

# Legal Commitment Through the Rule-of-law Mechanism versus Transactional Governance

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The decision to defect from the constitution

# Outline

# Overview

No one is bound to obey an unconstitutional law and no courts are bound to enforce it (American Jurisprudence)

- Constitutional safeguards against abuse of power by rulers?
- James Maddison (Federalist papers 10):
  - Greater number of veto players reduces risk that single faction imposes their will on the people
- Barry Weingast (1997)
  - Constitution defines "red lines" which serve to coordinate opposition against violations by the executive
  - Stand off between jurisprudence and President Trump over Muslim ban as an example?
  - The rule of law was "upheld"

## Our contribution

- The "Rule of Law" adds to the safeguards!
- Military would not carry out unlawful orders (former senior military officer)
  - In line with Code of Conduct for US military personnel introduced under Carter administration
- A lawful government cannot punish citizens for not complying with unlawful orders
- So every government wants to be law-abiding rather than law-breaking (to an extent)
- Law abiding governance is more attractive than transactional governance

## Concept check: What is the "Rule of Law"?

- Satisfying formal principles (generality, clarity, publicity, stability, and prospectivity of the norms that govern a society,
- procedural principles (the processes by which these norms are administered, and the institutions — like courts and an independent judiciary - that their administration requires)
- For us: The principle that simple laws need to comply with higher law
- And laws violating this principle are defunct

## The basic argument and empirical predictions

- Agents are to a varying degree willing to stand up against a violating government
- but are unaware of how precisely other agents react (for uniqueness)
- Greater average determination to stand up should make constitution more safe
  - Common proposition of ourselves and Weingast
- But greater trust in the stability of the legal order will only induce them to resist in our model
  - Longer constitutional history should coincide with greater stability

# Overview

- The government lives forever and in each period it may be legal or in violation of the legal order
- A violating government expects to consume a rent  $k$
- $k$  follows a random walk
- In  $t = 0$ , the government may announce an illegal course of action
- Agents comply with a legal government but they have a preference for not complying with an illegal government
- So an illegal government incurs an enforcement cost  $C(S, \theta)$  which increases in non compliance  $\theta$

## Overview, cont.

- In  $t = 1$ , after the violation, the government either continues in illegality
- or it returns to legality
- If it continues in illegality into period  $t = 2$ , it finally realizes its rent  $k_1$ 
  - The government needs to stay firm against any opposition before they realize some political "gain" from a violation
- If it returns to legality in  $t = 2$ , it forsakes its rent  $k_1$
- But it does not incur an enforcement cost.
- and citizens who failed to comply go without punishment
  - So the expectation that the government could "return to legality" encourages non compliance



# The government

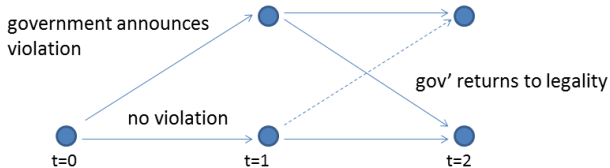
- Depending on compliance the government enjoys a pay off  $z(1 - \theta)$
- and if it manages to stay outside of the legal order for two consecutive periods, it enjoys a rent  $k$
- $k_t$  has a "bell-shaped" distribution on  $(k_{t-1} - \Delta, k_{t-1} + \Delta)$
- and it incurs an enforcement cost  $C$  which increases in  $\theta$  unless it decides to return to constitutionality
- The government's objective function:

$$V_t = a_{t-1} a_t k_{t-1} + (1 - \theta_{t-1})z - C(a_t S, \theta_{t-1}) + \beta[a_t a_{t+1} k_t + (1 - \theta_t)z - C(a_{t+1} S, \theta_t) + \beta^2 V_{t+2}], \quad (1)$$

where a government violating in  $t$  sets  $a_t = 1$ .

# Timing

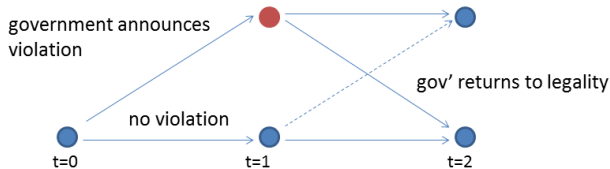
- gov' knows "prize"  $k_1$
- agents receive noisy signal of  $k_1$
- agents choose compliance  $\theta_1$
- gov' consumes  $k_1$
- incurs enforcement cost  $C(S, \theta_1)$
- updating information and agents choosing compliance  $\theta_2$



- gov' starts legal
- gov' knows prize  $k_0$
- agents comply
- gov' knows prize  $k_1$
- agents comply
- no enforcement and no cost
- no consuming  $k_1$
- updating information and agents comply

# After a Defection

- gov' knows "prize"  $k_1$
- agents receive noisy signal of  $k_1$
- agents choose compliance  $\theta_1$
- gov' consumes  $k_1$
- incurs enforcement cost  $C(S, \theta_1)$
- updating information and agents choosing compliance  $\theta_2$



- gov' starts legal
- gov' knows prize  $k_0$
- agents comply
- gov' knows prize  $k_1$
- agents comply
- no enforcement and no cost
- no consuming  $k_1$
- updating information and agents comply

## Multiple equilibria under common knowledge

Assume the government has violated the constitution. What next?

### Proposition 1

*Under common knowledge, the following combinations of beliefs and strategies constitute an equilibrium in pure strategies: For small  $k$  the profile is: Agents set the probability of a return to legality,  $P = 1$ , the share of non compliers is maximized and the government returns to full legality. For large  $k$  the profile is: Agents set the probability of a return to legality,  $P = 0$ , the share of non compliers is minimized and the government persists outside of the constitution. For intermediate  $k$ : Either the first or the second strategy profile is played.*

# Strategic complements

## Lemma 2

*Agents' strategies are strategic complements.*

- If one additional citizen fails to comply
- It imposes an enforcement cost on a non legal government
- And it becomes more likely that the government will want to return to legality
- So the likelihood of punishment is reduced
- Making it more attractive for other citizens not to comply.

# Unique equilibrium under incomplete information

Assume the government has violated the constitution (but there is incomplete information about the government's incentive  $k$ ).  
What's next?

## Lemma 3

*In the incomplete information game there is a critical mass of non compliers  $\phi(k_t)$  for which the government is indifferent between becoming legal and staying illegal and which strictly increases in  $k_t$ .*

# The central result

Let  $k_t \in (k_{t-1} - \Delta, k_{t-1} + \Delta)$  so  $2\Delta$  is the "width" of the distribution of "k" each period. Consider a game which starts in period  $T - 2$  and ends in  $T$ :

## Proposition 4

*For  $\Delta$  sufficiently large, the rule of law matters in the truncated game: The critical value of the rent above which the government defects under the rule of law is greater than the critical value in the absence of the rule of law.*

or: no constraint on process  $k$  and statement that for  $k_t \neq +/\infty$  the critical value is greater

## Extension to infinite horizon

### Proposition 5

*In the infinite horizon game there is a unique stationary Markov-perfect equilibrium with some value  $k^{**}$  such that the government violates the constitution in  $t$  exactly when  $k_{t-1} > k^{**}$ .*

### Corollary 6

*For  $\Delta$  sufficiently large, the rule of law matters in the stationary game: The critical value above which the government defects under the rule of law,  $k^{**}$  is greater than the critical value in the absence of the rule of law.*



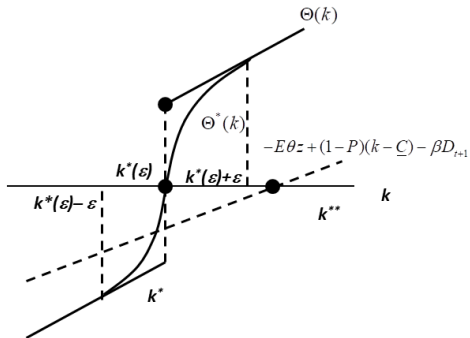
## One more characterization result

### Lemma 7

*In equilibrium the cut-off point  $k^*$  for a violating government to return to the legal order and the cut-off point  $k^{**}$  for a government to violate the legal order satisfy  $k^* < k^{**}$ .*

No return to violate again for a given level of  $k$ !

# Critical value $k^* < k^{**}$



# Agents

- An agent refuses to comply if

$$\Phi^i \equiv \eta - (1 - P^i)S \geq 0. \quad (2)$$

where  $\eta$  is preference,  $S$  the punishment and  $P^i$  the individual probability that the government is not going to remain a violator