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## On the Evasion of Executive Term Limits

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## ON THE EVASION OF EXECUTIVE TERM LIMITS

TOM GINSBURG,\* JAMES MELTON\*\* & ZACHARY ELKINS\*\*\*

### ABSTRACT

*Executive term limits are precommitments through which the polity restricts its ability to retain a popular executive down the road. But in recent years, many presidents around the world have chosen to remain in office even after their initial maximum term in office has expired. They have largely done so by amending the constitution, sometimes by replacing it entirely. The practice of revising higher law for the sake of a particular incumbent raises intriguing issues that touch ultimately on the normative justification for term limits in the first place. This Article reviews the normative debate over term limits and identifies the key claims of proponents and opponents. It introduces the idea of characterizing term limits as a type of default rule executives may overcome if sufficient political support is apparent. It then turns to historical evidence to assess the probability of attempts, both successful and unsuccessful, to evade term limits. It finds that, notwithstanding some high-profile cases, executives observe term limits with remarkable frequency in consolidated democracies. The final Part considers alternative institutional designs that may accomplish some of the goals of term limits, but*

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*finds that none are likely to provide a perfect substitute. Term limits have the advantage of clarity, which very likely increases their enforceability, and they should be considered an effective part of the arsenal of democratic institutions.*

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## INTRODUCTION

In late June 2009, the Honduran military escorted sitting President José Manuel Zelaya out of the country for proposing a referendum on the question whether to amend the constitution—a proposal that opponents took to be the first step in eliminating constitutional term limits and paving the way for his reelection.<sup>1</sup> The Honduran Constitution contains a “poison pill” clause directed against this very type of proposal, and Zelaya was promptly replaced after adjudication of the issue by the country’s supreme court.<sup>2</sup> The constitutional crisis quickly turned into an international one, which is unresolved as of this writing: a subsequent election, won by the conservative opposition candidate, has not been recognized by many countries, and Zelaya’s ultimate fate is still undetermined.<sup>3</sup>

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1. PETER J. MEYER, CONG. RESEARCH SERV., HONDURAN-U.S. RELATIONS 5-6 (2009), available at [http://assets.opencrs.com/rpts/RL34027\\_20090804.pdf](http://assets.opencrs.com/rpts/RL34027_20090804.pdf). Zelaya’s proposed referendum would have asked voters whether they were in favor of *another* referendum to be held on the next election day on the question whether to revise the constitution. *Id.* at 3. Zelaya pointed out that another President would have been elected on the same day as the second referendum, and so Zelaya himself would not have benefited. *Id.* at 5.

2. Article 239 reads

A citizen who has held the title of the Executive Power may not be President or a Designate.

He that violates this provision or advocates its amendment, as well as those that directly or indirectly support him, shall immediately cease to hold their respective offices and shall be disqualified for ten years from exercising any public function.

CONST. HOND. art. 239; see also NORMA C. GUTIÉRREZ, LAW LIBRARY OF CONG., HONDURAS: CONSTITUTIONAL LAW ISSUES (2009), <http://www.loc.gov/law/help/honduras/constitutional-law-issues.php> (discussing the constitutional provisions that give the Honduran Supreme Court of Justice and the National Congress power to disapprove of the conduct of the President). This provision triggered the Honduran action. The origins of the poison pill are uncertain, though the general institution may be traced to fifth century BCE Athens. See GIDEON DORON & MICHAEL HARRIS, TERM LIMITS 5 (2001). Honduras’s Constitutions of 1957, CONST. HOND. of 1957, art. 197, and 1982, CONST. HOND. art. 239, adopted similar provisions, as did Peru’s Constitution of 1933, CONST. PERU of 1933, art. 142, and Guatemala’s Constitution of 1945, CONST. GUAT. of 1945, art. 133. Perhaps a more effective mechanism would be to require that any amendments to the executive term apply to only successors and not to the incumbent. See CONST. BOL. of 1880, art. 135.

3. See PETER J. MEYER & MARK P. SULLIVAN, CONG. RESEARCH SERV., HONDURAN-U.S. RELATIONS 2-7 (2010), available at [http://assets.opencrs.com/rpts/RL34027\\_20100618.pdf](http://assets.opencrs.com/rpts/RL34027_20100618.pdf); see also Mica Rosenberg, *Army Overthrows Honduras President in Vote Dispute*, REUTERS, Jan.

Zelaya can hardly be singled out for trying to overcome constitutional limits on his term. In the last fifteen years, many of Zelaya's counterparts throughout Latin America have successfully amended or replaced their constitutions to facilitate term extensions.<sup>4</sup> The past two years seem to have been particularly hazardous. In January 2009, Bolivian voters approved a new constitution relaxing limits on the presidential term, thereby allowing incumbent Evo Morales to run again.<sup>5</sup> Three weeks later, Hugo Chávez won a referendum amending the Venezuelan Constitution to do the same thing.<sup>6</sup> In October 2009, the Nicaraguan Supreme Court's constitutional chamber declared executive term limits to be unconstitutional.<sup>7</sup> In February 2010, the Constitutional Court in Colombia rejected an attempt to re-amend the constitution to allow a third term for President Alvaro Uribe.<sup>8</sup>

Attempts to overturn limits on executive terms have little to do with the executives' ideology (Uribe and Chávez are hardly soul-

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28, 2009, <http://www.reuters.com/article/idUSTRE55R0US20090628>. At this writing, Zelaya is in exile in the Dominican Republic. See New York Times, José Manuel Zelaya News, [http://topics.nytimes.com/topics/reference/timestopics/people/z/jose\\_manuel\\_zelaya/index.html](http://topics.nytimes.com/topics/reference/timestopics/people/z/jose_manuel_zelaya/index.html) (last visited Mar. 14, 2011). Trials of those responsible for the coup were held, but none were punished. MEYER & SULLIVAN, *supra*, at 8. A similar story could be told with regard to Niger President Mamadou Tandja, who was deposed in a coup in February 2010. *Niger Leader Mamadou Tandja Held After Military Coup*, BBC NEWS, Feb. 18, 2010, <http://news.bbc.co.uk/2/hi/8522227.stm>. Tandja had forced through amendments to the constitution to allow himself to remain in office after his term expired. Adam Nossiter, *President Claims More Power in Niger's Disputed Referendum*, N.Y. TIMES, Aug. 8, 2009, at A6.

4. See ZACHARY ELKINS, TOM GINSBURG & JAMES MELTON, *THE ENDURANCE OF NATIONAL CONSTITUTIONS* 73 n.8 (2009) (discussing actions in Peru in 1993 and Venezuela in 1999); Ileana Gomez, Comment, *Declaring Unconstitutional a Constitutional Amendment: The Argentine Judiciary Forges Ahead*, 31 U. MIAMI INTER-AM. L. REV. 93, 96 n.17, 97 n.18 (2000) (discussing actions in Argentina in 1993); U.S. DEP'T OF STATE, *BACKGROUND NOTE: COLOMBIA* (2010), <http://www.state.gov/r/pa/ei/bgn/35754.htm> (discussing the 2005 amendment in Colombia); see also CONST. ARG. § 90 (amended 1994); CONSTITUIÇÃO FEDERAL [C.F.] [Constitution] art. 14 (Braz.) (amended 1997).

5. *New Bolivia Constitution in Force*, BBC NEWS, Feb. 7, 2009, <http://news.bbc.co.uk/2/hi/americas/7877107.stm>.

6. See Simon Romero, *Chávez Wins Bid To End Term Limits*, N.Y. TIMES, Feb. 16, 2009, at A1. It was Chávez's second try, having failed in a similar referendum in 2007. *Id.* at A9.

7. Blake Schmidt, *In Nicaragua, Opposition Sees an End Run*, N.Y. TIMES, Nov. 16, 2009, at A6.

8. JUNE S. BEITTEL, CONG. RESEARCH SERV., *COLOMBIA: ISSUES FOR CONGRESS 4-6* (2010), available at [http://assets.opencrs.com/rpts/RL32250\\_20100423.pdf](http://assets.opencrs.com/rpts/RL32250_20100423.pdf). The original 1991 constitution limited Presidents to one term, and a 2005 amendment facilitated a second Uribe term. *Id.* at 4.

mates), nor are they restricted to Latin America. Last year Azerbaijan and Niger also adopted referenda overturning term limits.<sup>9</sup> Similar movements were afoot in the Philippines in the latter years of President Gloria Arroyo's term.<sup>10</sup> Africa has had its share: just since 1990, Algeria, Cameroon, Chad, Gabon, Guinea, Namibia, Togo, Tunisia, and Uganda have effected term limit reform, in the form of *relaxing* term limits.<sup>11</sup> The constitutional choice of presidentialism and semi-presidentialism in Eastern Europe has led to tension between temporal rules and ambitious executives there as well. Vladimir Putin opted to step down from the Russian presidency in favor of an informally empowered prime ministership, which provided him with an unlimited tenure, or at least one at the mercy of a sympathetic legislature controlled by his party.<sup>12</sup> Term limits have recently been relaxed in several

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9. See INT'L CRISIS GROUP, AZERBAIJAN: VULNERABLE STABILITY 4 (2010), available at <http://www.crisisgroup.org/en/regions/europe/caucasus/azerbaijan/207-azerbaijan-vulnerable-stability.aspx>; Nossiter, *supra* note 3.

10. In spring 2009, the Philippines House of Representatives passed a resolution that opened the door for constitutional amendments. See H.R. Res. 1109, 14th Cong., 2d Reg. Sess., 5 CONG. REC. 512, 517 (Phil. 2009) (enacted); see also Gil C. Cabacungan, Jr. et al., *House Rams Through Con-Ass Resolution*, PHIL. DAILY INQUIRER, June 3, 2009, <http://newsinfo.inquirer.net/inquirerheadlines/nation/view/20090603-208528/House-rams-through-Con-ass-resolution>. One issue concerned the scope of foreign investment in certain sectors of the economy, but at the same time, the House pushed for procedural changes that allowed joint voting by both houses as a Constituent Assembly for constitutional changes. See INT'L PHIL. ELECTION OBSERVATION TEAM 2010, PHILIPPINE CONSTITUTION AND CHARTER CHANGE (2010), <http://sites.google.com/site/ipeoteam2010/philippine-constitution-and-charter-change>. The proposal, known locally by the unfortunate nickname "Con-Ass," allowed the 278-member House to dominate the 23-member Senate. See Cabacungan et al., *supra*. The real subtext, according to many observers, was President Arroyo's desire to stay in office when her current term expired on June 30, 2010. See Leila Salaverria, *Solon: Charter Change Can Extend Arroyo Term*, PHIL. DAILY INQUIRER, June 2, 2009, <http://newsinfo.inquirer.net/breakingnews/nation/view/20090602-208483/Solon-Charter-change-can-extend-Arroyo-term>. But see *President Arroyo Says She Won't Extend Time in Post*, WALL ST. J., July 28, 2009, at A11. Every President since Corazon Aquino has sought to do the same thing. See INT'L PHIL. ELECTION OBSERVATION TEAM, *supra*. The Philippine Constitution currently allows only one six-year presidential term. CONST. (1987), Art. VII, § 4 (Phil.).

11. Gideon Maltz, *The Case for Presidential Term Limits*, J. DEMOCRACY, Jan. 2007, at 128, 129-30; Daniel N. Posner & Daniel J. Young, *The Institutionalization of Political Power in Africa*, J. DEMOCRACY, July 2007, at 126, 132.

12. See C.J. Chivers, *Putin Is Installed as Prime Minister, Picking Up Where He Left Off as President*, N.Y. TIMES, May 9, 2008, at A12. Putin may run again for President once he has been out of office for one term, and there are indications that he plans to do just that. *Why Russia Needs Me*, ECONOMIST, Sept. 11, 2010, at 64.

neighboring countries, including Belarus,<sup>13</sup> Kazakhstan,<sup>14</sup> Tajikistan,<sup>15</sup> and Uzbekistan.<sup>16</sup> The same dynamics operate at the subnational level, where executives of regional and even municipal governments face many of the same incentives and institutional constraints. Indeed, Michael Bloomberg's successful amendment of New York City's charter in order to facilitate his third mayoral term had some people comparing the city to a "banana republic."<sup>17</sup> These varied cases suggest that the evasion of term limits is widespread.

This latest wave of term limit evasions invites a number of questions. First, how should we think of this phenomenon from a normative perspective? Alexander Hamilton and many of the Founders thought term limits would invite mischief by ex-Presidents and argued against their inclusion in the U.S. Constitution;<sup>18</sup> others, including Thomas Jefferson, thought that term limits were necessary to curb executive ambition.<sup>19</sup> As term limits have grown in popularity over time, some have called for their universal adoption in presidential systems as a core feature of democracy.<sup>20</sup> But term limits have been criticized on a number of grounds, most obviously that they restrict democratic choice.<sup>21</sup> Part I of this Article reviews the arguments for and against term limits. It considers motivations grounded in the prevention of tyranny and the protection of the institutional integrity of democracy, including countering

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13. STEVEN WOEHLER, CONG. RESEARCH SERV., BELARUS: BACKGROUND AND U.S. POLICY CONCERNS 2 (2007), available at <http://www.fas.org/sgp/crs/row/RL32534.pdf>.

14. *Kazakhstan Parliament Abolishes Presidential Term Limits on Nazarbayev*, VOICE AM., May 18, 2007, <http://www.voanews.com/english/news/a-13-2007-05-18-voa6.html>.

15. Christopher Walker, *East: The 'Leader for Life' Governance Model*, RADIO FREE EUR., Feb. 29, 2008, <http://www.rferl.org/content/article/1079557.html>.

16. *Id.*

17. Posting of Keith to the Call Blog, <http://www.ny1.com/content/123674/bloomberg-says-new-yorkers-should-decide-term-limits> (Aug. 13, 2010, 15:23 EDT); see also David W. Chen & Michael Barbaro, *Bloomberg Wins 3rd Term in Tight Race*, N.Y. TIMES, Nov. 4, 2009, at A1.

18. See *infra* notes 90-99 and accompanying text; see also Lloyd N. Cutler, *The Constitutionality of State-Imposed Term Limits for Federal Office*, in THE POLITICS AND LAW OF TERM LIMITS 99, 102-03, 104 n.33 (Edward H. Crane & Roger Pilon eds., 1994); Mark P. Petracca, *Restoring "The University in Rotation": An Essay in Defense of Term Limitation*, in THE POLITICS AND LAW OF TERM LIMITS, *supra*, at 57, 65.

19. See *infra* note 58 and accompanying text.

20. See Maltz, *supra* note 11, at 128-29, 141.

21. See Paul Jacob, *From the Voters with Care*, in THE POLITICS AND LAW OF TERM LIMITS, *supra* note 18, at 27, 38-39.



the incumbency advantage in electoral competition.<sup>22</sup> It also introduces the idea that term limits may be most profitably thought of as default rules that may be overcome through constitutional amendment processes.<sup>23</sup> Even if term limits appear rigid, they may be overcome by executives with sufficiently strong political support.<sup>24</sup>

Many of the theoretical arguments about term limits turn on empirical claims about the likely behavior of the incumbent in his or her last period of office, an issue about which we have little evidence. Other empirical data, however, may inform the broader normative debate.<sup>25</sup> The Honduras situation suggests that term limits may themselves induce a constitutional crisis in some circumstances.<sup>26</sup> When a popular leader overturns term limits to remain in office, there may be significant collateral damage to the constitutional order. If such occurrences are frequent and their consequences severe, we ought to think twice about the suggestion that term limits be seen as a core feature of democratic constitutions. To evaluate this possibility, Part II asks the positive question of how frequently term limit evasions occur. It begins by describing the prevalence and type of limits on executive tenure across time and space. We then ask whether term limits “work,” in the sense of actually and effectively constraining executives from remaining in office. Part III takes advantage of a unique set of data on the content of historical constitutions.<sup>27</sup> We conclude that term limits are surprisingly effective in constraining executives from extending their terms, at least in democracies. There is no evidence that term limits are associated with the death or disability of democracy, even if in some circumstances they may induce early constitutional replacement.<sup>28</sup>

Notwithstanding this generally positive assessment, Part IV examines institutional alternatives to term limits. The normative question about term limits must be considered as one of compara-

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22. *See infra* Part I.B.

23. *See infra* Part I.D.

24. *See infra* notes 112-15 and accompanying text.

25. *See infra* text accompanying note 141.

26. *See supra* notes 1-3 and accompanying text.

27. *See* Comparative Constitutions Project, <http://www.comparativeconstitutionsproject.org> (last visited Mar. 14, 2011).

28. *See infra* Part III.C.

tive institutional choice, and we evaluate whether alternatives may mitigate some of the negative effects of term limits identified in the theoretical literature. Part IV considers several ideas, including manipulating the length of the executive term, shedding presidential powers, handicapping electoral incumbents, and inducing retirement. None of the conceivable alternatives to restrict executive tenure, however, are likely to substitute for term limits. As a normative matter, then, term limits seem to be an effective form of constitutional precommitment. Despite high-profile evasions in some countries,<sup>29</sup> the overall story seems to be of an institution that operates as an effective constraint in most times and places.

## I. THE DEBATE OVER TERM LIMITS

Term limits have been part of the arsenal of institutional design for millennia, but have assumed particular significance in modern presidential democracies. Presidentialism is characterized by the election of a single executive for a fixed term of office, and critics of this form of government have focused on its resulting inflexibility, particularly as compared to parliamentary government.<sup>30</sup> Limits on the number of terms, not just their length, add yet another dimension of inflexibility.<sup>31</sup> When the modern presidency was designed in Philadelphia, the Framers engaged in extensive debates over the length of the term and whether the executive could stand for reelection.<sup>32</sup> This Part reviews the normative debate over term limits.

### A. *The Rationale for Fixed Terms: Temporary Insulation*

To understand term limits, we must begin by understanding why political systems have fixed terms for the executive in the first place. Fixed terms are a typical feature of presidential systems, and

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29. See *supra* notes 6, 12, 17 and accompanying text.

30. See, e.g., Juan J. Linz, *Presidential or Parliamentary Democracy: Does It Make a Difference?*, in *THE FAILURE OF PRESIDENTIAL DEMOCRACY* 3, 9-10 (Juan J. Linz & Arturo Valenzuela eds., 1994).

31. See, e.g., Juan J. Linz, *The Perils of Presidentialism*, *J. DEMOCRACY*, Winter 1990, at 51, 61.

32. See CHARLES W. STEIN, *THE THIRD TERM TRADITION: ITS RISE AND COLLAPSE IN AMERICAN POLITICS* 3-6 (1943).

are contrasted with the prototypical parliamentary system in which the executive may be removed by the legislature at any time.<sup>33</sup> We do not wish to rehash the extensive debate over these two forms of government here, as it forms a central issue in the discipline of comparative politics.<sup>34</sup> We ourselves prefer to refer to the forms as popular-election and assembly-confidence systems, rather than presidential or parliamentary, because the latter terms often connote a set of elective attributes that, it turns out, are not especially elective.<sup>35</sup> Moreover, we wish to focus on only one aspect of the distinction, a central tradeoff in the choice between systems.

Under either a popular-election or assembly-confidence system, periodic elections provide a primary mechanism of ensuring accountability of officeholders.<sup>36</sup> Allowing an executive to remain in office for a set period, as is typical of popular-election systems, insulates that executive from short-term fluctuations in political opinion. This can facilitate the undertaking of policies that may entail short-term costs, but produce benefits in the midterm.<sup>37</sup> Insulation must be tempered with periodic elections, which confirm the mandate of the officeholder for another term in office.<sup>38</sup> Thus fixed terms allow for periods of insulation set off by elections that secure legitimacy and accountability. In addition, the president and the legislature are independent of each other. In assembly-confidence systems, by contrast, the executive and the legislature exist in a certain codependence, in which one office may be dissolved by the other at any given time.<sup>39</sup>

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33. To be sure, this is an oversimplification, and some have argued that parliamentary systems can accommodate fixed terms. *See, e.g.*, Richard Albert, *The Fusion of Presidentialism and Parliamentarism*, 57 AM. J. COMP. L. 531, 551 (2009). Albert also points out that the potential for recall in presidential systems is the functional equivalent of the vote of no confidence in parliamentary systems. *Id.* at 560-61.

34. *See generally* JOSÉ ANTONIO CHEIBUB, PRESIDENTIALISM, PARLIAMENTARISM, AND DEMOCRACY (2007) (reviewing scholarly debate over presidentialism and parliamentarism).

35. *See* José Antonio Cheibub, Zachary Elkins & Tom Ginsburg, *Beyond Presidentialism and Parliamentarism: On the Hybridization of Constitutional Form* 30 (Jan. 14, 2010) (unpublished manuscript, on file with the authors).

36. Philippe C. Schmitter & Terry Lynn Karl, *What Democracy Is ... And Is Not*, J. DEMOCRACY, Summer 1991, at 75, 80.

37. *See, e.g.*, THE FEDERALIST NO. 71, at 395 (Alexander Hamilton) (E.H. Scott ed., 2002).

38. *See id.*

39. CHEIBUB, *supra* note 34, at 10; Torsten Persson & Guido Tabellini, *Constitutions and Economic Policy*, in DEMOCRATIC CONSTITUTIONAL DESIGN AND PUBLIC POLICY 81, 101 (Roger

The rationale for fixing terms does not carry with it a universally applicable criterion for what the length of those terms should be. It is difficult *ex ante* to determine the “optimal” term for an officeholder, by which we mean the length of time in which the benefits of policy insulation outweigh the costs of reduced accountability. As noted below, there is surprisingly little variation across written constitutions in length of executive term,<sup>40</sup> even though the time required to develop, implement, and evaluate policies will depend on a number of variables that differ across time and space. These variables may include other features of the constitutional structure, such as the existence of veto players that may make policies easier or more difficult to adopt and implement.<sup>41</sup> They also include exogenous conditions, such as the rate of social and political change, which will affect the demand for new policies and new leaders.<sup>42</sup> Other factors, such as the structure of the party system and individual characteristics of the leader, are surely relevant. It is also likely that the optimal term would be different across policy areas, as costs and benefits of policies may be revealed at different rates, and so a fixed term for a single executive is simply the aggregate of an optimizing function over individual issue areas. The approach of fixing terms to a set number of years is to adopt a bright-line rule for periodic elections, notwithstanding the fact that the optimal amount of time for an executive to stay in office may in some instances be much shorter or longer.

Juan Linz, among others, places fixed terms at the center of his criticisms of presidential democracy.<sup>43</sup> In addition to other vices, Linz sees presidential systems as institutionalizing conflict between branches, leading to deadlock and higher incentives to take extra-constitutional action.<sup>44</sup> As Scott Mainwaring and Timothy Scully put it, “[B]ecause of the fixed terms of office, if a president is unable to

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D. Congleton & Birgitta Swedenborg eds., 2006).

40. See *infra* text accompanying note 178.

41. See GEORGE TSEBELIS, VETO PLAYERS 2 (2002).

42. See, e.g., Martin Krakowski, *Inflation, Unemployment, and Presidential Tenure*, 83 J. POL. ECON. 867, 868 (1975) (suggesting that the length of presidential terms could vary based on the rates of inflation and unemployment).

43. See Linz, *supra* note 30; Linz, *supra* note 31.

44. See Linz, *supra* note 30, at 10.

implement her/his program, there is no alternative but deadlock.”<sup>45</sup> Although the current state of the literature is more agnostic,<sup>46</sup> the assumptions of the Linzian position are still widely held.<sup>47</sup> The focus here is not on fixed terms per se, but on whether a system ought to limit the *number* of fixed terms a single individual may hold. This is a second-order decision constitutional designers face once they choose to adopt a fixed-term, popularly elected president.

### *B. Arguments for Executive Term Limits*

The origins of executive term limits go back to the ancient republics. In one of the earliest definitions of democracy, Aristotle listed as a key characteristic of democracy that “no office should ever be held twice by the same person.”<sup>48</sup> Accordingly, Greek city-states are known to have imposed term limits of one-tenth of a year on some of the officials who were elected by random lottery.<sup>49</sup> In Athens, there was the additional restriction that no individual could serve more than two years on the governing council in the course of a lifetime.<sup>50</sup> The rationale for term limits in these early democracies was the idea of rotation of office.<sup>51</sup> Democracy, in the view of the ancient Greeks, required that citizens have the experience of both “ruling and being ruled in turn,” and this principle was best effectuated with a strict limitation on tenure in public office, so as to maximize the number of citizens that could govern.<sup>52</sup>

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45. Scott Mainwaring & Timothy R. Scully, *Introduction* to BUILDING DEMOCRATIC INSTITUTIONS: PARTY SYSTEMS IN LATIN AMERICA 33 (Scott Mainwaring & Timothy R. Scully eds., 1995). *But see* Jide O. Nzelibe & Matthew C. Stephenson, *Complementary Constraints: Separation of Powers, Rational Voting, and Constitutional Design*, 123 HARV. L. REV. 617, 643-45 (2010) (arguing that a separation of powers does not induce gridlock).

46. *See, e.g.*, CHEIBUB, *supra* note 34, at 166-68.

47. *Id.* at 7, 13-14.

48. ARISTOTLE, THE POLITICS OF ARISTOTLE 258 (Ernest Barker ed. & trans., Oxford University Press 1976).

49. C. HIGNETT, A HISTORY OF THE ATHENIAN CONSTITUTION TO THE END OF THE FIFTH CENTURY B.C. 237 (Clarendon Press 1967) (1952).

50. GIDEON DORON & MICHAEL HARRIS, TERM LIMITS 5 (2001).

51. *See* HIGNETT, *supra* note 49, at 227.

52. DORON & HARRIS, *supra* note 50 (quoting Mark P. Petracca, *Rotation in Office: The History of an Idea*, in LIMITING LEGISLATIVE TERMS 19, 20 (Gerald Benjamin & Michael J. Malbin eds., 1992)).

In polities larger than a city-state, the ideal of each citizen having a real possibility of holding public office is a fiction. Accordingly, we have observed some evolution in normative thinking about the rationale for term limits. In the modern consideration of term limits, the themes of preventing tyranny and protecting electoral competition have come to the fore, with ideas about self-government losing salience.<sup>53</sup>

The touchstone of current views is the American founding. The Framers debated the length of the presidential term, including the question whether reelection ought to be allowed.<sup>54</sup> The initial version of the Virginia Plan submitted to the Constitutional Convention provided that the President would be ineligible for a second term.<sup>55</sup> This position remained in place while the Framers debated various proposals for term length. Until close to the end of the Constitutional Convention, the Framers' plan was to have the President limited to a single seven-year term.<sup>56</sup> Many of the Framers were concerned that the prospect of reelection would force the President to curry favor with Congress, an undesirable outcome that they associated with failing to take into account the national interest.<sup>57</sup> In the end, of course, the U.S. Constitution initially omitted term limits, much to the chagrin of Thomas Jefferson, who declared the omission to be one of the defects of the document.<sup>58</sup>

Those in favor of term limits focus on the potential for tyranny by an executive. As Simón Bolívar put it, before reversing his position once he assumed executive office himself,

Nothing is more perilous than to permit one citizen to retain power for an extended period. The people become accustomed to obeying him, and he forms the habit of commanding them; herein lays [sic] the origins of usurpation and tyranny.... Our

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53. See, e.g., *id.* at xiii-xv.

54. See STEIN, *supra* note 32, at 4.

55. *Id.* at 5.

56. *Id.* at 4.

57. *Id.* at 6 (describing the position of George Mason of Virginia).

58. Letter from Thomas Jefferson to James Madison (Dec. 20, 1787), in *SOMETHING THAT WILL SHAKE THE WORLD* 280-82 (Susan Dunn ed., 2006) (expressing concern over the incumbency advantage and stating that “[t]he power of removing [the President] every fourth year by the vote of the people is a power which will not be exercised”).

citizens must with good reason learn to fear lest the magistrate who has governed them long will govern them forever.<sup>59</sup>

Bolívar identified the perverse advantage of incumbency: the current officeholder may, either intentionally or not, come to seem like the only option.

Although it is possible that the incumbency advantage is simply a function of better information on the current officeholder than on the challenger, it is also possible that it results from cognitive biases in favor of stability: better the proverbial “devil you know” than a possibly unproven candidate. In modern psychological terms, this implicates the status quo bias, through which people stick with earlier choices without adequately considering alternatives.<sup>60</sup> In addition, incumbents have well-documented advantages in political competitions because of agenda control, greater media coverage, and control over the instruments of power.<sup>61</sup> Incumbents may even be tempted to improperly use public resources in pursuit of remaining in office.<sup>62</sup>

Besides these direct advantages, incumbency also has indirect effects on political competition. Incumbency may indirectly serve as a barrier to entry, so that other good candidates may refrain from entering a contest against an established incumbent.<sup>63</sup> Analogizing to antitrust law, regulation may be an appropriate solution to address these potential distortions in the political marketplace.<sup>64</sup>

Term limits form a kind of precommitment by the polity to consider alternative candidates. Like all precommitments, term limits rest on a claim that some judgments are better made earlier rather than later because the principal cannot be trusted to make the right

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59. John M. Carey, *The Reelection Debate in Latin America*, in *LATIN AMERICAN DEMOCRATIC TRANSFORMATIONS: INSTITUTIONS, ACTORS, AND PROCESSES* 79, 80 (William C. Smith ed., 2009).

60. Daniel Kahnemann, Jack L. Knetsch & Richard H. Thaler, *Anomalies: The Endowment Effect, Loss Aversion, and Status Quo Bias*, 5 *J. ECON. PERSP.* 193, 198 (1991).

61. See, e.g., Kathryn Dunn Tenpas, *PRESIDENTS AS CANDIDATES* 105 (2003); Jacob, *supra* note 21, at 27, 30-32.

62. See, e.g., Sean Scully, *Corruption Scandal Scrambles Pennsylvania Politics*, *TIME*, Jan. 18, 2010, <http://www.time.com/time/politics/article/0,8599,1954271,00.html>.

63. Einer Elhauge, *Are Term Limits Undemocratic?*, 64 *U. CHI. L. REV.* 83, 154-55, 159 (1997).

64. *Id.* at 156-65 (developing the antitrust analogy).

call down the road.<sup>65</sup> As an incumbent serves in office, the ability of the polity to evaluate performance and provide electoral discipline somehow becomes distorted.<sup>66</sup> Hence, there is a need to categorically restrict candidates from re-upping. At the time of adopting a constitution, the polity limits its own will down the road, a paradigmatic precommitment.<sup>67</sup> The precommitment is grounded in the judgment *ex ante* that discarding all executives after a fixed term will produce aggregate benefits, even though we will lose the services of some executives that we would really want to keep.<sup>68</sup>

A precommitment to change executives may have beneficial upstream effects on the selection of candidates who make themselves available to run for office. Knowing *ex ante* that their tenure in public office is, at least presumptively, limited, self-aggrandizing agents may be deterred from seeking office in the first place.<sup>69</sup> Agents who wish to rule for life will be screened out, or at least will be discouraged from running for public office.<sup>70</sup> In contrast, a term limit will encourage agents who have moderate ambition to enter political competition.<sup>71</sup> Term limits thus affect the labor pool of candidates.

Another positive effect of term limits may operate on potential challengers for power. In the absence of term limits, an incumbent

65. See STEPHEN HOLMES, *PASSIONS AND CONSTRAINT: ON THE THEORY OF LIBERAL DEMOCRACY* 272 (1995).

66. See, e.g., Robert S. Erikson, *The Advantage of Incumbency in Congressional Elections*, 3 *POLITY* 395 (1971) (suggesting that name recognition distorts voters' evaluations of candidates).

67. Indeed, term limits exemplify an institution that is better analyzed using precommitment theory than agency cost theories of constitutionalism. See Tom Ginsburg & Eric A. Posner, *Subconstitutionalism*, 62 *STAN. L. REV.* 1583, 1594 & n.29 (2010) (arguing that agency costs drive many aspects of constitutions, but not all). Term limits operate even if the agent retains popularity, and indeed only make sense *because* the agent may retain popularity. The polity limits its own will down the road, *even if there are no agency costs*.

68. See George Will, *Term Limits Aren't Appropriate in "Tough Times"?*, *TOWNHALL.COM*, Oct. 12, 2008, [http://townhall.com/columnists/GeorgeWill/2008/10/12/term\\_limits\\_arent\\_appropriate\\_in\\_tough\\_times](http://townhall.com/columnists/GeorgeWill/2008/10/12/term_limits_arent_appropriate_in_tough_times) (stating that advocates of term limits believe that "the benefits of churning the talent pool exceed the costs of limiting tenures").

69. See GEORGE F. WILL, *RESTORATION: CONGRESS, TERM LIMITS AND THE RECOVERY OF DELIBERATIVE DEMOCRACY* 145 (1992). *But see* Bruce E. Cain & Marc A. Levin, *Term Limits*, 2 *ANN. REV. POL. SCI.* 163, 176 (1999) (arguing that deterrence will occur only if the ambition of the agent is "static" as opposed to "progressive").

70. See WILL, *supra* note 69, at 200-01.

71. See *id.* at 201; John H. Fund, *Term Limitation: An Idea Whose Time Has Come*, in *LIMITING LEGISLATIVE TERMS* 225, 232-36 (Gerald Benjamin & Michael J. Malbin eds., 1992).



may govern for too long, and potential challengers may grow impatient. The precommitment to rotating leaders will assure such challengers that they will indeed have a chance of winning office.<sup>72</sup> Broadly speaking, then, term limits reduce the stakes of politics, and may prevent alternative candidates from resorting to unconstitutional action.<sup>73</sup>

In preventing incumbent leaders from running, term limits change the incentives for politicians in their final period of office. Some have argued that term limits will lead executives to focus more on the public interest if they are not concerned about the need for reelection, even if they may be underpowered in their lame-duck status.<sup>74</sup> Certainly, term limits reduce the risk of manipulation of policy by the executive to maintain power, at least to the extent that the restrictions are effectively enforced.<sup>75</sup>

Term limits also promote a party-based, as opposed to personality-based, vision of democracy. Term limits assume that ultimately no one individual, no matter how competent and exalted, has a monopoly on the skills needed to govern. By forcing even highly competent and popular leaders to stand down, term limits encourage the cultivation of successors.<sup>76</sup> They also encourage the creation of robust political parties to maintain the leader's policies into the future.<sup>77</sup> Channeling ambition to others can have the important benefit of preventing personality from trumping policy.<sup>78</sup>

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72. See Mark P. Petracca, *Term Limits Work Just Fine, Thank You*, L.A. TIMES, July 23, 2006, at M3 (arguing that term limits "check the power of incumbency, increase opportunities for citizens to serve in public office and provide for a modicum of electoral competitiveness").

73. See Barry Weingast, *Designing Constitutional Stability*, in DEMOCRATIC CONSTITUTIONAL DESIGN AND PUBLIC POLICY, *supra* note 39, at 343, 344 (arguing that "all successful constitutions lower the stakes of politics" and that "citizens are less likely to support extra-constitutional action to protect themselves when constitutions protect what they hold most dear").

74. See, e.g., JOHN M. CAREY, TERM LIMITS AND LEGISLATIVE REPRESENTATION 190-91 (1996).

75. See Petracca, *supra* note 18, at 61.

76. Cf. Maltz, *supra* note 11, at 133 (stating that electoral authoritarian rulers who do not have limits shy away from successors because successors make them dispensable). A leader who knew he had to step down, however, would cultivate a successor.

77. See Petracca, *supra* note 18, at 81 (noting that amateur legislators help with party building, and term limits foster amateurs' presence in legislatures).

78. For an example of a leader who has refused to create a party or designate a successor, consider Hamid Karzai of Afghanistan. See Scott Baldauf, *Karzai, A Man with No Party*, CHRISTIAN SCI. MONITOR, Oct. 26, 2004, <http://www.csmonitor.com/2004/1026/p01s03->

In short, there are considerable arguments in favor of term limits. Term limits are seen as having a beneficial effect on the democratic system as a whole by minimizing the potential for tyranny, and shifting the focus away from an individual candidate toward policies and political structures to implement them.<sup>79</sup> However, as the next Section will demonstrate, there are also formidable theoretical arguments against term limits.

### *C. Arguments Against Executive Term Limits*

The primary objection to term limits is rooted in concerns about representation. In this view, term limits serve as an artificial and illiberal constraint on the choice of the polity to retain an executive whom it may otherwise wish to keep.<sup>80</sup> In theory, the polity can always vote the incumbent out of office if it chooses, so there is no need to categorically limit candidates from continued participation in elections. This argument has been adopted by both scholars and courts.<sup>81</sup>

The standard rebuttal is that term limits are typically *adopted* by democratic majorities as part of a package of constitutional commitments.<sup>82</sup> Like other precommitments, term limits may be reversed by downstream amendment. But inclusion of such limits in the constitutional text shifts the default position toward automatic removal of officeholders after a certain period. This may have illiberal consequences when the voters prefer to retain the person in office. Indeed, it is only because of such presumed efficacy that the Framers did not adopt term limits in the first place:<sup>83</sup> an unpopular leader needs no limit on the number of terms she can serve.

Opponents of term limits also argue that governance, like other activity, requires experience, and that practitioners of government may get better over time.<sup>84</sup> This argument was associated with

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79. See Thomas E. Mann, *Congressional Term Limits: A Bad Idea Whose Time Should Never Come*, in THE POLITICS AND LAW OF TERM LIMITS, *supra* note 18, at 84.

80. STEIN, *supra* note 32, at 14-15.

81. U.S. Term Limits, Inc. v. Thornton, 514 U.S. 779, 837-38 (1995).

82. See *supra* notes 65-73 and accompanying text.

83. See STEIN, *supra* note 32, at 7-11 (recounting the Framers' debate over reeligibility and noting that term limits were not adopted in the Constitution).

84. Cf. Nelson W. Polsby, *Constitutional Mischief: What's Wrong with Term Limitations*,

David Hume, who critiqued James Harrington's scheme of government in *The Commonwealth of Oceana* on the grounds that forcing executives out of power would deprive the polity of the best possible leaders.<sup>85</sup> Hume saw no benefit in artificial rotation among officeholders, and suggested that an ideal scheme of government would not have term limits.

The argument about expertise was repeated by Alexander Hamilton, a principal opponent of term limits in debates over the U.S. Constitution. Hamilton thought that a limitation on the presidential term involved "the banishing [of] men from stations in which, in certain emergencies of the state, their presence might be of the greatest moment to the public interest or safety."<sup>86</sup> Hamilton's concern was not only experience but the related concern of a uniquely qualified leader. This may be particularly important in new states or fragile democracies,<sup>87</sup> and many of the Framers may have had George Washington in mind when thinking about the problem of term limits. Artificially forcing uniquely qualified individuals from office, it is argued, may deprive the state of the best possible leadership and risk undermining the social basis for the state.<sup>88</sup> The list of people who have made such claims, however, invites skepticism.<sup>89</sup>

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AM. PROSPECT, June 23, 1991, [http://www.prospect.org/cs/articles?article=constitutional\\_mischief\\_whats\\_wrong\\_with\\_term\\_limitations](http://www.prospect.org/cs/articles?article=constitutional_mischief_whats_wrong_with_term_limitations).

85. DAVID HUME, POLITICAL DISCOURSES 283 (1752) ("[R]otation is inconvenient, by throwing men, of whatever ability, by intervals, out of public employments."). Hume's essay emphasizes the cultivation of expertise over time, limiting higher office to those who have already held lower office.

86. STEIN, *supra* note 32, at 15; *see also id.* at 12 (noting that Charles Cotesworth expressed a similar idea).

87. *See generally* Maltz, *supra* note 11 (examining the effects of term limits on democracies around the world from 1992 to 2006).

88. STEIN, *supra* note 32, at 15 (discussing Hamilton's views).

89. Compare Nursultan Nazarbayev, who is in the process of amending the constitution to name himself President of Kazakhstan for life, Feruza Jani & Irina Yermakova, *Why Would Nursultan Nazarbayev Want To Be President for Life?*, FERGHANA, May 23, 2007, <http://enews.ferghana.ru/article.php?id=1985>, with Nelson Mandela, the embodiment of South Africa's democratic transition who retired on time, Leon Marshall, *Nelson Mandela Bows Out of Public Life*, NATIONAL GEOGRAPHIC NEWS, June 2, 2004, [http://news.nationalgeographic.com/news/2004/06/0602\\_040602\\_mandela.html](http://news.nationalgeographic.com/news/2004/06/0602_040602_mandela.html), and George Washington, who is seen as the "indispensable man" at the founding, JAMES THOMAS FLEXNER, WASHINGTON: THE INDISPENSABLE MAN 214 (1974). Washington, however, privately expressed concern that term limits may exclude the most qualified leader during a time of emergency. STEIN, *supra* note 32, at 12.

Opponents expressed another concern about the role of ex-leaders. In *Federalist* No. 72, Hamilton worried about the effects on politics “to have half a dozen men who had credit enough to raise themselves to the seat of the supreme magistracy wandering among the people like discontented ghosts, and sighing for a place, which they were destined never more to possess.”<sup>90</sup> Such effects are not uncommon in Latin America: Juan Perón in Argentina, for example, cast a long shadow over politics long after his term of office ended.<sup>91</sup> In the United States, at least, ex-Presidents seem to thrive out of office—sometimes as minimally meddling statesmen—and cause very little mischief.<sup>92</sup> Gideon Maltz, who has written in favor of term limits, recommends the practice of maintaining the trappings of executive office, such as a security detail or honorary positions, as a way to incentivize more statesman-like behavior by ex-Presidents.<sup>93</sup>

Hamilton was particularly concerned with the potential for a term-limited leader to manipulate his power to remain in office. As he put it, “as the object of his ambition would be to prolong his power, it is probable that in case of a war, he would avail himself of the emergency to evade or refuse a degradation from his place.”<sup>94</sup> For this reason Hamilton favored a life term during good behavior, a kind of elective monarchy for the United States that, in any event, would not have a large quantum of power.<sup>95</sup>

Another Founding Father, Gouverneur Morris, eloquently made a similar argument that the final term would induce unconstitu-

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90. THE FEDERALIST NO. 72 (Alexander Hamilton), *supra* note 37, at 398-99.

91. See Mugambi Jouet, *The Failed Invigoration of Argentina's Constitution: Presidential Omnipotence, Repression, Instability, and Lawlessness in Argentine History*, 39 U. MIAMI INTER-AM. L. REV. 409, 441 (2008).

92. For accounts of the activities of past Presidents after they left office, see generally MAX J. SKIDMORE, *AFTER THE WHITE HOUSE: FORMER PRESIDENTS AS PRIVATE CITIZENS* (2004); PAUL B. WICE, *PRESIDENTS IN RETIREMENT: ALONE AND OUT OF OFFICE* (2009); Douglas Brinkley, *The Rising Stock of Jimmy Carter: The “Hands-On” Legacy of Our Thirty-Ninth President*, 20 DIPLOMATIC HIST. 505 (1996). *But see* JOHN HEILEMANN & MARK HALPERIN, *GAME CHANGE: OBAMA AND THE CLINTONS, MCCAIN AND PALIN, AND THE RACE OF A LIFETIME* 6 (2010) (covering Bill Clinton's substantial involvement in the presidential campaign of his wife Hillary Clinton).

93. Maltz, *supra* note 11, at 140.

94. STEIN, *supra* note 32, at 7.

95. *Id.*

tional behavior by a leader.<sup>96</sup> Should the possibility of reelection be foreclosed, he argued, a leader may seek to retain it by the sword.<sup>97</sup> Furthermore, the short but definite period of a single term would tempt the President to accumulate wealth quickly while in office, as there would be no electoral discipline to induce public-regarding behavior.<sup>98</sup> It was this argument that seemed to prevail in the heated final days of the Constitutional Convention; though the final text remains silent on reeligibility, it was assumed to be permissible.<sup>99</sup> As described below in Part II, an unwritten norm developed restricting any individual to two presidential terms.

One point of disagreement apparent in the debate is that opponents of term limits tend toward a different interpretation of likely executive behavior in the final term.<sup>100</sup> Although proponents argue that term limits will free up the executive to act in the public interest,<sup>101</sup> opponents note that the lack of electoral check may also give way to corruption and pursuit of policies for personal gain.<sup>102</sup> It may therefore make sense to incentivize leaders with the possibility of continued office to avoid final-term problems. Ultimately, whether public- or private-regarding motivation predominates in the final term of office is an empirical question on which, to our knowledge, there has been little scholarship.

Another empirical question unresolved in the current literature concerns the interaction of the incumbency advantage and time. Specifically, does the degree of incumbency advantage generally remain constant over time, or does it increase or decrease? If it generally decreases after a certain point, term limits may be unnecessary. On the other hand, if it continues to increase with the term of the incumbent, term limits are more justifiable. The literature analyzing the slope of the incumbency advantage is relatively

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96. *Id.* at 9.

97. *Id.*; see also *id.* at 13 (discussing Madison's similar views).

98. *Id.* at 9.

99. *Id.* at 11.

100. Becky Cain, *Term Limits: Not the Answer to What Ails Politics*, in *THE POLITICS AND LAW OF TERM LIMITS*, *supra* note 18, at 45, 47; Carey, *supra* note 59, at 160-63.

101. Carey, *supra* note 59, at 190-91.

102. Much of the debate over constitutional reform in South Korea, for example, focuses on the problems of the single-term, five-year presidency, most of whose occupants have engaged in massive corruption. See ROBERT E. BEDESKI, *THE TRANSFORMATION OF SOUTH KOREA* 40 (1994).

limited,<sup>103</sup> but the little evidence available suggests that most of the benefits from incumbency materialize in politicians' first reelection bid, the so-called "sophomore surge."<sup>104</sup> With no other evidence, we assume that the slope is flat for purposes of the analysis in this Article.

#### *D. A Qualified Approach: Term Limits as Default Rules*

Term limits involve a tradeoff: restricting voter choice in order to preserve an equitable political marketplace. Limits are perceived as both antidemocratic and essential to preserve democracy,<sup>105</sup> and much of the argument turns on underspecified claims regarding the optimal term of office, the effects of incumbency, and the nature of final-period problems.<sup>106</sup> In this Section, we analyze constitutional term limits from the perspective of default rules, showing that term limits are more flexible than they appear to be.<sup>107</sup>

Return to the rationale for a fixed term. Fixed terms provide for insulation, allowing pursuit of midterm over short-term considerations.<sup>108</sup> Ex ante, however, the optimal duration of executive tenure is not obvious, and may vary with a number of considerations, including aspects of the international environment, domestic stability, and the presence of alternative leaders.<sup>109</sup> We cannot be sure that the blanket fixed term specified for the executive is ideal in any sense. An assembly-confidence system may allow for more flexibility in response to changing conditions, in that underperforming executives may be removed relatively easily.<sup>110</sup> But although assembly-confidence systems address the problem of the underperforming leader staying too long, they allow for performing leaders to stay in

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103. For a source of data on the incumbency advantage and a review of research on the topic, see Roy A. Dawes & A. Hunter Bacot, *Electoral Career Patterns and Incumbency Advantage in the U.S. House of Representatives*, 23 LEGIS. STUD. Q. 575 (1998).

104. See *id.* at 577-78.

105. See Jacob, *supra* note 21, at 27, 39.

106. See *supra* Part I.B-C.

107. For definitions and analysis of default and immutable rules, see generally Ian Ayres & Robert Gertner, *Filling Gaps in Incomplete Contracts: An Economic Theory of Default Rules*, 99 YALE L.J. 87, 87-92 (1989).

108. See *supra* notes 36-39 and accompanying text.

109. See *supra* notes 40-42 and accompanying text.

110. See *supra* note 33 and accompanying text.

office forever, and hence exacerbate incumbency advantages. Term limits, on the other hand, place an upper limit on the duration of service, mitigating incumbency advantages but raising the possibility that an effective leader will be forced out of office too early.

Term limits, however, are no more entrenched than any other constitutional provision (the unusual Honduran “poison pill”<sup>111</sup> notwithstanding). The possibility that term limits may be bypassed by constitutional amendment—either negotiated or obtained through referendum—or replacement suggests that executive term limits may be usefully thought of as merely default rules. They may be effective only so long as the polity does not amend around them. To be sure, they raise the cost of extending tenure. But a truly popular executive will find them of little constraint. Franklin Delano Roosevelt, for example, initially denied wishing to run again in 1940 after his second term, in keeping with the unwritten constitutional norm of the time.<sup>112</sup> But with the New Deal in full swing, his popularity was such that his party insisted that he run again.<sup>113</sup> Term limits did form some constraint, in that Roosevelt’s popularity had to be high enough to overcome the default norm of the unwritten constitution: no doubt some unspecified number of voters who might have otherwise been inclined to vote for him declined to do so because of the unwritten limitation. But the threshold was overcome. Once the Twenty-Second Amendment was adopted, the degree of political support necessary shifted again: a future President would require enough support to sustain a constitutional amendment reversing the Twenty-Second Amendment, a much higher threshold.<sup>114</sup>

Term limits may thus be said to raise the degree of political support required for an executive to maintain office from the ordinary electoral majority baseline to the higher constitutional amendment threshold, which we may think of as a supermajority,

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111. See *supra* note 2 and accompanying text.

112. See DORON & HARRIS, *supra* note 50, at 18; STEIN, *supra* note 32, at 323.

113. See DORON & HARRIS, *supra* note 50, at 18-19.

114. Formal amendment procedures under the U.S. Constitution are among the most difficult in existence. Jack Knight, *Institutionalizing Constitutional Interpretation*, in CONSTITUTIONAL CULTURE AND DEMOCRATIC RULE 361, 380 (John Ferejohn, Jack N. Rakove & Jonathan Riley eds., 2001). On the ambiguities of the Twenty-Second Amendment, see BRIAN C. KALT, CONSTITUTIONAL CLIFFHANGERS: A LEGAL GUIDE FOR PRESIDENTS AND THEIR ENEMIES (forthcoming 2011).

although amendment provisions vary. It is not clear *ex ante* that the amendment threshold is always optimal, however, in terms of offsetting the incumbency advantage. It may be that the amendment threshold is too low, so that it does not constrain the executive in any real way. Alternatively, the amendment threshold may be so high as to exceed the incumbency advantage. In such instances, a popular president whom the polity would otherwise prefer to retain will be forced to leave office because of term limits.

To illustrate, suppose that the net advantage of being an incumbent in presidential elections is 10 percent, which is the average incumbency advantage for members of the U.S. Congress since 1975.<sup>115</sup> This means that a candidate will obtain the additional votes of 10 percent of the electorate relative to the support she would receive were she not an incumbent. Suppose further that the incumbent candidate is forbidden by the constitution from running for a second term, but the constitution may be amended by referendum with the support of two-thirds of the population. In this example, the amendment supermajority exceeds a majority plus the incumbency advantage. An incumbent who has the support of 62 percent of the population would have been elected by a majority even without the incumbency advantage, but will be prevented from running by term limits. An incumbent who has the support of 70 percent of the public, on the other hand, will be able to secure an amendment and remain in office. Arguably the term limit rule in this example is excessively restrictive: it does more than simply offset the incumbency advantage.

By providing for an absolute upper bound on executive service, without regard to external conditions, term limits are a blunt instrument to deal with a delicate but real problem—the proverbial sledgehammer used to crack a nut. It is possible, of course, that in establishing a fixed maximum term to be applied to all executives, we manage to choose a period of years that is perfectly optimal, such that it allows the executive sufficient time to develop policies without fear of losing power.<sup>116</sup> We may force some truly popular executives to stand down in favor of less competent candidates, but

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115. Andrew Gelman & Gary King, *Estimating Incumbency Advantage Without Bias*, 34 AM. J. POL. SCI. 1142, 1158 fig.2 (1990).

116. *See supra* notes 36-42 and accompanying text.



the cost is worth it because of the risks of declining performance from an executive that stays past her optimal date.<sup>117</sup> In short, we might by chance set the maximum term for a period that is, as Goldilocks would put it, neither too hot nor too cold. But this seems unlikely given variation in the myriad factors that will affect the optimal term.<sup>118</sup>

If the default rule is not sufficiently sensitive to real world conditions, it is likely to provoke pressures for change. In the constitutional context, however, these pressures may lead to constitutional crises, as the Honduran experience demonstrates.<sup>119</sup> By constitutional crises, we mean a situation in which constitutional politics become so heated that they suspend the operation of normal politics.<sup>120</sup> Constitutional politics are those that involve struggles over the meaning and enforcement of the constitution; ordinary politics involve issues to be decided within the governance structure established by the constitution.<sup>121</sup> When an executive suspends the operation of term limits in order to remain in power, there is likely to be a severe reaction from other parts of the political system and this may suspend ordinary political processes.<sup>122</sup> This was one of the concerns that Hamilton raised in opposition to the limited and fixed term of office.<sup>123</sup> Even if the crisis does not result in violence, the personalization of the conflict—over whether a particular individual may retain office—distinguishes a term limits crisis from other types of constitutional crisis that may arguably have beneficial effects down the road.<sup>124</sup>

Suppose an executive remains highly popular and reaches the end of his or her term. Although supporters may argue for an extension of the term, other members of the public may demand that the constitution be enforced as written. Four resolutions to the crisis are

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117. See *supra* notes 59-79 and accompanying text.

118. See *supra* notes 40-42 and accompanying text.

119. See *supra* notes 1-3 and accompanying text.

120. Cf. Eric A. Posner & Adrian Vermeule, *Constitutional Showdowns*, 156 U. PA. L. REV. 991 (2008) (discussing nondisruptive constitutional politics).

121. See JAMES M. BUCHANAN & GORDON TULLOCK, *THE CALCULUS OF CONSENT: LOGICAL FOUNDATIONS OF CONSTITUTIONAL DEMOCRACY* 7, 119-25 (1962) (differentiating between operational and constitutional decisions).

122. See, e.g., *supra* notes 1-3 and accompanying text.

123. See *supra* note 94 and accompanying text.

124. See Posner & Vermeule, *supra* note 120, at 1010-11.

possible, all with varying welfare consequences. The possible resolutions are (1) the executive departs, (2) the executive remains and *amends* the constitution, (3) the executive remains and *replaces* the constitution, or (4) the executive remains and *ignores* the constitution.

The first outcome—the only one in which term limits work as designed—is seemingly unproblematic, except for those who reasonably argue that the executive’s departure denies the majority’s will.<sup>125</sup> The second and third outcomes represent two methods of constitutional adaptation, with one preserving the constitution and the other eviscerating it. Although we remain agnostic about the effects of amendment to abolish term limits, replacement seems to be of greater concern. In part, this is because the welfare effects of constitutional replacement may be negative.<sup>126</sup> Replacing a constitution entails costly renegotiation along many dimensions and may perpetuate broader instability.<sup>127</sup> The fourth solution, in which an executive remains without any legal basis, may undermine the very idea of a constitutional order. In short, replacement and ignoring the constitution will have systemic consequences, whereas the departure of the executive will also leave the polity devoid of an effective or popular leader.

Even the second solution, amendment, may be problematic, though it adheres nominally to constitutional guidelines. Democracy is ultimately about processes, not personalities,<sup>128</sup> and there is something unseemly about rulers who reengineer higher law to facilitate personal ambition. Of course, one may adopt a qualified approach to amendments designed to evade term limits by focusing on the *process* of evasion. John Carey distinguishes extensions of executive term brought about by negotiations between the president and the opposition from those brought about by plebiscite.<sup>129</sup> In the former case—which Carey associates with strategies chosen by Latin

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125. See *supra* note 80 and accompanying text. The manner of the executive’s departure may make a difference as well. For example, removal of the president through military intervention may be deemed more damaging to the constitutional order than allowing the executive to remain in place.

126. ELKINS, GINSBURG & MELTON, *supra* note 4, at 22.

127. *Id.* at 66-68.

128. See *supra* notes 76-78 and accompanying text.

129. Carey, *supra* note 59, at 88.

American leaders Carlos Menem, Fernando Cardoso, and Alberto Uribe<sup>130</sup>—the extension of term is accompanied by limits on power, and so the risk of tyranny is mitigated.<sup>131</sup> With referenda, subsequent constraints on the executive may be less effective.<sup>132</sup> Another alternative is informal amendment through supreme or constitutional court interpretation, as in Nicaragua,<sup>133</sup> Ukraine,<sup>134</sup> and Kyrgyzstan.<sup>135</sup>

In short, the normative debate over term limits turns on various empirical and theoretical claims. Proponents fear executive tyranny, and more generally the effects of incumbency on political competition.<sup>136</sup> They also believe there to be positive benefits from encouraging leaders to develop successors and political organizations that can extend their policies into the future.<sup>137</sup> Opponents argue that term limits are antidemocratic and form an artificial restriction on choice.<sup>138</sup>

Whatever benefits are associated with term limits, they seem to be a relatively crude instrument because we have no reason to think that the maximum legal term will always or even typically correspond with the optimal term of office. That optimal period will be determined by a whole array of exogenous factors, including the extent of dynamic inconsistency problems, the international environment, and the level of incumbency advantage.<sup>139</sup> Moreover, this Article emphasizes that term limits, whatever their benefits, have the distinct disadvantage of inducing constitutional crises for which there exist few appealing solutions.<sup>140</sup> The frequency of such crises is explored in Part II. To be sure, there are many settings in which term limits appear to function without inviting crisis, such as in the

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130. *Id.* at 79.

131. *Id.* at 88.

132. *Id.*

133. See *supra* note 7 and accompanying text.

134. Seth Mydans, *Ukraine President Was Right To Seek New Term*, INT'L HERALD TRIB., Dec. 31, 2003, at 3.

135. See Bruce Pannier, Commentary, *Rethinking Kyrgyzstan's Tulip Revolution*, RADIO FREE EUR., Aug. 25, 2009, [http://www.rferl.org/content/Rethinking\\_Kyrgyzstans\\_Tulip\\_Revolution/1807335.html](http://www.rferl.org/content/Rethinking_Kyrgyzstans_Tulip_Revolution/1807335.html).

136. See *supra* notes 53-64 and accompanying text.

137. See *supra* notes 76-77 and accompanying text.

138. See *supra* note 80 and accompanying text.

139. See *supra* notes 40-42 and accompanying text.

140. See *supra* notes 116-28 and accompanying text.

United States and Mexico. One wonders whether these settings are immune from crisis, or simply whether an executive that is young enough and popular enough has not managed to tempt supporters to challenge the law.<sup>141</sup>

One implication of this analysis is that empirical inquiry may inform the normative debate. We have, as yet, very little information on the frequency with which term limits are adopted and subsequently evaded. We also need a better sense of how often crises arise historically and how they are typically resolved. The next Part begins to provide some documentation of the frequency of term limits and evasions.

## II. EXECUTIVE TERM LIMITS: THEIR TYPES AND INCIDENCE

We define an executive term limit as a constitutional restriction on the number of fixed terms—consecutive or otherwise—the head of state may serve. In this sense it is a species of qualification for office, akin to age and other constitutional provisions that restrict candidate entry and, thus, voters' choice in some way. The focus in this Article is exclusively on executives and not legislators, even though some of the same issues arise with limits on either office. Although most of the literature in the United States has focused on legislative term limits,<sup>142</sup> term limits on legislators are rare outside of the United States.<sup>143</sup> On the other hand, limits on the head of state's term are a characteristic of the majority of fixed-term presidential systems of government and apply to both "real" and figurehead heads of state.<sup>144</sup>

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141. See KALT, *supra* note 114, at 151-58 (analyzing a hypothetical scenario in which a president seeks to retain power by becoming vice president). Congressman José Serrano has introduced a proposal in every Congress since the 105th to repeal the Twenty-Second Amendment. See GovTrack.us, H.J. Res. 5, <http://www.govtrack.us/congress/bill.xpd?bill=hj111-5&tab=related> (last visited Mar. 14, 2011). Senator Harry Reid introduced a similar proposal in the Senate in 1989. See S. Res. 36, 101st Cong., 135 CONG. REC. 1302 (1989).

142. See, e.g., CAREY, *supra* note 74, at 3; DORON & HARRIS, *supra* note 50, at xxi; LEGISLATIVE TERM LIMITS: PUBLIC CHOICE PERSPECTIVES 1-2 (Bernard Grofman ed., 1996); Polsby, *supra* note 84.

143. See CAREY, *supra* note 74, at 3.

144. See *supra* note 33 and accompanying text.

As mentioned in Part I, the ancient Greeks developed the idea of term limits to promote rotation in office.<sup>145</sup> This principle also seems to run through the architecture of the Roman republic, where consuls served for only one year.<sup>146</sup> Drafters at the beginning of the modern constitutional era (the turn of the eighteenth century) were informed by classical models of democracy and certainly saw term limits as a viable option as well.<sup>147</sup> The U.S. Founders engaged in a vigorous debate on the subject, both during and after the Philadelphia sessions, described briefly above, but allowed executive reelection.<sup>148</sup> Regardless, George Washington left office after two terms and set a precedent that would be followed by the next thirty Presidents, including some such as Jefferson and Jackson that could easily have won a third term.<sup>149</sup>

By at least the late nineteenth century, then, the two-term stay was considered an unwritten constitutional norm in the United States.<sup>150</sup> When General Grant was considering running for a third term, a popular outcry ensued with some taking Washington's precedent as unwritten law.<sup>151</sup> Incumbent President Grover Cleveland's own Democratic Party adopted a statement in its party platform in 1896 that there was such an unwritten law,<sup>152</sup> no doubt to keep him from running a third time. Theodore Roosevelt tested the scope and limits of the norm, however, when he sought to run on his independent Bull Moose ticket in 1912, having already served a full term as well as most of another when he succeeded from the Vice Presidency

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145. See *supra* notes 48-52 and accompanying text.

146. See TITUS LIVIUS, *THE HISTORY OF ROME, BOOKS I AND II*, at 109 (D. Spillon trans., Philadelphia, David McKay 1896).

147. See *supra* note 54 and accompanying text.

148. See *supra* notes 54-58, 86-90, 94-99 and accompanying text.

149. See JOHN E. FERLING, *THE FIRST OF MEN: A LIFE OF GEORGE WASHINGTON* 465 (1988); FLEXNER, *supra* note 89, at 347; JAMES MORTON SMITH, *GEORGE WASHINGTON: A PROFILE* 245 (1969). Jefferson even hoped that his following Washington's precedent might lead to a constitutional amendment to prevent extensions of term. STEIN, *supra* note 32, at 36. Jackson, for his part, proposed such an amendment limiting Presidents to one term. *Id.* at 56.

150. See, e.g., HERBERT W. HORWILL, *THE USAGES OF THE AMERICAN CONSTITUTION* 88-89 (1925); STEIN, *supra* note 32, at 62-63; CHRISTOPHER G. TIEDEMAN, *THE UNWRITTEN CONSTITUTION OF THE UNITED STATES: A PHILOSOPHICAL INQUIRY INTO THE FUNDAMENTALS OF AMERICAN CONSTITUTIONAL LAW* 51-53 (1890). John Quincy Adams may have been the first to identify it as such. He called it a "tacit subsidiary constitutional law" in 1839. See STEIN, *supra* note 32, at 62.

151. HORWILL, *supra* note 150, at 92.

152. *Id.* at 92-93.

after the death of James McKinley.<sup>153</sup> While campaigning, Roosevelt was shot by a man who justified his actions “as a warning that men must not try to have more than two terms as President.”<sup>154</sup> Roosevelt was ultimately defeated and the issue lay dormant until his cousin Franklin Delano Roosevelt ran for a third term in 1940.<sup>155</sup> After Franklin Roosevelt’s death, the Republican party introduced the Twenty-Second Amendment to formalize the informal rule, and the Amendment was ratified in 1951.<sup>156</sup>

Constitution makers in Latin America pointedly ignored the U.S. lead and explicitly adopted term limits almost universally from the start.<sup>157</sup> Other regions around the world have followed. Executive term limits have thus been a central democratic institution associated with national constitutions from very early on.

We may get a better sense of this history by consulting the data on constitutions in the Comparative Constitutions Project.<sup>158</sup> In that project, we have collected the written constitutions for all independent countries since 1789 and recorded their characteristics across a wide number of dimensions. Our current sample includes 619 constitutional systems from the universe of 960 systems that we have identified as existing in independent states, including microstates, from 1789 to 2006. Overall, 269 of these constitutions, or 43 percent, place some limit on the number of terms the head of state is eligible to serve. However, if we consider only the 428 constitutional systems that provide the head of state with a fixed term in office—that is, presidential and semi-presidential systems, which is a more relevant sample for our purposes and the one used throughout the

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153. *Id.* at 93.

154. *Id.* at 95. Roosevelt took the bullet in the chest but insisted on giving his speech, in keeping with his “Bull Moose” reputation. *Id.*

155. STEIN, *supra* note 32, at 314.

156. See Stephen W. Stathis, *The Twenty-Second Amendment*, 7 CONST. COMMENT. 61, 65-70 (1990). For an argument on the efficacy of the formal Amendment, see David A. Strauss, *The Irrelevance of Constitutional Amendments*, 114 HARV. L. REV. 1457, 1494-96 (2001). Some have argued that the Amendment could easily be overcome if a term-limited President ran for Vice President and succeeded to the office. See Bruce G. Peabody & Scott E. Gant, *The Twice and Future President: Constitutional Interstices and the Twenty-Second Amendment*, 83 MINN. L. REV. 565, 633 (1999).

157. Carey, *supra* note 59, at 80-81 (describing early Latin American thinking on the subject).

158. See Comparative Constitutions Project, *supra* note 27, for further details on data and coding.

remainder of this Article—the share of systems with executive term limits is over 60 percent.<sup>159</sup> Another 10 percent of fixed-term constitutions explicitly state that there are no term limits, leaving roughly 30 percent that are silent on the subject. For most of the last group, we infer that there is no limit, although certainly some such limits may be imposed by ordinary law or unwritten custom—for example, as many assert existed in the United States until the passage of the Twenty-Second Amendment.<sup>160</sup>

Executive term limits come in several varieties. Historically, the most common species—27 percent of all fixed-term constitutions—allows multiple terms, but not in succession, an approach that institutionalizes some alternation in power.<sup>161</sup> The U.S. model, in which only two terms are permitted, is also found with some frequency: 20 percent of cases.<sup>162</sup> In addition, 8 percent of constitutions combine these two models, so that two successive terms are permitted, after which the candidate must sit out at least one term before returning. Some Latin American constitutions have a prohibition on consecutive terms combined with a specification of the number of terms the executive must remain out of office. For example, the constitutions of Ecuador (1830 and 1897),<sup>163</sup> Panama (1956 and 2004),<sup>164</sup> Uruguay (1917),<sup>165</sup> and Venezuela (1961)<sup>166</sup> require two terms to elapse before the executive may be reelected.

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159. We exclude parliamentary systems with figurehead heads of state, such as India. Seventy-five percent of in-force presidential and semi-presidential constitutions have term limits for the head of state. *See infra* fig.1.

160. In this sense our data may understate the true extent of actual term limits in operation.

161. Some of these constitutions extend the succession limitation to the vice president to prevent the president and vice president from alternately succeeding each other. *See, e.g.*, CONST. ARG. § 90 (amended 1994).

162. A small number of constitutions allow three terms. *See* CONST. KIRIBATI § 32 (1995); CONST. SEY. art. 52, § 2 (1993); *see also* CONST. DESIGN GROUP, TERM LENGTH AND TERM LIMITS OF THE HEAD OF STATE 4 (2009), *available at* [http://constitutionmaking.org/files/term\\_limits.pdf](http://constitutionmaking.org/files/term_limits.pdf) (noting other constitutions that allow three terms, including the Republic of Vietnam's 1962 Constitution and Rwanda's 1973 Constitution). Some of these allow a subsequent term after a term out of power. The largest number of terms is found in the Rwanda Constitution of 1962, CONST. RWANDA art. 53 (1962), which allowed four successive terms.

163. CONST. ECUADOR art. 34 (1830); CONST. ECUADOR art. 89 (1897).

164. CONST. PAN. art. 158 (1956); CONST. PAN. art. 178 (2004).

165. CONST. URU. art. 73 (1917).

166. CONST. DESIGN GROUP, *supra* note 162, at 6.

Limitations of the executive to a single term, such as the provision at issue in Honduras's constitutional crisis<sup>167</sup> or Mexico's *sexenio*, are relatively rare.<sup>168</sup> Historically, only eighteen constitutions—3 percent of fixed-term constitutions—have included such a provision.<sup>169</sup>

More obscure variants exist. Some constitutions specify an exceptional provision for a particular person holding the executive post as well as a more general provision to apply to subsequent officeholders. For example, the French Constitution of 1852 specifies that “[t]he government of the French Republic is confided for ten years to Prince Louis Napoleon Bonaparte, now President of the Republic.”<sup>170</sup> The Constitution of Yugoslavia of 1963 specified a general four-year term for a President but provided unlimited tenure for Josip Broz-Tito,<sup>171</sup> who served in that office until his death in 1980.<sup>172</sup> This tendency toward personalization is not relegated to the dustbins of history. As of September 2009, reports suggested that leaders in Kazakhstan planned to introduce a law that would have named longtime leader Nursultan Nazarbayev as “President for Life,” though he subsequently rejected it.<sup>173</sup> A more reasonable attempt to deal with a short-term political need was the Lebanese constitutional amendment of 1995, which included a one-time, three-year extension of the term of the sitting President.<sup>174</sup>

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167. See *supra* notes 1-3 and accompanying text.

168. On Mexico, see ELKINS, GINSBURG & MELTON, *supra* note 4, at 194.

169. CONST. DESIGN GROUP, *supra* note 162, at 2.

170. 1852 CONST. art. II (Fr.).

171. CONST. YUGO. art. 220 (1963).

172. Raymond H. Anderson, *Giant Among Communists Governed Like a Monarch*, N.Y. TIMES, May 5, 1980, at A1.

173. See Dana Rysmukhamedova, “Canada.com”: Kazakhstan To Consider “Lifelong Presidency,” ZAMANDASH, Sept. 15, 2009, [http://www.eng.zpress.kg/news/news\\_only/5/2043](http://www.eng.zpress.kg/news/news_only/5/2043).

174. See Elias Hrawi, 80, *Ex-Chief of Lebanon*, N.Y. TIMES, July 8, 2006, at B6. This turned out to set a precedent, adopted by the successor President as well. See John Kifner, *Pressed by Syria, Lebanese Cabinet Agrees To Extend Leader’s Term*, N.Y. TIMES, Aug. 29, 2004, at N3.



Liberia's 1847 Constitution, as amended in 1943,<sup>175</sup> is a very interesting case in which a second eight-year term is prohibited, but a shortened second term is allowed:

The Supreme Executive Power shall be vested in a President who shall be elected by the people, and shall hold his office for a term of eight years. No President may be elected for two consecutive terms of eight years, but should a majority of the ballots cast at a second or any other succeeding election by all of the electors voting thereat elect him, his second or any other succeeding term of office shall be for four years.<sup>176</sup>

Figure 1 provides a historical sense of the distribution of executive term limits. The majority of fixed-term constitutions have always had term limits. In the post-World War II era, however, we observe a drop in their popularity, mostly due to an influx of non-Latin American constitutions to the population. Since the third wave of democratization, executive term limits have come back into fashion and are now as popular as ever. Although term limits retain great popularity, constitutions now provide executives with a more generous period to govern than did early constitutions. Prior to World War II, few countries with limits allowed their heads of state to serve more than one consecutive term. Since World War II, most countries with term limits have settled on two terms as the appropriate threshold, with roughly half of those allowing a return to office following a sitting-out period and the other half not allowing any return.

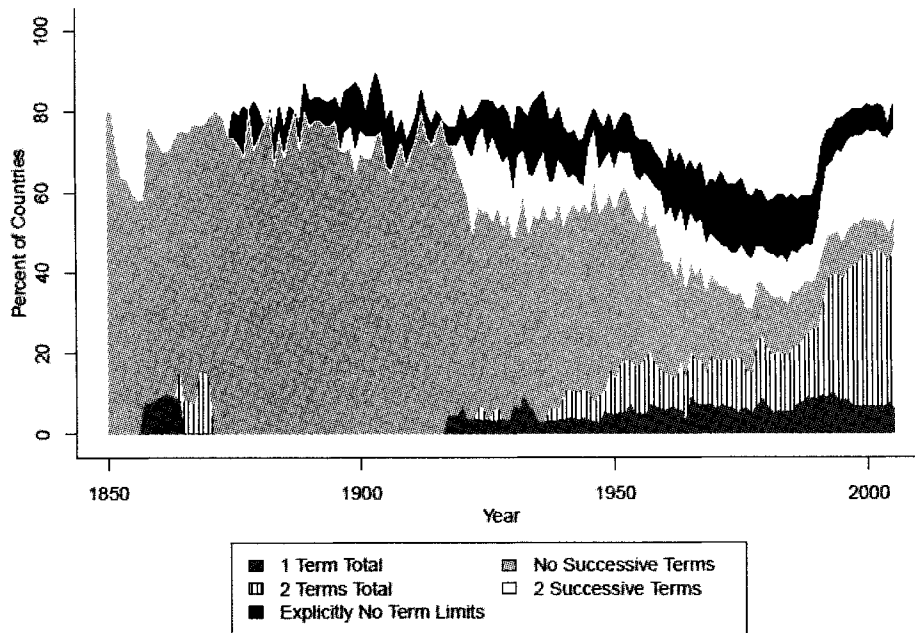
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175. The length of term and term limits in Liberia's 1847 Constitution were heavily amended throughout the years. The length of term was originally two years with no term limits. See George W. Ellis, *Political Institutions in Liberia*, 5 AM. POL. SCI. REV. 213, 214 (1911). This was extended to four years with no term limits in 1907, *id.*, and extended to eight years without the possibility of reelection in 1935, see MICHAEL G. KITAY, CONSTITUTIONS OF THE COUNTRIES OF THE WORLD: LIBERIA 3 n.21 (Albert P. Blaustein & Gisbert H. Flanz eds., 1982). This was changed to the final configuration in 1943 during William Tubman's tenure as President. See Luca Renda, *Ending Civil Wars: The Case of Liberia*, FLETCHER F. WORLD AFF., Fall 1999, at 63.

176. CONST. LIBER. art. 3.1 (1943).

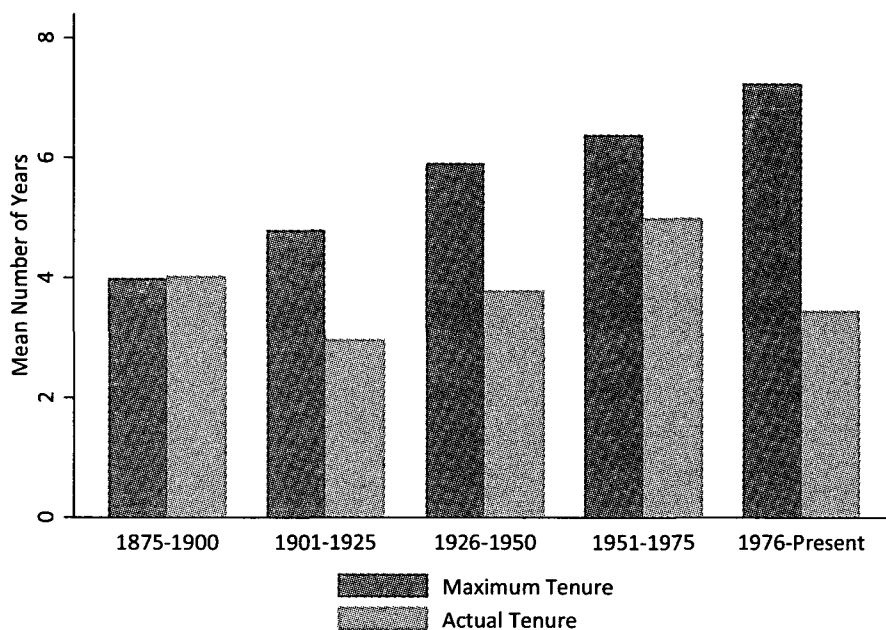
**Figure 1. Percent of Countries with Executive Term Limits, by Type of Limit**

Universe: Constitutional systems with fixed-term heads of state, since 1850



**Figure 2. Mean Tenure and Mean Permitted Tenure<sup>177</sup> over Time**

Universe: All leaders with a limited term, since 1875



Not only is the *number* of permitted terms on the rise, but so too is the *length* of terms. The most common term lengths for heads of state are four, five, and six years—84 percent of constitutions specify one of these term lengths.<sup>178</sup> The prevalence of four-year terms has been on the decline since the early 1900s.<sup>179</sup> In 1900, 60 percent of constitutions that had a specified term length for the head of state provided for a four-year term.<sup>180</sup> By 2000, however, that number had decreased to 18 percent.<sup>181</sup> This drop may be yet

177. By “permitted tenure” we mean the product of term length and the number of terms allowed.

178. CONST. DESIGN GROUP, *supra* note 162, at 1-2.

179. *See id.* at 3 fig.1.

180. Data on file with William and Mary Law Review.

181. Data on file with William and Mary Law Review.

another indicator of the decline of popularity of the U.S. constitutional model.<sup>182</sup> The share of constitutions granting a five-year term, on the other hand, has increased dramatically since the 1930s, from almost none to about 60 percent of those constitutions with a specified term.<sup>183</sup>

The combination of longer terms and an increase in the number of permitted terms has considerably stretched the maximum time heads of state are constitutionally allowed to hold office; indeed, the average permitted tenure has *doubled* since 1875. As Figure 2 shows, the average maximum tenure for executives has increased from just over four years in 1875 to nearly eight years in 2006. For much of this time period, the observed tenure of executives has also increased. Recent years, however, have witnessed a drop in actual time served.

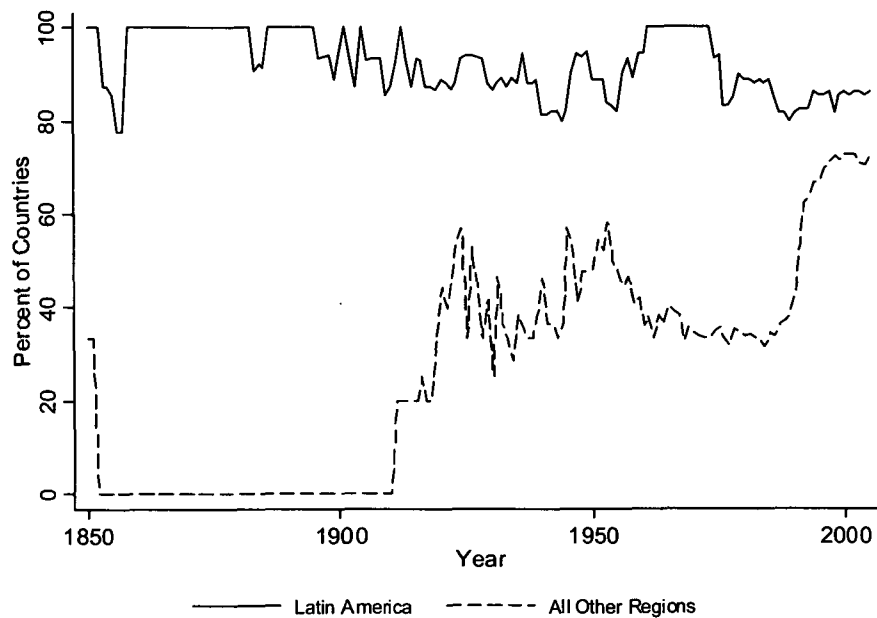
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182. See ELKINS, GINSBURG & MELTON, *supra* note 4, at 26, for others.

183. Data on file with William and Mary Law Review.

**Figure 3. Percent of Countries with Executive Term Limits, by Region**

Universe: Constitutional systems with fixed-term heads of state, since 1850



There is an interesting regional pattern to these data, as Figure 3 shows. In Latin America, a region that has been universally presidentialist since state formation,<sup>184</sup> nearly all constitutions through the turn of the twentieth century, and well over 90 percent of constitutions through World War II, contained executive term limits. In the postwar era, however, the proportion of countries in Latin America with limits has dropped. Among constitutions currently in force in Latin America, only 85 percent contain executive term limits, down from 95 percent immediately after World War II. On the other hand, constitutions in the rest of the world have gone the other direction. Although only 47 percent of

184. Data on file with William and Mary Law Review.

constitutions outside of Latin America provided for term limits in 1950, 73 percent now do. With respect to term limits at least, Latin America is starting to look more like the rest of the world at the same time the rest of the world is becoming more like Latin America.

Upon closer inspection, the data also suggest distinctive regional and temporal styles with respect to the type of limits. Although one-term limits are relatively rare in the modern era, they are nearly all found in Latin America, with most such cases allowing nonsuccessive terms.<sup>185</sup> In the post-Soviet and Sub-Saharan African countries, on the other hand, two-term limits are more popular, and whereas the post-Soviet countries are split on nonsuccessive terms, the Sub-Saharan African countries tend to explicitly prohibit such a return by the executive.<sup>186</sup>

Overall, the data suggest that term limits are an almost universal and enduring part of presidential democracy. They are prominent not only in Latin America—a region where their usage has eroded in recent years—but also in other regions where presidentialism and (especially) semi-presidentialism have become fashionable. It does appear, however, that restrictions on executives have softened over the years. Leaders are permitted to stay twice as long as they used to be. Still, the cases cited at the outset of this Article suggested that even these longer limits may not be enough to contain executive ambition.<sup>187</sup> We turn now to an analysis of these sorts of evasions.

### III. HOW OFTEN ARE TERM LIMITS HONORED?

A crucial question for the study of comparative constitutions is under what conditions their provisions are observed. We know, of course, that in many times and places, constitutions do not provide any effective constraint on power holders, while in other instances they seem to be effective.<sup>188</sup> Term limit provisions provide one lens

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185. Data on file with William and Mary Law Review.

186. Data on file with William and Mary Law Review.

187. See *supra* notes 1-17 and accompanying text.

188. See BEAU BRESLIN, FROM WORDS TO WORLDS: EXPLORING CONSTITUTIONAL FUNCTIONALITY 103-04 (2009); NATHAN J. BROWN, CONSTITUTIONS IN A NON-CONSTITUTIONAL WORLD 3-7 (2002).

through which to analyze this issue. Are term limits mere “parchment barriers” to be set aside whenever an ambitious executive wishes to stay in office?<sup>189</sup> Or do they form real constraints that are observed in practice? This Part tackles these questions.

*A. Understay, Punctual Exit, and Overstay*

Conceptually, executives subject to a fixed term may (1) *understay*, defined as leaving office early; (2) serve through their maximum tenure and leave punctually; or (3) *overstay*, defined as staying longer than the maximum term as it stood when the candidate originally came in office. The focus here is on the last two categories. We may classify leaders into one of the three categories by comparing de jure constitutional information on term limits with the period of time that leaders actually served. De jure rules may be assessed with data from written constitutions, combining information on both the *number* and the *length* of terms that leaders are permitted. These two elements combine to produce a measure of the maximum allowed tenure. Figure 4 describes the distribution of this measure, whose mean of roughly eight for this sample corresponds to the U.S. model of two terms of four years. The modal value of ten, likewise, corresponds to the increasingly popular formula of two terms of five years.

This measure is fairly easy to compare with the career of leaders who served consecutive terms. Of course, any such comparison depends upon good information on the tenure of world leaders, and for that we employ a very useful set of data from the Archigos Project,<sup>190</sup> which, for leaders across the world since 1875, records the date on which they took and left office and by what means they left. The analysis of the two sets of data thus begins in 1875, even

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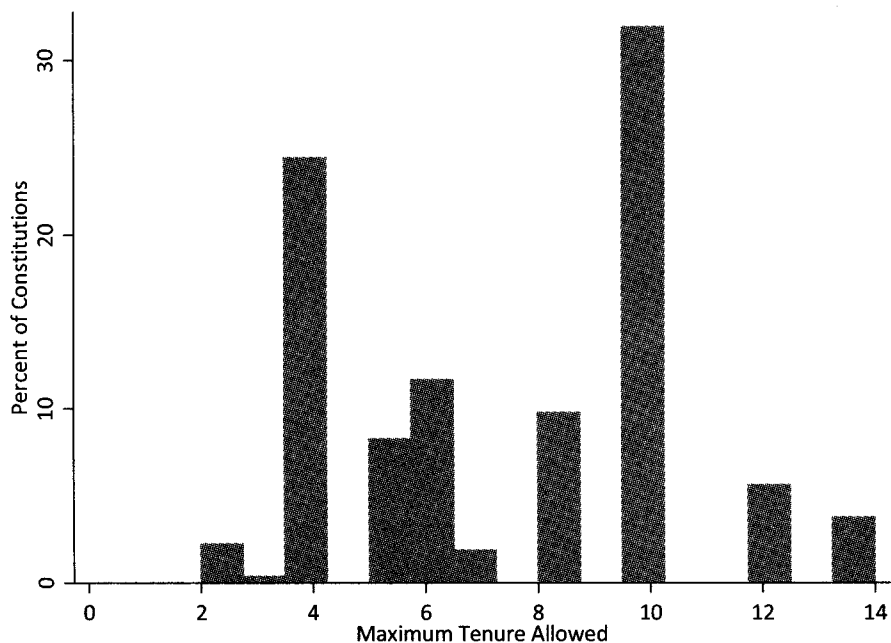
189. THE FEDERALIST NO. 48 (James Madison), *supra* note 37, at 274 (asking rhetorically, “[w]ill it be sufficient to mark, with precision, the boundaries of these departments, in the constitution of the government, and to trust to these parchment barriers against the encroaching spirit of power?” and stating that “[t]he conclusion which I am warranted in drawing from these observations is, that a mere demarcation on parchment of the constitutional limits of the several departments, is not a sufficient guard against those encroachments which lead to a tyrannical concentration of all the powers of government in the same hands”).

190. See generally Henk E. Goemans, Kristian Skrede Gleditsch & Giacomo Chiozza, *Introducing Archigos: A Dataset of Political Leaders*, 46 J. PEACE RES. 269 (2009).

though we have data on constitutional provisions dating to 1789. The sample includes 644 heads of state subject to limits, of whom 45 percent (292 heads of state) understayed, 44 percent (281 heads of state) served their maximum tenure and then stepped down, and 11 percent (71 heads of state) overstayed.

**Figure 4. Maximum Tenure for Heads of State (Combines Term Length and Term Limits)**

Universe: Constitutional systems with fixed-term heads of state, since 1789



For the purposes of this Article, we are primarily interested in the executives who leave punctually or overstay, but because the plurality of leaders understay, a brief look at this group seems warranted. Leaders may leave early for a number of reasons. Table



1, which draws on the reasons for exit, sheds some light here.<sup>191</sup> Most understayers—51 percent—are removed from office through “regular means.” For the executives in this set, this means regularly scheduled elections, although these elections may not be “free and fair.” Another 12 percent either died of natural causes or retired citing health reasons. Thus, over 60 percent of executives who did not serve their maximum tenure left through “regular” means, leaving the formal constitution intact.<sup>192</sup> On the other hand, a nontrivial number of understaying executives, 32.3 percent, were forced from office by some extraconstitutional leadership change, such as a military coup. The third row of Table 1 concerns those who serve their maximum time in office and then leave punctually. Roughly 90 percent of these executives leave office through “regular” means. Thus, it appears that those who leave office early are unlikely to leave through constitutionally prescribed procedures, whereas those who leave “on time” do.

Some subset of those leaders who understay or leave on time would likely have preferred to remain in office.<sup>193</sup> Another subset probably tried to remain in office, despite limits, but without success.<sup>194</sup> At this stage, we cannot precisely estimate the population in these groups. Unrealized attempts to extend power do not reveal themselves easily, at least in the large sample we consider here. We can, however, say something about the degree and kind of overstays.

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191. As coded by Goemans, Gleditsch, and Chiozza, *id.* at 272-74; *see infra* tbl.1.

192. Some 4 percent of understaying executives are still in office. The fate of these executives is undecided. They may turn out to be understayers. They may also serve their maximum tenure or beyond.

193. *See* Posner & Young, *supra* note 11, at 133.

194. Indeed, Honduran President Zelaya “understayed” only because he failed in his attempt to overstay. *See* J. Mark Ruhl, *Honduras Unravels*, J. DEMOCRACY, April 2010, at 93, 100-02; *see also* Posner & Young, *supra* note 11, at 133; *infra* note 222 and accompanying text.

**Table 1. Punctuality and Mode of Exit**

Universe: Fixed-term executives, since 1875

<b>Mode of Exit</b>						
<b>Punctuality of Exit</b>	<b>Still in Office</b>	<b>Regular Means</b>	<b>Died in Office</b>	<b>Retired</b>	<b>Irregular Means</b>	<b>N</b>
No Term Limits	6 (2.9%)	153 (74.3%)	10 (4.9%)	2 (1.0%)	35 (17.0%)	206 (100%)
Understay	11 (3.8%)	150 (51.4%)	26 (8.9%)	11 (3.8%)	94 (32.3%)	292 (100%)
Punctual Exit	22 (7.8%)	228 (81.1%)	4 (1.4%)	6 (2.1%)	21 (7.5%)	281 (100%)
Overstay	18 (25.4%)	26 (36.6%)	7 (9.9%)	0 (0.0%)	20 (29.0%)	71 (100%)
<b>Means of Overstay</b>						
Amendment	14 (48.3%)	8 (27.6%)	2 (6.9%)	0 (0.0%)	5 (17.2%)	29 (100%)
Replacement	2 (7.4%)	13 (48.2%)	2 (7.4%)	0 (0.0%)	10 (37.0%)	27 (100%)
Coup/Emergency/ Suspension	1 (20.0%)	1 (20.0%)	1 (20.0%)	0 (0.0%)	2 (40.0%)	5 (100%)
Disregarded/Not Specified	2 (22.2%)	4 (33.3%)	1 (11.1%)	0 (0.0%)	3 (33.3%)	9 (100%)
<b>All</b>	<b>57</b> (6.7%)	<b>557</b> (65.5%)	<b>47</b> (5.5%)	<b>19</b> (2.2%)	<b>170</b> (20.0%)	<b>850</b> (100%)

Overall, overstayers do not constitute a significant segment of the population of leaders (11 percent). Yet, if we restrict the analysis to those executives who actually had the opportunity to overstay—that is, omitting understayers—the overstayers are a significant group. This sort of restriction makes sense because an executive's age, popularity, and other factors restrict opportunities for overstaying.<sup>195</sup> So, of those leaders who served at least their maximum tenure, *more than 25 percent stayed longer than allowed*.

Overstayers managed this through various means. As we have noted, sometimes the executive may engineer a constitutional amendment<sup>196</sup> or judicial interpretation<sup>197</sup> to ensure continued ten-

195. See Posner & Young, *supra* note 11, at 135; *supra* notes 83, 193-94 and accompanying text.

196. See *supra* notes 1-17 and accompanying text.

197. See *supra* notes 133-35 and accompanying text.

ure in office, either by extending the current term<sup>198</sup> or by removing prohibitions on reelection.<sup>199</sup> If an amendment is unavailable, the executive may formally suspend the constitution's operation,<sup>200</sup> perhaps through the use of emergency powers,<sup>201</sup> or simply ignore the constitution.<sup>202</sup> In some cases, the executive may commission the writing of a new constitution more amenable to longer terms.<sup>203</sup> Such rewriting may extend the term of the executive, remove the limit on the number of terms the executive is able to serve, or simply reset the clock, so to speak, by reducing the number of full terms the executive served under the in-force constitution. Thus, overstay and understay may come in both constitutional and extraconstitutional varieties. Some recent work suggests that extra-constitutional modes of term limit transgression are becoming less common.<sup>204</sup>

To examine this claim in more detail, we analyzed every instance of potential executive overstay, meaning all leaders who stayed until at least the expiration of their term. This more careful examination resulted in a smaller number of overstays than observed in the Archigos data. Out of 352 potential overstayers, 25.3 percent (89 leaders) attempted stay beyond their term.<sup>205</sup> Of these, 79.8 percent (71 leaders) were successful. This means that in 20.2 percent (71 of

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198. See JONATHAN HARTLYN, *THE STRUGGLE FOR DEMOCRATIC POLITICS IN THE DOMINICAN REPUBLIC* 39-41 (1998).

199. As noted above, the latter is exactly what occurred in Nicaragua in October 2009. See *supra* note 7 and accompanying text. Our data cannot capture such reinterpretations of term limits.

200. See *supra* notes 120-24 and accompanying text.

201. For example, President Ferdinand Marcos declared martial law in the Philippines. See William H. Overholt, *The Rise and Fall of Ferdinand Marcos*, 26 *ASIAN SURV.* 1137, 1139-40 (1986). Mamadou Tandja of Niger also assumed sweeping emergency powers after the defeat of a referendum that would have allowed him to seek reelection. See *Emergency Powers for Niger Leader*, BBC NEWS, June 26, 2009, <http://news.bbc.co.uk/2/hi/africa/8121974.stm>; *supra* note 3.

202. See *infra* notes 221-22 and accompanying text.

203. For example, Alberto Fujimori of Peru commissioned a new constitution that the country approved by referendum. See Steven Levitsky, *Fujimori and Post-Party Politics in Peru*, *J. DEMOCRACY*, July 1999, at 78. In the Philippines, Marcos replaced the constitution. See Overholt, *supra* note 201.

204. Posner & Young, *supra* note 11, at 126-27.

205. The most common method of *seeking* an overstay was a constitutional amendment (40 cases), followed by constitutional replacement (29 cases). Constitutional suspension or coup occurred in five cases, and in fifteen cases the constitution was simply disregarded or the mechanism of overstay was unclear.

352) of cases, term limits were not effective predictors of the actual term served. The cases of unsuccessful attempts to overstay might also be considered constitutional failures from an ideal of self-enforcement,<sup>206</sup> but from another perspective they reflect the effective, albeit active, enforcement of the constitution.<sup>207</sup>

Of the seventy-one cases in which executives successfully overstayed, twenty-nine involved constitutional amendment and hence are relatively unproblematic from a normative point of view.<sup>208</sup> In another twenty-seven cases the constitution was replaced, and in five cases the constitution was suspended or set aside. The remaining ten cases indicate the constitution was simply disregarded or are cases for which the mechanism of overstay is unclear, at least according to the historical sources we consulted. Setting aside those who overstayed through constitutional amendment, we may say that roughly forty-two cases of overstay—11.9 percent of all potential overstayers—resulted in a severe break to the constitutional order, and another eighteen attempts to overstay were unsuccessful. Whether this is considered a large or small number depends on a view of the proverbial glass being half full or half empty, but it is at least arguable that a figure of one in eight represents a serious level of risk for the constitutional order, even

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206. See THE FEDERALIST NO. 51 (James Madison).

207. See BROWN, *supra* note 188, at 198; *supra* notes 116-41 and accompanying text. Our data suggest that many of these are failed amendments. Attempts to overstay through amendment succeed in 72.5 percent of attempts, whereas attempts through replacement and suspension were successful in more than 95 percent of cases.

208. From an empirical standpoint, overstay through amendment also seems relatively unproblematic. Executives who extend their maximum tenure through the amendment process typically stay in office for only an extra four years—about one term. However, executives who extend their maximum tenure through replacement or suspension of the constitution typically stay in office for six or ten extra years, respectively. These numbers would likely be even higher if such a large number of executives who overstay via replacement or suspension were not removed through irregular means. See *supra* tbl.1. Of course, there are exceptions to this general rule, like Zine El Abidine Ben Ali of Tunisia, who served as President from 1987 to 2011 via an amendment in 2002 that abolished term limits in the country. See Clement Henry, *Tunisia's "Sweet Little" Regime*, in WORST OF THE WORST: DEALING WITH REPRESSIVE AND ROGUE NATIONS 300, 301, 311 (Robert I. Rotberg ed., 2007); *Tunisia: President Zine al-Abidine Ben Ali Forced Out*, BBC NEWS, Jan. 14, 2011, <http://www.bbc.co.uk/news/world-africa-1295025>. His total of nine extra years after amendment was relatively long. But in general, those who extend their term limits through constitutional amendment overstay fewer years than those who use other means. Moreover, as discussed below, the consequences of overstay tend to be less severe when overstay is achieved through amendment. See *infra* Part III.B.

if we may celebrate the fact that the constitution “works” in the other seven cases.

Even these numbers may overstate the incidence of punctual exit. Sometimes an executive may leave on time yet violate the spirit of term limits. Vladimir Putin’s amendments that created a more powerful prime ministerial office, and thus provided a “golden parachute” for the ex-President, are one example.<sup>209</sup> Another example is Dominican dictator Rafael Trujillo, who cited the American practice of limiting the presidency to two terms when in 1938 he stated that he refused to run, despite what he interpreted to be the wishes of his people.<sup>210</sup> Trujillo proceeded to step down in favor of his Vice President.<sup>211</sup> But after President Roosevelt ran for a third term in 1942, Trujillo followed suit and reassumed the presidency for two more terms, stepping down again in favor of his brother Hector in 1952.<sup>212</sup> The analysis of evasions of term limits in this Article does not fully capture these “false negative” instances of overstay.<sup>213</sup>

### *B. Consequences of Overstay*

Even if overstay through constitutional rupture occurs with some frequency (one in eight cases), it does not follow that these actions

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209. See Philip P. Pan, *Russia Lengthens Presidential Tenures*, WASH. POST, Dec. 31, 2008, at A12.

210. HARTLYN, *supra* note 198, at 43.

211. *Id.* at 43-45.

212. *Id.* Perhaps anticipating such manipulation, some Latin American constitutions forbid relatives from succeeding the President. See Constitución Política de la República de Nicaragua [Cn.] [Constitution] art. 147, La Gaceta [L.G.] 9 January 1987.

213. Another type of term evasion involves those who violate a limit on the number of nonconsecutive terms. As noted in Figure 1, constitutions increasingly eliminate executives’ ability to serve nonconsecutive terms. With these new limits on executive tenure comes the possibility that executives may run after intermediary terms, although they are constitutionally barred from office. The only such evasion we were able to identify was by Rafael Nunez of Colombia. Nunez was President from August 11, 1884, to April 1, 1886, and despite a restriction in the 1863 Constitution that a full two-year term must elapse before a President is eligible to serve again, he took office again on June 4, 1887. CONST. COLOM. of 1863, arts. 75, 79; 8 THE NEW ENCYCLOPEDIA BRITANNICA 830 (15th ed. 2007); THE STATESMAN’S YEAR-BOOK 607 (J. Scott Keltie ed., 1888). However, it is unclear whether this is an overstay because Nunez’s two terms were served under two different constitutions. William C. Banks & Edgar Alvarez, *The New Colombian Constitution: Democratic Victory or Popular Surrender?*, 23 U. MIAMI INTER-AM. L. REV. 39, 49 (1991) (stating that a new constitution was implemented in Colombia in 1886, before Nunez took office again). For the sake of inclusiveness, we count it as one.

result in constitutional crisis, as opposed to something closer to a consensual shift in constitutional norms. A more thorough investigation of the consequences of term limit violations is required. The remainder of this Part offers some suggestive evidence.

One way to get at the consequences of term limit evasion is to trace particular case histories. The Appendix lists every violator of term limits, sorted by whether the country was a democracy or autocracy at the time the leader took office.<sup>214</sup> Of the democratically elected leaders who overstayed in recent years, several did so through amendment and thus may fit the model of the popular leader who works around the default rule to remain in office. Carlos Menem in Argentina and Fernando Cardoso in Brazil revised their constitutions to allow a second term,<sup>215</sup> and both turned over the office to opposition parties after their second terms were over, though Menem tried to stay on before his attempt was ruled unconstitutional.<sup>216</sup> Alexander Lukashenko in Belarus, on the other hand, used amendment to consolidate power and moved his country from the ranks of democracies to a “competitive authoritarian” regime.<sup>217</sup> Others who pursued this strategy either replaced the constitution wholesale (Alberto Fujimori in Peru, Ferdinand Marcos in the Philippines)<sup>218</sup> or simply suspended it after failing to secure amendment (Mamadou Tandja in Niger).<sup>219</sup>

The nineteenth century cases are also mixed. For example, Costa Rica enacted a single four-year term limit with its 1871 Constitution.<sup>220</sup> President Tomás Miguel Guardia Gutiérrez, who

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214. See *infra* Appendix tbl.A1.

215. Carey, *supra* note 59, at 79.

216. *Id.* at 85; Larry Rohter, *Departing President Leaves a Stable Brazil*, N.Y. TIMES, Dec. 29, 2002, at A10.

217. Andrei Sannikov, *The Accidental Dictatorship of Alexander Lukashenko*, 25 SAIS REV. 75, 76 (2005).

218. See ALBERT F. CELOZA, *FERDINAND MARCOS AND THE PHILIPPINES* 48 (1997); Jean Grossholtz, *Philippines 1973: Whither Marcos?*, 14 ASIAN SURV. 102-03 (1974); Maria McFarland Sánchez-Moreno, *When a “Constitution” Is a Constitution: Focus on Peru*, 33 N.Y.U. J. INT’L L. & POL. 561, 570 (2001).

219. Editorial, *African Union Offering Too Little Too Late in Niger*, OBSERVER, Mar. 3, 2010, [http://www.observer.ug/index.php?option=com\\_content&task=view&id=7507&Itemid=61](http://www.observer.ug/index.php?option=com_content&task=view&id=7507&Itemid=61).

220. Fabrice Lehoucq, *Policymaking, Parties, and Institutions in Democratic Costa Rica* 7 (Centro de Investigación y Docencia Económicas, Working Paper No. 192, 2007), available at <http://www.cide.edu/publicaciones/status/dts/DTEP%20192.pdf>.

had been part of a coup ousting the previous President, overstayed several months, then ceded power to a puppet leader briefly before being reelected to continue his overstay until his own death.<sup>221</sup> Term limits were then observed for some time. In 1889, President Ramón Bernardo Soto Alfaro attempted to overstay after holding the purported first honest election in the country, but mass protests prevented him from succeeding.<sup>222</sup> The regime of his successor José Joaquín Rodríguez marked a turning point for democracy.<sup>223</sup> Thereafter, only one leader has overstayed (Rafael Yglesias Castro in 1898) and has done so through constitutional amendment.<sup>224</sup> The Costa Rican story appears to be one in which attempted evasion led to mass enforcement, ultimately leading to stable democracy.

Contrast the Costa Rican experience with that of Venezuela, the country in the sample with the largest number of overstays—six. Five of these occurred in the forty years prior to 1913,<sup>225</sup> a period of successive military strongmen who sometimes overstayed while other times governed through puppet leaders that would leave office on time.<sup>226</sup> There was no effective enforcement of term limits, and their application seemed to depend on the whim of the ruler.<sup>227</sup> After democracy was reestablished in 1959, term limits were regularly observed.<sup>228</sup> Hugo Chávez, however, initiated constitutional reform after his initial election in 1999,<sup>229</sup> and then in 2007 attempted to amend the new constitution to remove term limits.<sup>230</sup> His first referendum attempt failed narrowly,<sup>231</sup> but Chávez was able to hold

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221. ROBERT L. SCHEINA, *LATIN AMERICA'S WARS: THE AGE OF THE CAUDILLO, 1791-1899*, at 492 (2003).

222. See James L. Busey, *The Presidents of Costa Rica*, 18 *AMERICAS* 55, 67 (1961).

223. *Id.*

224. Castro attempted another constitutional amendment in 1902 to allow himself to remain in power, but was defeated. See Carey, *supra* note 59, at 82.

225. See *infra* Appendix tbl.A2.

226. GlobalSecurity.org, *Venezuela Introduction*, <http://www.globalsecurity.org/military/world/venezuela/intro.htm> (last visited Mar. 14, 2011).

227. See generally BRIAN LOVEMAN, *THE CONSTITUTION OF TYRANNY: REGIMES OF EXCEPTION IN SPANISH AMERICA 156-60* (1993).

228. See THE UNRAVELING OF REPRESENTATIVE DEMOCRACY IN VENEZUELA 11 (Jennifer L. McCoy & David J. Myers eds., 2004).

229. Maxwell A. Cameron & Flavie Major, *Venezuela's Hugo Chavez: Savior or Threat to Democracy?*, 36 *LATIN AM. RES. REV.* 255, 256 (2001).

230. Juan Forero, *Chavez Would Abolish Presidential Term Limit*, *WASH. POST*, Jan. 11, 2007, at A21.

231. *Chavez Defeated over Reform Vote*, *BBC NEWS*, Dec. 3, 2007, <http://news.bbc.co.uk/2/>

another referendum in 2009 that succeeded.<sup>232</sup> By these actions, at least, Chávez seems to represent a return to an earlier, less constitutionalist tradition in Venezuela.

Ferdinand Marcos of the Philippines exemplifies an executive who suspended democracy to remain in office. The Philippines was considered a democracy at the time of his initial election in 1965.<sup>233</sup> The presidential term was four years, with a limit of eight consecutive years in office.<sup>234</sup> In 1969, Marcos won an unprecedented second term,<sup>235</sup> but thereafter became increasingly dictatorial and developed a cult of personality.<sup>236</sup> In response to increasing insecurity and a communist uprising, Marcos declared martial law in 1972, suspending Congress.<sup>237</sup> He then wrote a new constitution, which allowed him to remain in power, and his dictatorship continued until the “People Power” revolution of 1986.<sup>238</sup> Since the reestablishment of democracy, however, the Philippine political system has weathered many attempts to engineer overstay, and has rebuffed them all.<sup>239</sup> Like Costa Rica, an incident of successful enforcement seems to have facilitated a pattern of observance of term limits thereafter.

### *C. Implications and Discussion*

Our analysis also has a number of implications for the question of whether and how constitutions “work.”<sup>240</sup> From one perspective,

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232. Romero, *supra* note 6, at A1.

233. See Abrogating Democracy: The Military and the Fragile Democracy of the Philippines (R.J. May & Viberto Selochan eds., 2004), [http://epress.anu.edu.au/mdap/mobile\\_devices/ch04s04.html](http://epress.anu.edu.au/mdap/mobile_devices/ch04s04.html).

234. CONST. (1946), Art. VII, § 5 (Phil.).

235. Richard J. Kessler, *Marcos and the Americans*, 63 FOREIGN POL’Y 40, 46 (1986).

236. STRUGGLE FOR FREEDOM 297 (Cecilio D. Duka ed., 2008); Anjan Ghosh, *People’s Power in the Philippines*, 21 ECON. & POL. WKLY. 1609, 1609 (1986).

237. SARA STEINMETZ, DEMOCRATIC TRANSITION AND HUMAN RIGHTS 144 (1994).

238. Kurt Schock, *People Power and Political Opportunities: Social Movement Mobilization and Outcomes in the Philippines and Burma*, 46 SOC. PROBS. 355, 355 (1999).

239. See Aurel Croissant, *From Transition to Defective Democracy: Mapping Asian Democratization*, 11 DEMOCRATIZATION 156, 161-62 (2004).

240. Other commentators have also opined on this question. See generally BRESLIN, *supra* note 188, at 8, 13 (discussing how constitutions work and what factors are important in their functionality).



term limits seem to be observed with remarkable frequency, though it is not clear what a baseline level of enforcement of such provisions ought to be.<sup>241</sup> The results suggest that the function of term limits differs across regime type, and that broadly speaking, they tend to function better in democracies than dictatorships. We do not have a clear view of the mechanism by which term limits function in democracies: they may operate through selection of better agents, through the prospect of enforcement by elites or the people, or through some other mechanism.<sup>242</sup> Nevertheless, the effect is strong enough to suggest that constitutional provisions seem to be observed more frequently in democracies than in dictatorships. In democracies, the gap between a term-limit provision and its practice is decidedly narrower.

Examining each leader who has violated the term limit provisions reveals only fifteen violations by leaders who took office in a democratic regime (out of 160 leaders), with the remaining fifty-six violations occurring in nondemocracies (out of 192 leaders).<sup>243</sup> One unanswered question, then, is why leaders in autocracies adopt term limits in the first place. Although at the margin term limits may provide some constraint,<sup>244</sup> in many cases they provide none.<sup>245</sup> Furthermore, the examples of Putin and Trujillo demonstrate that even apparently effective term limits may be illusory.<sup>246</sup> To speculate, the answer may have something to do with the achievement of internal coordination within the regime—a term limit may signal to potential rivals that they may have a chance to replace the leader down the road.<sup>247</sup> In this sense, the prevalence of term limits among

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241. See *supra* notes 40-42, 105-10, 139-41 and accompanying text.

242. See, e.g., *supra* notes 28, 222, 238 and accompanying text.

243. See *infra* Appendix tbls.A1 & A2. Our measure of democracies is those countries with a "Polity Score" of 3 or greater. See POLITY IV PROJECT, POLITICAL REGIME CHARACTERISTICS AND TRANSITIONS, 1800-2009 (2010), <http://www.systemicpeace.org/polity/polity4.htm> (explaining the Polity Score and typical score ranges). This is a relatively low threshold compared to the one traditionally used in the literature, see *id.*, because we wanted to ensure that new and marginal democracies are included in the sample.

244. See ROBERT BARROS, CONSTITUTIONALISM AND DICTATORSHIP: PINOCHET, THE JUNTA, AND THE 1980 CONSTITUTION 16-17 (2002).

245. See Quan Li, *Democracy, Autocracy, and Expropriation of Foreign Direct Investment*, 42 COMP. POL. STUD. 1098, 1105-06 (2009) (discussing the ineffectiveness of institutional constraints on autocrats).

246. See *supra* notes 12, 209-13 and accompanying text.

247. BARROS, *supra* note 244, at 19-20 (positing that institutional limits represent the

authoritarians may reflect a larger pattern: constitutions—we and others find—tend to be highly democratic, regardless of the use or misuse of the documents by those who govern with them.<sup>248</sup> But this question requires further microstudy of authoritarian constitutionalism.

Even if term limit evasions are sometimes associated with constitutional crises of a negative sort, it is necessary to disaggregate democracies and autocracies from a normative perspective. A “crisis”<sup>249</sup> in a dictatorship may lead to democratization and hence be desirable from a normative point of view. For democracies, the reverse presumption holds. We therefore cannot posit a global recommendation for both regime types.

Despite these limitations of the present analysis, those who are skeptical about term limits may point to the Zelaya and Tandja cases to argue that term limits are associated with *some* risk of constitutional rupture.<sup>250</sup> From a constitutional design perspective, then, we ought to consider institutional alternatives to term limits. The normative question about whether term limits ought to be adopted will depend on the existence of alternative institutional schemes that may accomplish the same goals without some of the costs. The next Part considers a number of such schemes.

#### IV. INSTITUTIONAL ALTERNATIVES

Term limits are designed to address real problems with democratic governance, namely the incumbency advantage, which distorts political choice and may hamper optimal selection of representatives.<sup>251</sup> In the absence of term limits, we may have underperforming representatives that stay too long, and so we decide *ex ante* to precommit to selecting a new agent.<sup>252</sup> But term limits are a blunt instrument to address the incumbency ad-

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“subordination of present power to rules,” which constrains the range of choices that can be made by current political actors).

248. See generally Zachary Elkins, *Diffusion and the Constitutionalization of Europe*, 43 COMP. POL. STUD. 969 (2010).

249. See *supra* notes 120-24 and accompanying text.

250. See *supra* notes 1-4 and accompanying text.

251. See *supra* notes 59-64 and accompanying text.

252. See *supra* notes 65-68 and accompanying text.

vantage.<sup>253</sup> Not only is the maximum legal length of a limited term unlikely to correspond to a hypothetical optimal term for an executive,<sup>254</sup> but this mismatch may induce popular executives to try to adjust the constitution to stay in power. If opposition is significant, the resulting crisis may lead to the death of the constitution and even a descent into tyranny. This Part considers several alternatives that may accomplish some of the desirable goals of term limits without entailing all the costs. These include mechanisms to adjust term length, alter the powers of the presidency through “unbundling,” handicap the incumbent, and incentivize the challenger.

#### *A. Adjusting Term Length*

We briefly mentioned the Liberian model of 1943, which featured a halving of the term length after the first two terms.<sup>255</sup> This reduction in term length may provide for greater accountability of the incumbent, and in party-based systems may incentivize the political party to cultivate successors to the current leader. A rational political party would rather retain office with a new candidate for a longer term, as opposed to retaining office with the incumbent for a shorter period.<sup>256</sup>

Adjusting term length may serve to address the concern with executive tyranny that motivates some critics of term limits. More frequent elections would allow the public to continuously scrutinize executive performance, enhancing accountability. However, this proposal would not directly address the incumbency advantage. There is nothing inherent in more-frequent elections that would reduce undue advantages an incumbent holds in electoral competition.<sup>257</sup> Indeed, it may give added legitimacy to an incumbent who frequently faces the voters.

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253. *See supra* notes 116-41 and accompanying text.

254. *See supra* notes 40-42 and accompanying text.

255. *See supra* notes 175-76 and accompanying text.

256. Assuming that a political party seeks to maximize the time its representatives are in office, in the case of decreasing term lengths, a rational party will prefer a new representative in office for a longer period over an incumbent for less time. The counterargument is that the incumbency advantage means that a political party may favor a candidate who is more likely to be reelected over a new candidate.

257. *See supra* notes 59-64, 103-04 and accompanying text.

A related substitute for term limits would be to promote the institution of recall.<sup>258</sup> A president subject to potential recall from voters is somewhat akin to a prime minister in a parliamentary system, in that every period of governance is potentially her last.<sup>259</sup> Recall provisions are not popular in presidential democracies, for they undermine the advantages of having a fixed term in the first place, namely the insulation to pursue policies that are valuable in the midterm.<sup>260</sup> A feasible hybrid would be to have recall available in later terms only; thus, the system would have features of a presidential system during the first term and of a parliamentary system in subsequent terms. We know of no system that has tried it, but it seems like a feasible option.

There is, of course, no reason that candidates to office need to stand for symmetrical terms. We might think about term length as a variable that candidates could themselves manipulate within constraints. Suppose, for example, that candidates for a second term to the U.S. presidency could choose to run for (1) a single term of four years or (2) a three-year term with the possibility of a final third term. Again, this idea seems to incorporate into a presidential system some of the irregular rhythm of elections in a parliamentary system. There would be some coordination costs in aligning terms of the House of Representatives with the presidency.<sup>261</sup> But there is nothing sacred about the four-year rhythm of the presidential cycle,<sup>262</sup> and creative institutional design may exploit variation in term as a device to accomplish some of the ends of term limits.

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258. See California Secretary of State Debra Bowen, FAQs About Recalls, [http://www.sos.ca.gov/elections/elections\\_recall\\_faqs.htm](http://www.sos.ca.gov/elections/elections_recall_faqs.htm) (last visited Mar. 14, 2011) (describing a recall).

259. See Albert, *supra* note 33, at 561.

260. See *supra* notes 34-39 and accompanying text.

261. See 147 CONG. REC. 26,905 (2001) (statement of Sen. Dodd) (outlining the costs of a program to improve federal elections).

262. Although the four-year length may not be sacred, in general, a term limit itself may be. For example, the delegates at the Constitutional Convention mostly agreed that the Constitution should limit the executive's terms. See THOMAS H. NEALE, CONG. RESEARCH SERV., PRESIDENTIAL TERMS AND TENURE: PERSPECTIVES AND PROPOSALS FOR CHANGE 1-2 (2009), available at <http://www.fas.org/sgp/crs/misc/R40864.pdf>.

*B. Altering Powers*

Another alternative to term limits may be to reduce formal executive powers as the tenure of the officeholder goes on. This could take two forms: unbundling powers and raising constraints. Either of these options involves weakening of the executive, and hence reduces the incentives to remain in office after the term ends.

Unbundling refers to the possibility of breaking up executive functions typically concentrated in a single office.<sup>263</sup> This may involve the adoption of plural executives, such as found in many U.S. states with directly elected attorneys general, lieutenant governors, and other officials.<sup>264</sup> In this context, unbundling may be thought of as shorthand for the idea that the formal powers of the executive may be reduced as the number of terms increases. Such powers may be transferred to another executive—for example, to the prime minister in a semi-presidential system—or to another branch of government entirely.<sup>265</sup> Raising constraints refers to the idea that one may calibrate constraints on executive decision making by empowering other actors, such as legislatures.

To illustrate, imagine a presidency with the constitutional powers to appoint officers, to issue executive decrees, and to veto legislation, subject to override by two-thirds of the legislature. An unbundling strategy might take the power to issue decrees and transfer it to another executive, say the vice president or a member of the legislature. Raising constraints would make override of the executive veto easier, by reducing the vote threshold to 60 percent, for example.

Many term limit adjustments may already proceed under some version of this proposal. As mentioned earlier, John Carey notes several cases in which an extension of executive term was secured

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263. See Christopher R. Berry & Jacob E. Gersen, *The Unbundled Executive*, 75 U. CHI. L. REV. 1385 (2008); Jacob E. Gersen, *Unbundled Powers*, 96 VA. L. REV. 301, 303-04 (2010).

264. See William P. Marshall, *Break Up the Presidency? Governors, State Attorneys General, and Lessons from the Divided Executive*, 115 YALE L.J. 2446, 2448 & n.3 (2006) (explaining that attorneys general serve at the Governor's behest in only two states, Alaska and Wyoming, and that in forty-three states, voters independently elect the attorneys general).

265. See Matthew S. Shugart, *Of Presidents and Parliaments*, 2 E. EUR. CONST. REV. 30, 30-31 (1993) (providing examples of countries with presidential and parliamentary regimes).

through negotiation with Congress.<sup>266</sup> For example, Carlos Menem in Argentina was able to secure an extension for a third term in exchange for policy concessions to Congress,<sup>267</sup> but the Supreme Court did not permit him to take office for a third term.<sup>268</sup> In cases such as this one, the negotiation may involve new implicit or explicit limitations on the institutional power of the presidency, in which case *de facto* unbundling may have taken place.

Altering powers has several advantages. By reducing formal power over time, it has the effect of mitigating the concern for tyranny that motivates term limits in the first place.<sup>269</sup> Reducing powers also serves to disincentivize incumbent candidates from running for office. Indeed, a strong political party may insist that the incumbent leave office on time to facilitate another candidate who may win and acquire the full range of executive powers.<sup>270</sup> By reducing the stakes of the presidency, adjusting powers may facilitate on-time departure and build stronger parties.

To be sure, shedding powers is no panacea. It may introduce a new veto player over key policies and so encourage delay and gridlock.<sup>271</sup> And in any case, a formal reduction in powers may not offset the tremendous informal powers that long-serving executives have.<sup>272</sup> These may more than compensate for the lack of formal authority. One may also imagine that an executive would seek to reacquire the lost powers through constitutional amendment after gaining office.<sup>273</sup>

### *C. Handicapping Incumbents*

Beyond manipulating the design dimensions of term length and constitutional powers, we may consider calibrating the electoral

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266. Carey, *supra* note 59, at 88.

267. *See id.* at 85.

268. *Id.* at 85-86.

269. *See supra* notes 53-59 and accompanying text.

270. *See supra* notes 76-78 and accompanying text.

271. *Cf.* JAMES MADISON, NOTES OF DEBATES IN THE FEDERAL CONVENTION OF 1787, at 45-47 (Ohio Univ. Press 1984) (1840) (debating the form of the executive and the relationship between executive form and executive power).

272. *See supra* note 61 and accompanying text.

273. *Cf. supra* notes 1-17 and accompanying text (listing executives who have used constitutional amendments to remain in power).

process more directly. One common mechanism appears in many Latin American countries, in which an incumbent seeking reelection must refrain from using state resources during the period of the electoral campaign.<sup>274</sup> This device prevents the incumbent from using the advantages of office to maintain power. To be sure, a well-known incumbent may still have advantages due to cognitive biases and media familiarity.<sup>275</sup> But this modest step does serve to handicap incumbents somewhat, and may do little harm.<sup>276</sup> We are aware of no literature evaluating the institution.<sup>277</sup>

A version of this handicap is the notion of caretaker governments.<sup>278</sup> In some parliamentary systems, a new caretaker government is installed when the government loses a vote of no confidence.<sup>279</sup> For example, in Bangladesh, the caretaker government is an advisory council headed by a former Chief Justice that governs prior to a new election.<sup>280</sup> This device is designed to prevent self-dealing by a more conventionally political caretaker government.

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274. See, e.g., CONST. COLOM. art. 127 (prohibiting use of state property by an incumbent President).

275. See *supra* notes 60-61 and accompanying text.

276. But see THE FEDERALIST NOS. 71, 72 (Alexander Hamilton) (discussing the ineffectiveness of an executive with too short a term).

277. Another approach would focus not so much on the incumbent, but on incentivizing challengers through leveling the playing field to overcome the excessive advantages of incumbency. Consider, for example, a situation in which elections involve public financing. We might provide *more* public funds to challengers than to incumbents to overcome the advantage of the incumbent. The Vermont campaign finance restrictions struck down in *Randall v. Sorrell*, 548 U.S. 230, 238-39 (2006), imposed lower expenditure limits on incumbents than on challengers, though this was not a dispositive issue in the case. We might also insist on *more* media time for the challenger than for the incumbent to offset greater public information on the latter. But see, e.g., 47 U.S.C. § 315(a) (2006) (requiring broadcasters to provide equal time to political candidates). Such overcompensation would be particularly helpful in reducing the barriers to entry associated with incumbency. Of course, there are technical issues of valuation that would not be easy to overcome, but this mechanism holds the greatest promise for overcoming the incumbency advantage. Monetizing the incumbency advantage would surely help to overcome it.

278. See Jaap Woldendorp, Hans Keman & Ian Budge, *Party Government in 20 Democracies: An Update (1990-1995)*, 33 EUR. J. POL. RES. 125, 128 (1998) (defining caretaker government).

279. See, e.g., Christopher Emsden, *Government of Romania Falls in Vote*, WALLST. J., Oct. 14, 2009, at A17 (reporting on the installation of a caretaker government following a vote of no confidence).

280. See Nick Robinson, *Expanding Judiciaries: India and the Rise of Good Governance Court*, 8 WASH. U. GLOBAL STUD. L. REV. 1, 66 (2009).

How else might we deal with the incumbency advantage? Consider, as a thought experiment, an alternative mechanism to deal with problems of incumbency: raising the vote thresholds for incumbents, with increasing tenure triggering higher thresholds. Suppose, for example, that a first presidential term required a plurality of votes, a second term an absolute majority, a third term a majority of 55 percent, and so on. In theory, one could calibrate the increasing supermajority required to maintain an incumbent to mitigate the problem of barriers to entry and other incumbency advantages.<sup>281</sup>

In a very different context, Bruce Ackerman draws on the South African constitutional provisions on emergencies to propose a “supermajoritarian escalator” in which gradually increasing legislative supermajorities are required to approve the state of emergency over time.<sup>282</sup> This proposal has been subjected to criticism in the context of emergency powers, in part because it does not anticipate the incentives of legislators, and also because Ackerman rather oddly proposes that it be based in statute.<sup>283</sup> The device may make more sense in the context of constitutional provisions regulating potential executive overstay. The proposal for a vote threshold that increases with the number of terms has not, to our knowledge, been made before, though it has some precedent in other constitutional domains.<sup>284</sup> Here we develop the idea briefly, considering some practical issues and potential objections.

A first issue is technical and centers around the problem of elections in which an incumbent needs a supermajority but does not obtain it. There would be several possible ways to run the elections

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281. See *supra* notes 59-64 and accompanying text.

282. BRUCE ACKERMAN, *BEFORE THE NEXT ATTACK: PRESERVING CIVIL LIBERTIES IN AN AGE OF TERRORISM* 4, 80 (2006).

283. See Adrian Vermeule, *Self-Defeating Proposals: Ackerman on Emergency Powers*, 75 *FORDHAM L. REV.* 631, 641-49 (2006).

284. See S. AFR. CONST. 1996 § 37(2) (“A declaration of a state of emergency, and any legislation enacted or other action taken in consequence of that declaration, may be effective only (a) prospectively; and (b) for no more than 21 days from the date of the declaration, unless the National Assembly resolves to extend the declaration. The Assembly may extend a declaration of a state of emergency for no more than three months at a time. The first extension of the state of emergency must be by a resolution adopted with a supporting vote of a majority of the members of the Assembly. Any subsequent extension must be by a resolution adopted with a supporting vote of at least 60 per cent of the members of the Assembly.”).



under consideration, most of which center around two-round processes.<sup>285</sup> Two-round systems are widely used in democracies that require an absolute majority of support for the presidency.<sup>286</sup> One alternative is that the initial vote is simply a retention election for the incumbent, something like the 1988 plebiscite on Augusto Pinochet's continuance in Chile.<sup>287</sup> If the incumbent fails to obtain the required supermajority, a second vote would be held under the ordinary rules, with the incumbent excluded. This idea has the advantage of pooling all opposition votes into a single negative vote on the incumbent, though it does raise the potential costs of the election in that it may require three rounds of voting to produce a candidate with an absolute majority.

To be sure, some voters' preference orderings may be to conditionally prefer the incumbent. To illustrate, imagine a situation in which there are three parties, arrayed left-center-right. The center is the incumbent. The right voter would prefer the incumbent to a left candidate, but prefers the right to either alternative. In an initial round of voting, the voter must decide to vote yes or no on the incumbent, and in doing so will have to engage in strategic calculations about what will happen in the second round. In some circumstances, the incumbent may win even though she has the absolute support of a minority. But this is not an objection to the scheme. Such strategic calculations are common to two-round systems,<sup>288</sup> and there is nothing unique about the fact that the candidate in question is an otherwise term-limited incumbent.

A second possibility is to hold a contested first round. Should the incumbent win a majority, or plurality if that is the applicable rule, but fail to secure the required supermajority, there would be a second round of voting with the incumbent excluded. Alternatively, the office could go to a deputy executive as matter of course. This would lead to a strategic calculus on the part of the executive about whether to try for a supermajority or simply let the deputy run as

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285. See José Antonio Cheibub, *Making Presidential and Semi-presidential Constitutions Work*, 87 TEX. L. REV. 1375, 1384-85 (2009) (explaining the two-round process).

286. *Id.*

287. See Shirley Christian, *Plebiscite in Chile*, N.Y. TIMES, Oct. 6, 1988, at A1.

288. See Carles Boix, *Setting the Rules of the Game: The Choice of Electoral Systems in Advanced Democracies*, 93 AM. POL. SCI. REV. 609, 612-13 (1999) (providing an example of strategic calculation in a two-round system).

a successor under ordinary rules. Incumbency advantages would likely induce the executive to run.<sup>289</sup>

One major problem with this alternative is that it may not effectively reduce the propensity of constitutional crises. Certainly, one could imagine the awkward situation in which an incumbent achieves a majority of the vote but not a supermajority. Will his supporters accept the outcome that a candidate who received fewer votes would take office? Perhaps not, and the result might be the same type of crisis produced by a majority whose will is frustrated by term limits.<sup>290</sup>

A second issue is how to set the vote thresholds. Pure majority rule, though contested on normative grounds in some quarters,<sup>291</sup> has enough value as a focal point to need little elaboration.<sup>292</sup> What, however, should be the threshold for executives that are running for a second or third term? Because we believe that the incumbency advantage, and its deleterious effects on political competition, form the most persuasive rationale for term limits,<sup>293</sup> we focus on that issue. The threshold might be set based on a local or global study of the incumbency advantage.<sup>294</sup> Alternatively, one might develop experimental evidence to try to estimate the advantage. In any case, the remedy is simple. If the incumbency advantage is determined to be 5 percent, then the supermajority requirement for retention might be 55 percent. We also believe that the threshold should rise with additional terms, though there ought to be an upper threshold for the “supermajoritarian escalator.”

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289. *See supra* notes 59-64 and accompanying text.

290. A mediate alternative would be to provide that term limits would be triggered for candidates who failed to obtain the supermajority but still got 50 percent of the vote. For example, an incumbent who failed to reach a threshold would still be allowed to take office, but not run again. Term limits in this scheme are conditional on earning majority but not supermajority support. It might be preferable to employ some other method of handicapping incumbents that makes adjustments at an earlier stage in the voting process. For example, one might alter the ballot by ruling incumbents eligible only as write-in candidates. *See Elhauge, supra* note 63, at 166.

291. JAMES M. BUCHANAN & GORDON TULLOCK, *THE CALCULUS OF CONSENT* 145 (1962) (critiquing majority rule).

292. *See THE FEDERALIST* NO. 22 (Alexander Hamilton), *supra* note 37, at 120 (“[The] fundamental maxim of republican government ... requires that the sense of the majority should prevail.”).

293. *See supra* notes 59-64 and accompanying text.

294. *See, e.g.,* Gelman & King, *supra* note 115, at 1142-43.

A third issue is that our proposal assumes that the executive is unable to manipulate the actual voting process. If an executive can freely engage in ballot box stuffing and other forms of electoral fraud, the level of supermajority required will not affect her ability to retain office: the executive will simply steal enough votes to win. Although these risks are very real, they do not form a special objection to supermajority requirements. Elections may be stolen with or without term limits, regardless of the voting threshold.

#### *D. Incentivizing Retirement*

If one cannot effectively handicap incumbents, one could consider the inverse: incentivizing incumbents to leave office. Providing for some ex officio constitutional power for ex-presidents may induce them to step down. Consider France, which makes all living ex-Presidents ex officio members of the constitutional court, the Conseil Constitutionnel.<sup>295</sup> Alternatively, international actors may induce presidents to step down. For example, Ernesto Zedillo, a non-overstaying former President of Mexico, is a professor at Yale University.<sup>296</sup> African entrepreneur Mo Ibrahim offers an annual prize for an African head of state who steps down, leaving a legacy of good governance, though he has had some difficulty finding a recipient in recent years.<sup>297</sup>

This approach to institutional design is orthogonal to term limits, in that the two mechanisms may be adopted separately or in conjunction. Its utility will depend on the sweetness of the inducements relative to the potential gains of remaining in office. When the potential gains of remaining in office are high—such as in nondemocracies with resource-rich economies—no level of public

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295. 1958 CONST. art. 56 (Fr.).

296. Yale Center for the Study of Globalization, Ernesto Zedillo Biography, <http://www.ycsg.yale.edu/center/zedillo.html> (last visited Mar. 14, 2011).

297. The prize is \$5 million plus an annuity of \$200,000 for life. See Mo Ibrahim Foundation, The Ibrahim Prize, <http://www.moibrahimfoundation.org/en/section/the-ibrahim-prize> (last visited Mar. 14, 2011); *Prize Offered to Africa's Leaders*, BBC NEWS, Oct. 26, 2006, [http://news.bbc.co.uk/2/hi/uk\\_news/6086088.stm](http://news.bbc.co.uk/2/hi/uk_news/6086088.stm). Joaquim Chissano of Mozambique received the prize in 2007, and Festus Mogae of Botswana received it in 2008. See Mo Ibrahim Foundation, The Ibrahim Prize Laureates, <http://www.moibrahimfoundation.org/en/section/the-ibrahim-prize/prize-laureates> (last visited Mar. 14, 2011). The Foundation did not make an award in 2009 or 2010. *Id.*

sector inducement to leave office is likely to be sufficient. Perhaps this explains why the well-intentioned Ibrahim prize has occasionally gone unclaimed.

A related concern is the risk of stepping down. Replacement leaders need to be able to credibly commit to not extorting the wealth and other benefits accrued by former leaders. This is an issue that has caused some concern about the International Criminal Court, for example.<sup>298</sup> Ensuring that retiring leaders have immunity, asylum possibilities, and other such security guarantees should help to induce them to leave office after successful overstay. This suggests that the approach Peru has taken with regard to Alberto Fujimori—extraditing him from Japan and Chile—is precisely wrong.<sup>299</sup> A subsequent overstayer in Peru will be less likely to step down, though arguably less likely to overstay in the first place.<sup>300</sup>

### *E. Summary*

Each of these four approaches—adjusting term length, powers, handicapping incumbents, and incentivizing retirement—offers some promise for addressing problems associated with executive overstay. Each may operate in conjunction with or as an alternative to term limits, serving as either complements or substitutes to accomplish the same goals. Yet none is an unambiguously better alternative. If term limits raise problems of calibration,<sup>301</sup> so do each of the alternatives. With term limits, calibration issues arise because we never know *ex ante* what the optimal term length might be.<sup>302</sup> The identical issues arise in any scheme to adjust the term

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298. See Tom Ginsburg, *The Clash of Commitments at the International Criminal Court*, 9 CHI. J. INT'L L. 499, 507-09 (2009); see also Julian Ku & Jide Nzelibe, *Do International Criminal Tribunals Deter or Exacerbate Humanitarian Atrocities?*, 84 WASH. U. L. REV. 777, 807 (2006) (discussing security threats).

299. See Simon Romero, *Chile Returns Fujimori to Peru To Face Rights Charges*, N.Y. TIMES, Sept. 23, 2007, at A20.

300. This problem has not yet manifested itself as the subsequent President did not overstay. See Juan Forero, *Failure in '90, Ex-President Wins in Peru in a Comeback*, N.Y. TIMES, June 5, 2006, at A13 (reporting on the election of Alan Garcia following the expiration of President Alejandro Toledo's full term).

301. See THE FEDERALIST NOS. 71, 72 (Alexander Hamilton), *supra* note 37 (discussing the benefits and drawbacks of term lengths and reeligibility restrictions).

302. *Id.*; see also *supra* notes 40-42.

length of the incumbent. Shedding powers also raises calibration issues, as we do not know what configuration of powers is sufficient to properly motivate the incumbent. Handicapping or incentivizing incumbents also raises questions of monetization of the incumbency advantage and of sufficient inducements to retire. In short, although each institutional alternative has promise, none provides an obviously superior alternative.

### CONCLUSION

Term limits are designed to discourage tyranny and to address real problems of incumbency in democratic governance, but they have been subject to competing claims by proponents and opponents. Some, such as Simón Bolívar, have argued that term limits are necessary to curb executive ambition. Others, including Alexander Hamilton and other American Founders, have argued that term limits would induce executives to seek to remain in office, and perhaps even generate crises to allow themselves to do so. The theoretical debate has proceeded without the benefit of much empirical analysis. One of the objectives of this Article has been to inform the normative debate with data on the frequency of overstay, and to consider some alternative institutions that may accomplish some of the ends of term limits without the costs of constitutional crises.

Our evidence is not definitive, but on balance suggests that, for democracies at least, constitutional crises induced through term limit violations are relatively rare. Constitutional enforcement of term limits appears to operate routinely in democracies, and even in many autocracies, such as Mexico before 1994. Term limits seem to “work” in the vast majority of cases, in that those who have the possibility of overstaying do not frequently seek to do so. Of those who do seek to overstay, 20 percent fail in the attempt, which may also be considered a constitutional enforcement of sorts, even if it sometimes coincides with a constitutional crisis.

Even when term limits are violated, the consequences are not always negative. Our evidence suggests that, on average, overstay does not lead to the denigration of democracy. Of the recent overstayers in democracies, some, such as Menem and Cardoso, fit the

profile of popular leaders who were able to amend around the default rule to serve a single extra term. Only a small number of leaders in recent years—Fujimori in Peru, Marcos in the Philippines, and Chávez in Venezuela—have completely replaced the constitution to allow themselves extra time. Some leaders, such as Niger's Mamadou Tandja, have subsequently found themselves replaced through military coup.

The finding that term limits operate as default rules whose amendment need not always lead to future disruption has implications for the study of executive-legislative relations. One of the canonical distinctions between presidential and parliamentary systems is that the executive in the former is subject to a fixed term, whereas the executive in the latter is subject to parliamentary confidence and hence is not constrained by a fixed term.<sup>303</sup> Yet if executives in presidential systems frequently overstayed or understayed their terms, we might think of presidential systems as *de jure* rigid, but in practice flexible in the number of years an executive serves. This would highlight Professor Albert's recent argument that the two canonical regime types may not, in fact, be so different in actual operation.<sup>304</sup>

Our consideration of institutional alternatives to term limits includes several new ideas not yet identified in the literature, including adjusting term length for incumbents only, reducing the powers of executive office with successive terms, and manipulating the incentives of incumbents to remain in office. Each of these alternatives, however, has costs. Furthermore, each alternative relies on the possibility of calibrating a more complex institutional design to mitigate incumbency advantages. The challenges to such calibration are quite real.

This suggests that the very simplicity of term limits—an idea easily comprehensible by the average citizen—may have something to do with their effectiveness. Simple and clear rules, it seems, may facilitate effective constitutional enforcement.<sup>305</sup> Constitutional text

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303. Cf. Albert, *supra* note 33, at 548-49; Cheibub et al., *supra* note 35; *supra* notes 33-39 and accompanying text.

304. Albert, *supra* note 33, at 531.

305. Russell Hardin, *Why a Constitution?*, in *THE FEDERALIST PAPERS AND THE NEW INSTITUTIONALISM* 100, 115-16 (Bernard Grofman & Donald Wittman eds., 1989); Peter C. Ordeshook, *Constitutional Stability*, 3 *CONST. POL. ECON.* 137, 151 (1992); Barry R. Weingast,

provides a focal point for enforcement behavior, and such enforcement is likely to be easier when everyone understands the rules. Although drawing a line of four or eight years as a maximum term in office has elements of arbitrariness, the very clarity of a bright-line rule ensures that the line will, more often than not, be observed. In contrast with Alexander Hamilton's conjecture, term limits restrain rather than promote conflict.<sup>306</sup> In the matter of constraining executive ambition, then, most constitutions seem to work most of the time.<sup>307</sup>

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*The Political Foundations of Democracy and the Rule of Law*, 91 AM. POL. SCI. REV. 245, 245-46 (1997).

306. See *supra* note 90 and accompanying text.

307. Cf. LOUIS HENKIN, *HOW NATIONS BEHAVE* 47 (1979) (“[A]lmost all nations observe almost all principles of international law and almost all of their obligations almost all of the time.”).

## APPENDIX

**Table A1. List of Democratic Overstayers (Democracy = Polity $\geq$ 3)<sup>308</sup>**

Country	Year	Leader	Means of Overstay	Overstay Year	Level of Democracy	Age of Regime
Argentina	1988	Menem	Amendment	1995	8	5
Belarus (Byelorussia)	1994	Lukashenko	Amendment	2006	7	3
Brazil	1995	Cardoso	Amendment	1998	8	10
Colombia	1884	Nunez	Replacement	1886	8	17
Colombia	2002	Uribe Velez	Amendment	2006	7	45
Costa Rica	1870	Guardia	Disregarded/ Not Specified	1876	5	29
Costa Rica	1885	Bernardo Soto Alfaro	Disregarded/ Not Specified	1886	7	44
Costa Rica	1894	Yglesias Castro	Amendment	1898	10	4
Honduras	1933	Carias Andino	Replacement	1936	5	7
Namibia	1990	Nujoma	Amendment	2000	6	0
Niger	1999	Mamadou	Coup/ Emergency/ Suspension	2009	5	0
Peru	1990	Fujimori	Replacement	1995	8	10
Philippines	1965	Marcos	Replacement	1973	5	15
Uruguay	1931	Terra	Replacement	1935	3	27
Venezuela	1999	Chávez	Replacement	2004	7	30

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308. See *supra* note 243 for a description of the Polity Score.



**Table A2. List of Autocratic Overstayers (Autocracy = Polity<3)<sup>309</sup>**

Country	Year	Leader	Means of Overstay	Over-stay Year	Level of Democracy	Age of Regime
Algeria	1999	Bouteflika	Amendment	2009	-3	4
Angola	1979	Dos Santos	Disregarded/ Not Specified	2007	-7	4
Argentina	1946	Peron	Amendment	1952	-8	0
Bolivia	1920	Saavedra	De Facto Control	1924	2	40
Bolivia	1971	Banzer Suarez	Disregarded/ Not Specified	1975	-7	0
Brazil	1930	Vargas	Replacement	1938	-4	0
Chad	1990	Deby	Amendment	2006	-7	4
Chile	1973	Pinochet	Replacement	1980	-7	0
Colombia	1904	Reyes Prieto	Amendment	1907	-5	0
Congo, Democratic Republic of	1965	Mobutu	Replacement	1969	-9	0
Ecuador	1895	Eloy Alfaro Delgado	Replacement	1896	-1	65
Ecuador	1906	Eloy Alfaro Delgado	Coup/ Emergency/ Suspension	1906	-3	76
El Salvador	1871	Gonzalez	Replacement	1873	-1	12
El Salvador	1876	Zaldivar	Replacement	1880	-1	17
El Salvador	1935	Hernandez Martinez	Replacement	1939	-9	4
Eritrea	1993	Afeworki	Disregarded/ Not Specified	2007	-6	0
Gabon	1967	Bongo	Amendment	2003	-7	7
Guatemala	1885	Barillas	Amendment	1889	2	6
Guatemala	1898	Estrada-Cabrera	Disregarded/ Not Specified	1903	2	0
Guatemala	1931	Ubico y Castañeda	Amendment	1934	-9	0
Guinea	1984	Conte	Amendment	2001	-7	26
Haiti	1957	Duvalier, Francois	Replacement	1962	-5	7
Honduras	1963	Lopez Arellano	Replacement	1968	-1	27

309. See *supra* note 243 for a description of the Polity Score.

Country	Year	Leader	Means of Overstay	Over-stay Year	Level of Democracy	Age of Regime
Kazakhstan	1991	Nazarbaev	Amendment	2005	-3	0
Lebanon	1943	El Khoury	Amendment	1948	2	0
Lebanon	1989	Elias Hrawi	Amendment	1995	0	0
Lebanon	1998	Emile Lahoud	Amendment	2004		0
Liberia	1944	Tubman	Amendment	1951	-6	60
Lithuania	1926	Smetona	Replacement	1932	0	0
Mali	1968	Traore	Amendment	1987	-7	8
Nicaragua	1893	Zelaya	Amendment	1896	-5	55
Nicaragua	1911	Díaz	Disregarded/ Not Specified	1914	-3	73
Nicaragua	1937	Somoza Garcia	Replacement	1942	-8	1
Nicaragua	1967	Somoza Debayle	Replacement	1972	-8	31
Panama	1920	Porras Barahona	Amendment	1920	-3	17
Paraguay	1880	Caballero	Disregarded/ Not Specified	1882	-4	10
Paraguay	1954	Stroessner	Coup/ Emergency/ Suspension	1964	-9	0
Peru	1919	Leguia	Replacement	1923	-4	0
Peru	1933	Benavidez	Disregarded/ Not Specified	1936	2	0
Rwanda	1973	Habyarimana	Replacement	1990	-7	12
Sierra Leone	1968	Stevens	Replacement	1978	1	0
Sudan	1989	Al-Bashir	Replacement	2008	-7	0
Taiwan	1950	Chiang Kai-shek	Coup/ Emergency/ Suspension	1961	-8	1
Tajikistan	1992	Rakhmonov	Amendment	2003	-6	0
Togo	1967	Eyadema	Amendment	2002	-7	7
Tunisia	1957	Bourguiba	Amendment	1969		
Tunisia	1987	Ben Ali	Amendment	2004	-5	0
Uganda	1986	Museveni	Amendment	2005	-7	0
Uruguay	1938	Baldomir	Coup/ Emergency/ Suspension	1941	0	4
Uzbekistan	1991	Karimov	Amendment	1997	-9	0
Venezuela	1870	Guzman Blanco	Replacement	1873	-5	40
Venezuela	1879	Guzman Blanco	Replacement	1881	-5	49

<b>Country</b>	<b>Year</b>	<b>Leader</b>	<b>Means of Overstay</b>	<b>Over- stay Year</b>	<b>Level of Democ- racy</b>	<b>Age of Regime</b>
Venezuela	1894	Joaquin Crespo	Replacement	1894	-3	64
Venezuela	1899	Cipriano Castro	Replacement	1902	-3	69
Venezuela	1908	Gomez	Replacement	1913	-3	78
Yugoslavia (Serbia)	1945	Tito	Amendment	1972	-7	0

## A MORAL RIGHTS THEORY OF PRIVATE LAW

ANDREW S. GOLD\*

### ABSTRACT

*Private law—the law of torts, contracts, and property—is at an interpretive impasse. The two leading conceptual theories of private law—corrective justice and civil recourse theories—both suffer from significant weaknesses. Given these concerns, private law may even seem incoherent. The problem is not insurmountable, however. This Article offers a new way to understand private law. I will argue that private law is best understood as a means for individuals to exercise their moral enforcement rights.*

*Moral enforcement rights exist when an individual may legitimately use coercion to force another individual to comply with his or her moral duties. Not all interpersonal relationships implicate moral enforcement rights. However, when moral enforcement rights do exist, the law typically provides a private right of action. Indeed, the private right of action fills an important need, given the backdrop of existing legal regulation. Individuals usually may not coerce a wrongdoer on their own, and thus require some other mechanism to do so. The private right of action can be seen as a substitute means of enforcement given that the state ordinarily prohibits self-help.*

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