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Introduction

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In contemporary practice, constitutional systems usually originate with bold acts of purposive institutional design, embodied in a founding document for the polity. These designs involve borrowing, learning, and accommodation, but they also involve moments of creative innovation and experimentation. Gathering together disparate elements from the real or mythical national past and the varied experience of other polities, constitution makers produce a document to structure government and express fundamental values. Viewed in this light, constitutional design is nothing if not audacious. Founders attempt to regulate future human conduct on the basis of speculative predictions of how institutions, sometimes untried, will actually function, and in the midst of heated political conflicts that render compromise inevitable.

This audacious practice has given rise to a long history of scholarly efforts seeking to analyze the successes and failures of constitutions, and this volume falls within that tradition. The focus is on constitutional design, and the volume brings together many leading students of constitutions. The contributions are a mix of positive analysis of the constraints and conditions of constitution making, along with normative analysis of particular design elements.

At the outset, it must be acknowledged that the term “constitutional design” is contested, and appropriately so. Design implies a technocratic, architectural paradigm that does not easily fit the messy realities of social institutions, especially not the messy process of constitution making. Even after decades of scholarship on political institutions, our knowledge of the interaction of particular practices with environmental factors is quite limited, and predictions of how institutions will operate are, at best, probabilistic guesses. Indeed, Horowitz (2002) argues that constitutional process, not design, is the better metaphor to understand how constitution making works. Hirschl (2009) explores other design sciences for potential analogies and generally finds the field of constitutional design wanting on a number of dimensions. In particular, unlike in other fields, constitutional designers may not be motivated

by technocratic desire to get the results right, but may be self-interested. And even with the best of intentions, most constitutional designs fail on the throes of unanticipated consequences, unforeseen external events, and new information revealed by counterparties (Elkins et al. 2009).

Even if constitution making is more art than science, however, it would be too rash to give up on the possibility of comparative knowledge. No two situations are quite the same, but there are recurring problems faced by constitutional designers, and therefore there is the possibility of learning from prior experience. Constitution making is always, and always has been, comparatively informed; it involves a balance between borrowed models and local tailoring, between conventional choices and creative innovation. As long as there is constitution making, there will be *attempts* at constitutional design, and it thus behooves us to keep the term around, so long as we have the requisite humility with regard to our ambitions and maintain a healthy suspicion of mechanistic recommendations.

ANTECEDENTS

The field of comparative constitutional studies can be traced back at least to Aristotle's systematic evaluation, in the *Politics*, of the constitutions of the Greek city-states. Aristotle's views, like those of his counterparts in ancient China, India, and elsewhere, were couched in normative and universalist terms, notwithstanding the discovery of variation in the analysis. Aristotle emphasized the mixed constitution, rejecting ideal types, as best suited for the ideal polity.

Modernity brought with it a new set of analysts, including Machiavelli, Montesquieu, and John Stuart Mill, who undertook comparative analysis to inform normative design. In the seventeenth century, state-builders in the Netherlands undertook extensive study of ancient and contemporary models to resolve constitutional problems of the nascent Dutch republic, finding particular inspiration in the proto-federalism of the biblical Israelites (Boralevi 2002). In the eighteenth century, besides Montesquieu's foundational exploration, lesser-known figures such as Gottfried Achenwall and Johann Heinrich Gottlieb von Justi undertook surveys of political forms (González Marcos 2003: 313). Comparative constitutional study thus has a long and distinguished lineage.

Constitutional design in its contemporary sense is associated with the rise and spread of the written constitutional form, conventionally understood to have emerged in full flower in the late eighteenth century in the United States, France, and Poland. These nation-states drew on earlier efforts in Corsica (Carrington 1973) and the American colonies. Conceiving the constitution as a written document led to a discrete emphasis on constitution making as an act of purposive institutional design. The integrated constitutional text also transformed the idea of the

constitution from a kind of applied political theory toward a more technical, even legal enterprise. The Enlightenment thinkers of the French, Polish, and American projects saw written constitutions as devices to channel self-interest into larger public ends. Theirs was a modernist project, but it was also a comparative one, for which wide study was a desirable, even necessary, feature. Drafters thus engaged in extensive examination and debate about the appropriateness of particular models. Modern constitutions were from the beginning informed by comparative inquiry, toward rationalist ends of optimal design.

The next wave of constitution making came in Latin America, in which liberal models were channeled through the 1812 Spanish Constitution of Cadiz. This in turn influenced the 1821 Constitution of Gran Colombia, the 1830 and 1832 Constitutions of New Granada, the 1830 Constitution of Venezuela, the 1823 and 1828 Constitutions of Peru, the Argentine Constitution of 1826, the Uruguayan Constitution of 1830, and the Chilean Constitution of 1828. In each instance, new nationalists sought to borrow the best from other models while tailoring them to local conditions and introducing new innovations. Some of these innovations, such as Bolivar's idea of a tricameral legislature, have faded away; others, such as the single-term executive who could run again after a term out of power, were very influential for a long time (as documented in Chapter 13 of this volume).

Elsewhere in the nineteenth century, new state-builders, initially in Western Europe but also in Japan, sought to adopt the new technology of the written constitution, and in doing so needed to engage in practical comparisons about which institutions were optimal. As a result, constitutional compilations became more popular, focusing on both European and Latin American countries (Marcos 2003: 314–16). The method involved a mix of normative and positive analysis, and in turn informed drafting exercises in new states and old (Takii 2006).

Early scholarship on constitutions and constitutional design tended to be case-driven and responsive to new constitutional events. Scholarly interest tended to come after waves of constitutional changes, such as those triggered by the end of World War I and the associated dissolution of empires. Much of this work was purely descriptive in character (Davidson 1925; Pollock 1923), or provided only minimal analysis (Albert et al. 1894; Moses 1893). The description focused on institutions, particularly executive-legislative relations, but also on regionalism (Dedek 1921; Quigley 1924) and rights (Bentwich 1924; Clark 1921).

Two developments in the late twentieth century – one academic and one in the world – coalesced to provide a fruitful environment for the explosive recent growth of comparative constitutional studies. The academic development was the revival of various institutionalisms in the social sciences (March and Olsen 1989; Powell and Dimaggio 1991). Sociologists and some political scientists began to (re)emphasize that individual agents were embedded in broader institutional structures, and

that these structures helped determine outcomes. From another angle, economists moving away from neoclassical models began to understand that rules were important (Buchanan and Tullock 1961; North 1991). Institutions were defined as the rules of the game that structured behavior. Constitutions, as the social devices that structure the creation of rules, were the ultimate institutions worthy of analysis. Hence there was a turn in economics to understanding constitutional structures. With some exceptions, the literature in constitutional political economy focused more on theory than on empirics, but it did provide a set of working assumptions and hypotheses for analyzing constitutions.

The late twentieth century also saw epochal changes in the real world that made it hard for academics to ignore constitutions. The third wave of democracy beginning in the mid-1970s brought new attention to constitutions as instruments of democratization, and the emergence of new states following the end of the Cold War prompted a new round of efforts to theorize and analyze institutional design (Elster et al., 1998; Holmes 1995; Sunstein 2001). In particular, constitutional design became a central focus for ethnically diverse states in the hope that proper institutions could ameliorate conflict (Choudhry 2008; Ghai 2001; Horowitz 1991). There was a revival of interest in federalism and other design techniques (LeRoy et al. 2006), and a number of intelligent comprehensive surveys (Lutz 2006; Murphy 2007; Schneider 2006).

THE STATE OF KNOWLEDGE

Today, there is much demand for wisdom and knowledge, largely driven by real-world constitutional designers. In any given year, five to ten countries are engaged in major acts of constitutional design or redesign. Most of the participants in these exercises are not repeat players, and they are not experts in comparative government or law. Instead, their aspiration is to find enduring solutions to political conflict or to incorporate technical adjustments in the constitution to improve governance and performance. Drafters are rarely on their own in trying to navigate these shoals; they are frequently accompanied by a large number of international organizations and assistance providers eager to help. This institutional environment naturally favors the search for “best practices,” and so it is worth inquiring what we as scholars can say about the state of the field.

The answer is that there is less consensus on the major issues of institutional design than might be hoped. To take one high-profile example, two decades of furious debate over the relative merits of presidentialism and parliamentarism have not produced definitive results as to which design is superior. Cheibub’s (2007) state-of-the-art analysis shows that, notwithstanding simple associations between presidentialism and regime failure, the causal connections are more ambiguous. In identifying

selection effects that led to the simple association, he suggests that the constitutional design choices are only intervening variables on the ultimate outcomes of interest. The unobservable deep structures of societies, rather than consciously designed institutions, may, in the end, be what are determining outcomes.

When one moves down from the grand choices toward more mundane ones, however, we do have a bit more knowledge about what works and what does not. Electoral systems, for example, have been the subject of extensive study, as have mechanisms of judicial appointments. Still, there are relatively few “best practices” in constitutional design, and much copying occurs without a strong social-science basis for asserting that it is based on actual learning.

To some degree these tensions reflect the difficulty of using positive social science for normative ends. Constitutional design is more art than science, and there are always myriad factors that can interfere with the best-laid plans. What this volume seeks to do is to bring together our best students of constitutional design from myriad disciplinary perspectives, including law, philosophy, political science, and economics, to see what we know about the design process in general as well as about particular constitutional institutions. It is intended as a stock-taking exercise, blending normative and positive perspectives.

OVERVIEW OF THE VOLUME

This volume is divided into three sections. The first section focuses on design processes. Jon Elster, who has for more than two decades been the leading analyst of constitutional design processes, begins by revisiting his classic tripartite framework of reason, passion, and interest as forces motivating constitution making. In Chapter 2, he revises his earlier view that reason, rather than passion or interest, should be the dominant mode in constitutional design. He nevertheless focuses on how to enhance public-spirited motivation through design processes, arguing for the need to “clear and strengthen” the channels of constitution making. His forward-looking analysis starts by identifying six intermediate variables likely to produce a good constitution. Elster states that an optimal constituent process ought to be guided by reason, which includes beliefs about the means as well as the ends. He assigns new weight to the role of passion, self-interest, and cognitive biases in collective decision making and states that each has varying effects on the constituent process. By studying and manipulating these variables, he argues, one may be able to eliminate distorting influences and enhance motivation and information, producing a better product.

Justin Blount, Zachary Elkins, and Tom Ginsburg then review the empirical evidence on design processes, revisiting some of Elster’s classic conjectures with new data drawn from the Comparative Constitutions Project (CCP). Consistent with

the earlier analysis, they find that there has been more theoretical speculation than empirical testing in this area. Elster's work had argued that institutional self-dealing was a major concern, and hence that legislatures ought to be disfavored as constitutional drafters; other writers and international organizations have argued that public participation ought to be enhanced in constitutional design processes. Blount and colleagues provide evidence that some of the assumptions of institutional self-dealing do not play out in constitutional design, whereas others do; they also find little direct support for the participation hypothesis. They conclude optimistically, suggesting that new data sources will facilitate a positive research program in this area. Together Chapters 2 and 3 point toward developing more precise variables in the study of constitution making, in terms of both interests and process and the need to connect these with outcomes.

The second section of this volume concerns constraints and conditions on design processes. In their contribution, Susan Alberts, Chris Warshaw, and Barry R. Weingast draw on a well-known literature arguing that successful democratic transitions are a product of the balance of power between opposing groups, but introduce into the argument the importance of constitutional design choices that lower the costs of upholding the democratic bargain. Using Chile as a central case study, they emphasize the role of countermajoritarian constitutional designs that allow the erstwhile authoritarians a role in the new democratic order, domesticating political conflict. Careful constitutional design, then, can facilitate democratization. The argument partially echoes Hirschl's (2004) notion of hegemonic preservation, but has a different normative spin: Whereas Hirschl had been critical of the constitutional entrenchment of neoliberal principles in the politics he examined, Alberts and colleagues point out that constitutionalization can facilitate credible commitments to dictators, and hence induce them to step down. The chapter emphasizes one of the central constraints on design processes: power. The assumption is that, given a particular balance of power between rising democrats and falling authoritarians, a carefully crafted solution can broker the transition that might otherwise not occur. They show in their model, however, that such outcomes are not predetermined.

Adam Przeworski, Tamar Asadurian, and Anjali Thomas Bohlken examine precisely such a set of historically contingent negotiations between new parliamentary elites and established monarchies. Even in monarchic constitutional schemes, the power of the purse led to some *de facto* power for the legislature, and it was the interaction of this legislature with the monarch that led to, alternatively, formalization of monarchical power, a republican revolution, or the emergence of parliamentary monarchy. In tracing these alternative paths, they make an important general point about the conditions under which things get written down in formal texts. The authors identify a structural incongruence between written texts and actual practices in the nineteenth-century parliamentary monarchies. Those constitutions

that provided for parliamentary responsibility were violated, whereas parliamentary responsibility flourished even without formal provision in many other countries. The idea is that when everyone observes the equilibrium balance of powers, there is no need to write it down. Once monarchic rule was formalized, however, it tended to be undermined. The generalizable implication is that some of the factors that lead to written constitutional norms perversely lead to their violation.

The gap between text and practice is picked up in a case study of constitutions in a dynamic authoritarian regime – Randall Peerenboom’s analysis of China’s Living Constitution. Peerenboom reviews the uses of the formal constitution in the country and the functional need to constrain Communist Party activity while guaranteeing the Party a leading role in China’s development. This design goal was difficult to achieve, given the country’s history of using constitutions for political rhetoric rather than empowerment of institutional constraints on the government. Even though the Chinese constitution is not judicially enforceable, it has nevertheless served to structure competition among different institutions and has also become a basis for popular discourse by claimants seeking to advance a variety of goals. In his review of various likely trajectories for constitutionalism in China, Peerenboom echoes Przeworski and colleagues’ analysis of monarchs and the perverse results of formalization. The story also hints, however, at the possibility for a more formal process of constitutional design in China’s future.

In his contribution, Ran Hirschl discusses the reasons why constitutional law and constitutional courts are so appealing to secularist and other antireligious social forces. He argues that among the key secularist appeals of constitutionalism is a logic of co-optation: By explicitly incorporating religion into the formal constitutional design, secular forces can gain influence over religious governance. In addition, the structure and logic of constitutionalism, in which the constitution is highest law, make it an attractive enterprise to those who wish to contain religiosity and assert state authority over religion. And because the jurisprudence of constitutional courts generally reflects a less radical view of religious identity, constitutional law and courts have become the natural companions of the groups that are against the spread of principles of theocratic governance.

Together these four chapters offer a typology of constitutional design situations amid some, but not all, kinds of drafting circumstances. Alberts and colleagues focus on democratization and the ability of constitutional design to accommodate erstwhile authoritarians; Hirschl’s focus is on a related problem, namely how establishment secularists can tame the rising forces of religion. In each case, the question is how to bring together the past and the potential future into some kind of accommodation. Przeworski and colleagues’ account of negotiation between monarchs and parliaments also reflects the need for accommodation between established and rising political forces, with the additional twist that formalization produces perverse

consequences. And Peerenboom's case study examines a very different type of constitution, a stable authoritarian regime in which constitutional discourse begins to make the design relevant to real politics, despite the intentions of the founders to keep the document symbolic. We can summarize the section as reminding us that constitutional design reflects political constraints and opportunities of the drafting circumstances, and that there is slippage between the goals of designers and actual political practice.

The third section of the book addresses particular issues in institutional design. Rosalind Dixon and Richard Holden focus on amendment rules, the very central institutions for formal constitutional change. They examine an under-analyzed feature of amendment rules, namely that the difficulty of amendment is determined not only by the threshold required in any voting body (majority, two-thirds, three-quarters, etc.), but also by the size of the body. As the denominator goes up, the practical difficulty of marshalling any particular threshold increases. After showing this theoretically, they go on to develop an empirical test using data from American states. They find a statistically significant negative relationship between the size of legislative voting bodies and the rate of constitutional amendment in various states. They then explore possible institutional corrections. There are clear implications for constitutional design, extending even beyond the context of constitutional amendment to any voting rule for a multimember institution.

Robert D. Cooter and Neil Siegel combine traditional methods of constitutional interpretation with economic analysis to produce a positive and normative account of the federal powers possessed by the U.S. Congress. Although developed in the context of the United States, their theory of "collective action federalism" has natural implications for other multijurisdictional settings. The basic idea is that the national government is best situated to solve problems of collective action for substates. Such problems include interstate externalities and impediments to interstate markets. The technical characteristics of these problems impede the ability of substates to solve them on their own. Cooter and Siegel argue that in the United States, courts ought (and, to a large extent, do) to interpret the founders' division of labor between national and state governments, articulated in Article I, Section 8 of the U.S. Constitution, in accordance with this structural approach.

Martha Nussbaum's contribution tackles modes of accommodation in systems of religious pluralism, using the example of personal laws in India to orient the discussion. The British colonialists, like many others, sought to give a good deal of autonomy to local communities in matters of religion, which typically encompass what we would call family law. Going further than simply accommodating the local communities, the British undertook efforts to codify religious custom, which had the perverse effect of freezing illiberal practices. In turn, the early leaders of independent India were reluctant to challenge powerful religious communities and left intact the personal laws for selected religious groups, despite their frequent conflict with

constitutional guarantees of equality and dignity. Rooting her argument in the comparative constitutional history of religious establishment, Nussbaum demonstrates the flaws in the current Indian scheme, while elaborating the difficult constitutional politics of moving toward a more just order. It is a cautionary tale for constitutional designers who may be tempted to accommodate illiberal religious practices; however, her story is also one that suggests a role for sensitive and careful constitutional adjudication in resolving conflicts.

Constitutional adjudication is the theme of the contribution from John Ferejohn and Pasquale Pasquino. The large literature on comparative constitutional review tends to focus on the German, French, and American models as ideal types. Ferejohn and Pasquino undertake the important corrective of emphasizing the Italian model, in which cases come to the court through referral from lower courts. This design is also found now in the European Union and in many Latin American countries. The Italian design has certain advantages over the others. Because it does not allow direct access from citizens through a constitutional complaint, it has not been subjected to tremendous backlogs as has the German court. At the same time, there is no need for political sponsorship to raise a claim, as is found in the French system of 1958–2008. The system also minimizes institutional conflicts between the ordinary and constitutional judiciary that have plagued other systems. In short, this is a call to consider a fresh but proven option in designing constitutional adjudication.

Eric A. Posner and Adrian Vermeule focus on executive power in Chapter 12, which they call “Tyrannophobia” – the fear of dictatorship that has been a long-standing theme of American political discourse. Fear of monarchy was pervasive among the founding fathers, yet they chose a constitutional design – a popularly elected president – which was amenable to the great expansion of executive power. Tyrannophobia, one might think, is itself a constraint that has helped limit executive aggrandizement, but Posner and Vermeule find no evidence for this proposition. Instead, they find that tyrannophobia in the United States is an irrational political attitude that has interfered – and continues to interfere – with needed institutional reform.

This section concludes with Zachary Elkins, Tom Ginsburg, and James Melton’s contribution on executive term limits, one of the devices used to minimize the possibility of tyranny. The chapter traces the origins of term limits and demonstrates that they are widespread within presidential systems. It also evaluates their consequences: Term limits are not associated with constitutional crisis and tend to be observed in democratic systems. The normative conclusion is that term limits are a vital and effective arrow in the quiver of constitutional design.

Together, the chapters in this section call into question many conventional assumptions about core institutions. Designing amendment rules involves more than picking the level of supermajoritarian entrenchment. Federalism is a device not only for political accommodation, but also for effective economic regulation. Accommodating

religious communities is a typical strategy of constitutional design, but it risks unanticipated consequences. Constitutional court models are not restricted to the French and German archetypes. Executive power need not be irrationally feared, and institutions such as term limits can serve as effective constraints on presidents. Each of these propositions implicates an active literature in institutional design and moves it forward with unconventional argument or empirical evidence.

CONCLUSION

“Constitutions,” noted the political theorist Hanna Pitkin, “are made, not found” (1987: 168). While constitutions no doubt require continuous reenactment through ongoing practices, they also involve self-conscious institutional choices that can become quite sticky once adopted. The chapters in this volume illustrate the importance of institutional choice, and thus reiterate the high stakes in constitutional design. Good designs can facilitate democracy and tame religious radicals; they can encourage executive turnover and promote responsive adjustment to new circumstances through constitutional amendments. Bad designs, on the other hand, can exacerbate intercommunal conflict and perpetuate unjust outcomes for women; they can block transitions to superior institutions; and they can clog channels of citizen redress through the courts.

It will be helpful to close with a final note on the place of this volume in the literature. This is the first volume in a new series of books published by Cambridge University Press on *Comparative Constitutional Law and Policy*. The contributors to this volume share a sense that our work is only beginning to scratch the surface of possibilities for the field. We do not, and cannot, produce acontextual or mechanistic statements about the universal effect of social institutions. We can, however, aspire to the more modest goal of raising issues for consideration by designers and students of design, and offer normative suggestions informed by comparative experience. It is hoped that future volumes will advance knowledge in this spirit.

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