

Panel 11.52

12:15 - 13:45 Wednesday, 1st July, 2026

Room O'Connor · L2.14

Theme Constitutional Theory & Foundations

Presentation type Parallel Session

Proportionality, Process and the Uses of Comparison

628 Proportionality, Process and the Uses of Comparison

Description

Panel assembled by the organization from individual submissions.

778 Federalism and Comparative Political Process Theory

Scott Stephenson

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Abstract

Comparative political process — or representation-reinforcement — theory has risen to prominence over the last decade. It seeks to refine John Hart Ely's political process theory, first developed in the United States, and expand its jurisdictional relevance. The theory explains and justifies judicial review, arguing that courts can and should exercise their powers to protect the processes of democratic government. The theory is focused on rights-based judicial review. Which rights and rights-like structures must courts enforce to ensure democratic government is protected?

Federalism has not featured in the discussion yet. On the one hand, that is unsurprising. Federalism-based judicial review is often thought not to present the same types of justificatory concerns as rights-based judicial review because the former primarily involves allocating powers between two majoritarian institutions — the national and subnational legislatures. On the other hand, it is surprising. Federalism is a political process. It is possible to argue that courts can and should exercise their powers to protect that process by, for example, ensuring one legislature does not effectively eradicate the other.

This paper considers the applicability of comparative political process theory to federalism. It argues that the theory holds some potential for the federal context, in particular illuminating aspects of federalism that can be underenforced by courts. However, it also identifies complications with translating the theory to the federal context, including the tension with democratic processes — does respect for the federal process require restraining one level of government from seeking to prevent purportedly anti-democratic actions by another level of government?

3252 What if I don't want to act proportionally?

Virgilio Afonso da Silva

University of Sao Paulo, Brazil

Abstract

The proportionality test was originally developed to control state interventions in freedom rights. Therefore, the standard situation that demands its application is the following: in order to foster freedom right R1 the legislature enacts a statute which restricts freedom right R2; restricting R2 can only be considered constitutional if it passes the proportionality test (i.e., if it is suitable, necessary, and well-balanced). But what if a restriction of a freedom right is brought about not by a state action but by an autonomous decision of an individual? Does the proportionality test have a role to play in assessing if and to what extent individuals are bound by constitutional rights provisions in their private relations (so-called horizontal effects of fundamental rights)? The debate on the convenience and even the feasibility of resorting to the proportionality test in such a context still has not received the attention it deserves. This presentation assumes that insofar as the proportionality test has been constructed as a tool for checking state interventions, there is

an argumentative burden whenever one argues for extending its application to other contexts. This presentation assumes further that, although this argumentative burden is not always insurmountable, it may be so in some contexts. The realm of horizontal effects of fundamental rights is probably one of them.

219 Mining the Proportionality Test: An Empirical Study on the ECJ (with Alexander Tischbirek)

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Abstract

Proportionality analysis is arguably one of the most prominent reasoning techniques in public law and plays a pivotal role, particularly in the case law of the ECJ. It serves as a key instrument for mediating the relationship between European and national law, constitutes a central tool in fundamental rights doctrine, and increasingly shapes secondary law. Against this backdrop, it is crucial to understand the legal contexts in which proportionality analysis is applied within EU law.

However, the Court's jurisprudence is so extensive that traditional legal scholarship struggles to fully capture the role of this concept in judicial reasoning. This project adopts a quantitative-empirical approach to examine this doctrinal technique. We employ state-of-the-art Natural Language Processing methods to automatically analyze the ECJ's body of decisions. The project falls within the field of argument mining. To this end, we use a range of techniques, including Large Language Models, which we compare and evaluate for their performance and reliability based on their ability to identify the proportionality test in the case law. Our goal is to create a comprehensive dataset on the use of this technique in the ECJ case law. By focusing on the use of argumentative tools, we aim to bridge the gap between argument mining, empirical legal studies, and traditional doctrinal scholarship.

3430 Litigation as a Technology of Government: The Political Economy of State Conflict: Evidence from Tax Litigation in Brazil

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Abstract

This article advances a theory of litigation as a technology of government, arguing that legal conflict operates as a political economy of governance rather than as an institutional malfunction. Drawing on Ronald Coase's framework (The Problem of Social Cost, 1960) and extractive institutions by Acemoglu and Robinson, the paper conceptualizes litigation as an incentive-driven institutional technology through which states transform normative uncertainty into durable sources of revenue, authority, and legitimacy.

The argument is developed through tax litigation in Brazil as an empirical and analytical case, where the logic of litigation as extraction becomes transparent. The Brazilian reveals a chain: (i) hyper-legislation produces normative uncertainty; (ii) subsidized state litigation converts uncertainty into a fiscal strategy sustained by

procedural privileges and the absence of risk; and (iii) attorney's fees (honorários de sucumbência) convert judicial success into income for public agents, transforming conflict into a revenue-generating mechanism.

Building on this machinery, the article introduces the concept of the legal externality of state litigation: the transfer to society of the costs of conflict—delay, unpredictability, and investment—while the State internalizes benefits in the form of cash flow, deferred liabilities, and the remuneration of public agents.

The claim is that litigation is not a pathology of governance—it is a policy of the State. As long as legal conflict generates individual and institutional returns for public agents, neither legal stability nor judicial rationality will be attainable. Overcoming this requires a re-engineering of incentive structures rather than procedural reforms.

3883 Chair

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