

COMPARATIVE CONSTITUTIONAL DESIGN

This volume brings together essays by many of the leading scholars of comparative constitutional design from myriad disciplinary perspectives, including law, philosophy, political science, and economics. The authors collectively assess what we know – and do not know – about the design process as well as particular institutional choices concerning executive power, constitutional amendment processes, and many other issues. Bringing together positive and normative analysis, it provides the state of the art in a field of growing theoretical and practical importance.

Tom Ginsburg is the Leo Spitz Professor of Law and Political Science at the University of Chicago. He is the coauthor of *The Endurance of National Constitutions* (2009, with Zachary Elkins and James Melton), which won the best book award from the Comparative Democratization Section of the American Political Science Association. His other books include *Rule by Law: The Politics of Courts in Authoritarian Regimes* (2008, with Tamir Moustafa) and *Judicial Review in New Democracies* (2003), which won the American Political Science Association's C. Herman Pritchett Award for best book on law and courts.





Comparative Constitutional Design

TOM GINSBURG

University of Chicago, School of Law





> CAMBRIDGE UNIVERSITY PRESS Cambridge, New York, Melbourne, Madrid, Cape Town, Singapore, São Paulo, Delhi, Mexico City

Cambridge University Press 32 Avenue of the Americas, New York, NY 10013-2473, USA www.cambridge.org Information on this title: www.cambridge.org/9781107020566

© Cambridge University Press 2012

This publication is in copyright. Subject to statutory exception and to the provisions of relevant collective licensing agreements, no reproduction of any part may take place without the written permission of Cambridge University Press.

First published 2012

Printed in the United States of America

A catalog record for this publication is available from the British Library.

Library of Congress Cataloging in Publication data
Comparative constitutional design / Tom Ginsburg.
p. cm.
Includes bibliographical references and index.
ISBN 978-1-107-02056-6 (hardback)
1. Constitutional law. I. Ginsburg, Tom.
K3165.C576 2012
342-dc23 2011048126

ISBN 978-1-107-02056-6 Hardback

Cambridge University Press has no responsibility for the persistence or accuracy of URLs for external or third-party Internet Web sites referred to in this publication and does not guarantee that any content on such Web sites is, or will remain, accurate or appropriate.



Contents

List	of Figures	<i>page</i> vii
List	of Tables	viii
List	of Contributors	ix
Acknowledgments		xi
1.	Introduction Tom Ginsburg	1
	I. DESIGN PROCESSES	
2.	Clearing and Strengthening the Channels of Constitution	
	Making	15
	Jon Elster	
3.	Does the Process of Constitution-Making Matter?	31
	Justin Blount, Zachary Elkins, and Tom Ginsburg	
	II. HOW DO WE GET TO CONSTITUTIONAL DESIGN?	
	CONSTRAINTS AND CONDITIONS	
4.	Democratization and Countermajoritarian Institutions: Power	
	and Constitutional Design in Self-Enforcing Democracy Susan Alberts, Chris Warshaw, and Barry R. Weingast	69
5.	The Origins of Parliamentary Responsibility	101
	Adam Przeworski, Tamar Asadurian, and Anjali Thomas Bohlken	
6.	Social Foundations of China's Living Constitution Randall Peerenboom	138
	National I celetiouotti	

V



V1	Contents	
7.	The Political Economy of Constitutionalism in a Non-Secularist World Ran Hirschl	164
	III. ISSUES IN INSTITUTIONAL DESIGN	
8.	Constitutional Amendment Rules: The Denominator Problem Rosalind Dixon and Richard Holden	195
9.	Collective-Action Federalism: A General Theory of Article I, Section 8 Robert D. Cooter and Neil S. Siegel	219
10.	Personal Laws and Equality: The Case of India Martha C. Nussbaum	266
11.	Constitutional Adjudication, Italian Style John Ferejohn and Pasquale Pasquino	294
12.	Tyrannophobia Eric A. Posner and Adrian Vermeule	317
13.	Do Executive Term Limits Cause Constitutional Crises? Tom Ginsburg, Zachary Elkins, and James Melton	350
Inde	ex	381



Figures

Proportion of constitutions in force that provide for public	0
	page 38
· · · · · · · · · · · · · · · · · · ·	
	38
	72
Model 1	76
Model 2	79
Spatial preference map, countermajoritarian	
equilibrium (outcome D)	81
Spatial preference map, authoritarian equilibrium (outcome G)	82
Spatial preference map, an equilibrium with mutual defection	83
Scale and probability of amendment given supermajority rule	198
Scale and probability of amendment given simple-majority rule	211
The eighteen clauses in Article I, Section 8	242
Economic analysis of enumerated powers	24 3
Percent of countries with executive term limits, by type of limits	356
Mean tenure and mean permitted tenure over time	357
Percent of countries with executive term limits, by region	358
Maximum tenure for heads of state (combines term length	
and term limits)	360
Probability of maximum tenure evasions by executives by year	364
Probability of maximum tenure evasions by executives by year	
	365
9	, ,
limit violations	368
	ratification Proportion of constitutions in force that specify some promulgation procedure Countermajoritarian provisions typology Model 1 Model 2 Spatial preference map, countermajoritarian equilibrium (outcome D) Spatial preference map, authoritarian equilibrium (outcome G) Spatial preference map, an equilibrium with mutual defection Scale and probability of amendment given supermajority rule Scale and probability of amendment given simple-majority rule The eighteen clauses in Article I, Section 8 Economic analysis of enumerated powers Percent of countries with executive term limits, by type of limits Mean tenure and mean permitted tenure over time Percent of countries with executive term limits, by region Maximum tenure for heads of state (combines term length and term limits) Probability of maximum tenure evasions by executives by year Probability of maximum tenure evasions by executives by year and region Logistic regression model predicting successful term



Tables

3.1	Actors and processes $(N = 460)$	page 37
3.2	Constitutional design processes and average de jure	
	parliamentary power	46
3.3	Proportion of constitutional texts containing de jure	
	parliamentary power provisions, by design process	46
3.4	Proportion of constitutions containing direct democracy	
	provisions, by use of referendum	55
3.5	Proportion of constitutions containing selected rights provisions, by	
	use of referendum	56
5.1	Summary of constitutions and practices	109
8.1	Panel summary statistics	200
8.2	Aggregate summary statistics	201
8.3	Amendment rates using aggregate data	203
8.4	Panel negative binomial results	204
8.5	Estimates of amendment probability	207
8.6	House-legislative rule interaction	210
12.1	Survey results for selected nations	331
13.1	Punctuality and mode of exit	361
13.2	Average number of years with a conflict by overstay status	369
13.3	Analysis of overstay recurrence	371
13.4	Mean level of democracy (as measured by polity) by initial	
	regime type and overstay status	372



Contributors

Susan Alberts recently received her PhD from the Department of Political Science, Georgetown University.

Tamar Asadurian is an Analyst at the U.S. International Trade Commission in Washington, DC, and holds a PhD from the Department of Politics, New York University.

Justin Blount is PhD candidate, Department of Political Science, University of Illinois.

Anjali Thomas Bohlken is Assistant Professor of Political Science, University of British Columbia.

Robert D. Cooter is Herman Selvin Professor of Law, Berkeley Law School.

Rosalind Dixon is Assistant Professor, University of Chicago Law School.

Zachary Elkins is Associate Professor of Government, University of Texas at Austin.

Jon Elster is Robert K. Merton Professor of Social Sciences, Columbia University.

John Ferejohn is Samuel Tilden Professor of Law, New York University Law School.

Tom Ginsburg is Leo Spitz Professor of International Law, University of Chicago Law School.

Ran Hirschl is Canada Research Chair in Constitutionalism, Democracy, and Development, University of Toronto Faculty of Law, Canada.

Richard Holden is Professor of Economics, Australian School of Business, University of New South Wales, Australia.

James Melton is Post-Doctoral Fellow, IMT Institute for Advanced Studies, Italy.



X

Cambridge University Press 978-1-107-02056-6 - Comparative Constitutional Design Tom Ginsburg Frontmatter More information

Contributors

Martha C. Nussbaum is Ernst Freund Distinguished Service Professor of Law and Ethics, University of Chicago.

Pasquale Pasquino is Global Distinguished Professor, New York University.

Randall Peerenboom is Professor of Law, La Trobe University, Australia.

Eric A. Posner is Kirkland & Ellis Professor of Law, University of Chicago.

Adam Przeworski is Carroll and Milton Petrie Professor of European Studies and Professor of Politics and Economics, New York University.

Neil S. Siegel is Professor of Law and Political Science, Duke University School of Law.

Adrian Vermeule is John H. Watson Professor of Law, Harvard Law School.

Chris Warshaw is PhD candidate, Department of Political Science.

Barry R. Weingast is Senior Fellow, Hoover Institution, and Ward C. Krebs Family Professor, Department of Political Science, Stanford University.



Acknowledgments

Thanks to Dean Michael Schill and the Russell Baker Scholars Fund at the University of Chicago Law School for support for this project. Chantelle Hougland and Angela Kim provided research assistance. Cooter and Siegel acknowledge the editors of the *Stanford Law Review*, who published related material in Volume 63 (2010). Thanks also to the editors of the *William and Mary Law Review*, who published material from Chapter 13 in Volume 52 (2011), and the *Annual Review of Law and Social Science*, who published material from Chapter 2 in Volume 5.

