Historical Institutionalism and Judicial Decision-Making

ideas, institutions, and actors in french high court hate speech rulings

By Erik Bleich

This article integrates insights from different veins of historical institutionalism to offer an analytical framework that specifies how ideas, institutions, and actors account for key aspects of judicial decision-making, including change over time. To the extent that ideas are widely distributed, highly salient, and stable among actors in the judicial field, they can affect patterns of rulings in a particular issue area. The distribution, salience, and stability of norms, however, may change over time for reasons embedded in the institutional structures themselves. Existing policies, laws, or treaties create the potential for new actors to enter the judicial field through processes that theorists of institutional change have identified as intercurrence, displacement, conversion, layering, and drift. New actors can shift the relative salience of ideas already rooted in the judicial field. This ideational salience amplification can alter patterns of judicial decision-making without the fundamental and often costly battles involved in wholesale paradigm change. French high court hate speech decisions provide the context for the development of this framework and serve to illustrate the dynamic. The author uses evidence from an original data set of every ruling by the French Court of Cassation regarding racist hate speech from 1972 through 2012 to explain the varying propensity of the high court to restrict speech that targets majorities compared to minorities.

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Erik Bleich is a professor of political science at Middlebury College. His research focuses on topics related to race and ethnicity in liberal democracies. Bleich is the author of *Race Politics in Britain and France: Ideas and Policymaking since the 1960s* (2003) and *The Freedom to Be Racist? How the United States and Europe Struggle to Preserve Freedom and Combat Racism* (2011). His most recent book, *Migrants, Minorities, and the Media: Information, Representations, and Participation in the Public Sphere* (2017), is coedited with Irene Bloemraad and Els de Graauw. Bleich’s current projects focus on hate speech adjudication and the media’s coverage of minorities. He can be reached at ebleich@middlebury.edu.