederick Schauer
(University of Virginia)

Abstract

Many conceptions of the rule of law, especially substantive conceptions, incorporate the importance of freedom of expression. And many conceptions of freedom of expression incorporate ideas of collective epistemology. Specifically, does freedom of expression foster the idea of collective decision-making, and does this idea include collective decision-making about facts and the empirical world as well as collective decision-making about what ought to be done? And if this is so, then is that desirable? Although conceptions of democracy recognize the importance of collective decision-making about normative matters, collective decision-making about factual matters invites the question whether such collective decision-making about facts and factual truth inclines towards knowledge and truth or whether, to the contrary, it impedes it.

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Strategic Behavior in Tight, Loose and Polarized Environments

Silvia Sonderegger
(University of Nottingham)

Abstract

In the context of strategic decision-making, we investigate how individuals respond to different distributions of co-player behavior. We focus on the difference between tight (i.e., characterized by low behavioral variance), loose (i.e., characterized by high behavioral variance), and polarized (i.e., characterized by U-shaped behavior) environments. Our results show that individuals strongly adapt their actions to the variance and distribution (polarized/single-peaked) of co-player behavior. In particular, higher variance environments generate greater variance of replies, and polarized environments generate polarized responses. This implies that tight, loose, and polarized (empirical) norms are self-sustaining.

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Chasing Constitutional Change:
Tracing the Normalization of Illiberal Democracy

Renata Uitz
(Central European University)

Abstract

The normalization of illiberal democracy into an everyday experience is a profound and consequential constitutional change that accompanies democratic backsliding.

Long gone are the days when illiberal attacks on the founding values of the Union (among them the rule of law) by an illiberal member state were considered dramatic – and not sheer embarrassment. The normalization of the EU's rule of law crisis is not an isolated incident. It is a symptom of the normalization of illiberal constitutional and political practices around the world, witnessed in illiberal/hybrid regimes, but also in established democracies. The architects of contemporary illiberal democracies did not develop a grand constitutional design of their own, nor did they devise a new, distinctive approach to the rule of law. Instead, they tweak the institutional design of decently functioning constitutional democracy -

arrogating executive powers through compromising processes of political participation, constitutional accountability and individual liberties. Illiberal tweaks secure democratically elected actors' lasting hold on constitutional offices and assist their self-perpetuation through constitutional means even in the face of opposition or resistance (illiberal constitutional resilience). Due to their propensity to rule by cheating[1], the gap between the constitutional words and the realities[2] of illiberal democracies can be rather wide.

While the ideological coherence of illiberal constitutional democracies may be disputed in academic circles, their ability to learn and adapt for self-preservation is not disputed anymore. Their constitutional tweaks also adjust the realm of the politically possible. The January 6, 2021 attack on the Capitol that was inflamed by President Trump in the aftermath of his election defeat may not have normalized constitutional coups, yet, it certainly inspired illiberal political leaders. A few months later an open letter of influential political figures warned in an open letter that President Bolsonaro and his circle are preparing for a coup, a la January 6.[3] Even those who find a coup unlikely admit that Bolsonaro's "continued sowing doubt over the election process and the integrity or usefulness of the supreme court, while picking another army general as his running mate [...] could—depending on the election results—could cause tension in parts of the electorate, including among officers tasked with public security."[4]

This paper explores patterns of constitutional change amidst the normalization of illiberal democracy. The normalization of illiberal constitutional practices is not a claim about the extent or intensity of democratic backsliding. Rather it speaks to a sea change in the realm of *constitutional imagination*: the ability of a constitution "to project an account of political existence in ways that shape - and reshape - political

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[1] A Sajó, Ruling by Cheating (CUP 2021)

[2] S Voigt, Mind the gap: Analyzing the divergence between constitutional text and constitutional reality, ICON 19(5): 1778–1809 (2021)

[3] https://www.theguardian.com/world/2021/sep/06/brazil-warning-bolsonaro-may-be-planning-military-coup-amid-rallies

[4] Raul Jungmann: There will be not be a coup in Brazil, June 29, 2022, https://www.americasquarterly.org/article/jungmann-there-will-not-be-a-coup-in-brazil [Raul Jungmann was Brazil's defense and public security minister from 2016 to 2018.]

reality.[5] Part I explores constitutional practices that assist the settlement of the abuse of powers and the lasting self-perpetuation of illiberal incumbents into an everyday political experience. Offering comparative insights, Part II focuses on how illiberal political actors manipulate constitutional continuity. Thereafter Part III explores how transnational alliances inspire the transformation of constitutional imagination and boost the resilience of illiberal/hybrid regimes.

The transformation of constitutional imagination due to illiberal normalization may well be the most consequential constitutional change of our times.

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[5] M Loughlin, The Constitutional Imagination, Modern Law Review 78(1): 1-25,3 (2015)

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Transitional justice and the rule of law: Tainted judges and accountability for Nazi crimes in West Germany

Holger Kern
(Florida State University)

Georg Vanberg
(Duke University)

Abstract

Despite a concerted effort at denazification following the defeat of Nazi Germany, a substantial proportion of judges tainted by close association with the national socialist (NS) regime found employment in the post-war West German judiciary. Using an original dataset on more than 500 accused Nazi criminals in West German courts between 1952 and 1964, we demonstrate that this NS legacy had a profound impact on accountability for Nazi crimes: Accused Nazi criminals who found themselves in courts staffed with a greater proportion of tainted judges had substantially higher odds of escaping conviction. These findings have direct implications for the connection between transitional justice and the rule of law, and for trade-offs involved in retaining officials and collaborators of an authoritarian regime in the wake of a democratic transition.