2013

Review of Comparative Constitutional Design by Tom Ginsburg

Cameron Charles Russell

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By
Cameron Charles Russell*

There is nothing more fundamental to any polity than the rules and principles by which it is governed. For the modern nation-state, a constitution not only determines the structure of political institutions, but also embodies national identities, values, and aspirations. Constitutional design, therefore, goes to the very heart of all political systems.

Comparative Constitutional Design is a volume of collected essays that does not aim to tell us how to construct the perfect constitution, or what types of institutions are always appropriate for given situations. Rather, it is a volume that understands that such a weighty and expansive subject must be approached one piece at a time by utilizing both varied disciplinary perspectives and normative analyses. In doing so, the volume manages to maintain both breadth and depth in addressing a diverse set of issues that are central to the problems of constitutional design: the constitutional design process, the factors effecting a constitution's content, and a constitution's political, institutional, and social effects.

Tom Ginsburg, Leo Spitz Professor of International Law at the University of Chicago, School of Law, is a leading scholar of comparative constitutional design. He co-directs the Comparative Constitutions Project, which is engaged in collecting data on every written constitution since 1789. The purpose of this project is to promote scholarly investigation into the sources and consequences of constitutional choices, as well as to offer guidance to constitutional designers.[1] With the causal connections between constitutions and political realities often obscured, and many theories untested empirically, Ginsburg's collected work seeks both to advance scholarly knowledge and offer normative perspectives for the consideration of constitutional designers.[2] This volume is at

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1. *See* COMPARATIVE CONSTITUTIONS PROJECT, http://www.comparativeconstitutions project.org (last visited Apr. 8, 2013).

2. Tom Ginsburg, *Introduction*, *in* COMPARATIVE CONSTITUTIONAL DESIGN 1, 10 (Tom

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once ambitious and humble in aspiration, and while some essays leave unanswered questions, this is quite fitting in a volume replete with intriguing and surprising findings. Scholars of many backgrounds will find as much worth in the work's scholarship as constitutional drafters will find guidance.

Ginsburg highlights the audacious nature of constitutional design,[3] and as a counterpoint to this, each chapter generally takes a more humble approach, analyzing specific design issues or case studies. "So long as we have the requisite humility with regard to our ambitions and maintain a healthy suspicion of mechanistic recommendations," Ginsburg argues, we can seek knowledge as to the causes and effects of constitutional provisions.[4] This humility is well suited to the nature of the volume as a whole, for it reads like a foundational exploration of a growing and inter-disciplinary field, with each chapter presenting an issue that is ripe for more scholarly treatment, or reaching a counter-intuitive conclusion that shows us we have much yet to learn in the field of comparative constitutional design.

The volume starts as one might expect—at the beginning. Jon Elster's theoretical and prescriptive chapter considers not what a constitution should include, but rather the optimal conditions for generating a constitution; that is, "how an omnipotent designer of a constituent assembly ought to structure the selection of delegates, the organization of the [constitutional] assembly, and the mode of ratification."[5]

Elster sees three distinct motivations that animate the framers of a constitution: interest, reason, and passion.[6] For decades, Elster has been at the forefront of contributing to theories of constitutional design processes, and in this chapter he revises his position to argue for a design process that includes roles for passion and interest in addition to reason.[7] Broadly, Elster sees two tasks for the omnipotent designer: firstly, to "clear the channels" of constitution-making by largely eliminating the biases, interests, and passions of the constitutional framers; and, secondly, "strengthening the channels" by enhancing the motivations of the framers and improving the information available to them.

Elster's prescriptions include using constitutional assemblies whose members are diverse, rather than simply the most competent people available. In addition, the assembly should be large enough to process information well, but also be composed of small groups working on separate tasks to reduce the risk

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Ginsburg ed., 2012).

3.   *Id.* at 1.

4.   *Id.* at 2.

5.   Jon Elster, *Clearing and Strengthening the Channels of Constitution Making*, *in* COMPARATIVE CONSTITUTIONAL DESIGN 15, 15, 31 (Tom Ginsburg ed., 2012).

6.   *Id.* at 15.

7.   *See id.*

of free-riding.[8] He also proposes limiting the negative impacts of self-interest through exposing those who work for themselves and not the interests of the citizens.[9] However, Elster allows some room for more positive passions of the kind that motivate people to accomplish great tasks.[10] To support these prescriptions, Elster offers the reader a wealth of examples from French and American history, as well as the writings of philosophers and historians. These certainly provide a lot of intellectual interest, but they cannot reliably inform a would-be constitutional designer without evidence that they lead to the outcomes Elster desires. So Justin Blount, Zachary Elkins, and Tom Ginsburg pick up where Elster left off, and empirically test how the process of constitution-making affects form and content.[11]

Along with a brief overview of constitutional design processes, these authors set about presenting some empirical findings related to such processes. Perhaps the most intriguing result is that Elster's concern over self-interest is largely empirically unfounded. Elster advocates for a constitutional assembly that is specially convened, rather than one made up of those who currently, or will likely later, form the legislature; and he also calls for ratification by a body other than the legislature.[12] His fear is that institutional self-dealing will lead to a self-aggrandizing constitution where the legislature has too much power and the public's interests are not paramount.[13] Perhaps counter-intuitively, Blount and colleagues find no empirical support to suggest that legislative assemblies produce constitutions that provide for a more powerful legislature than do non-legislative assemblies.[14] However, Elster's fear of institutional self-dealing is supported when considering design processes that are centered on a powerful executive.[15] When an executive leads the constitution's drafting, the result is a more powerful executive and a weaker legislature. It appears, therefore, that Elster's hypotheses were half-right. Why might this be the case? The latter result seems intuitive, but the former does not. Perhaps, the authors speculate, members of constituent assemblies see themselves as potential legislators in the future.[16] A more pessimistic perspective would be that the logistical difficulty of

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8.   *Id.* at 20-22.

9.   While Elster wishes to insulate the assembly from party interests, the reader should keep in mind the arguments and findings of Alberts, Warshaw, and Weingast. *See infra* text accompanying notes 23-34. In brief, Alberts and colleagues find that allowing the strong party to get its way in the constitutional drafting process may, in the long run, be beneficial for a stable polity, and for democracy.

10.   Elster, *supra* note 5, at 23, 26.

11.   Justin Blount, Zachary Elkins & Tom Ginsburg, *Does the Process of Constitution-Making Matter?*, *in* COMPARATIVE CONSTITUTIONAL DESIGN 31, 31 (Tom Ginsburg ed., 2012).

12.   *Id.* at 44.

13.   *Id.*

14.   *Id.* at 45-48.

15.   *Id.* at 48.

16.   *Id.*

drafting as lofty a document as a constitution convinces the drafters that legislative assemblies cannot be trusted to function smoothly, and should therefore not be entrusted with undue power.

The authors also consider various hypotheses related to public participation in the drafting and ratification of constitutions, with one finding deserving particular attention. As one might expect, the authors find a link between public ratification of a constitution and the number of rights enshrined in those constitutions.[17] However, as mentioned above, over time an increasing proportion of constitutions have required ratification by referendum. Simultaneously, the extent of rights provisions has also increased. Thus, de-trending the data is necessary.[18] This produces the intriguing result of a statistically significant and *negative* relationship between referenda and rights.[19] The authors suggest that this unexpected result can be explained by the fact that most referenda are paired with executive-centered design processes.[20] Once the authors control for this pairing, a positive association between public referenda and rights provisions in a constitution approaches levels of statistical significance.[21] Exactly what causal mechanism might be at work here, however, is not clear.

In general, Blount and colleagues leave to others the work of discussing the causal mechanisms that are in play, either through case-studies or other methods, and acknowledge that such work is necessary to escape problems of endogeneity.[22] Their chapter is an important step in moving the debate from the theoretical to the empirical, and their initial intriguing results suggest that those who aspire to be involved with constitutional design will have to maintain an open mind until the theories and empirics match up.

However, before design processes can affect content, there are conditions and constraints that can determine the timing of constitutional reform as well as a constitution's content. Susan Alberts, Chris Warshaw, and Barry R. Weingast use a game-theoretical model to consider what constraints and conditions lead to successful democratic transitions.[23] They take as their starting point the models of Acemoglu and Robinson,[24] and Boix.[25] The players in the game are an

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17.   *Id.* at 54.

18.   *Id.*

19.   *Id.*

20.   *Id.*

21.   *Id.*

22.   *Id.* at 56-57.

23.   Susan Alberts, Chris Warshaw, & Barry R. Weingast, *Democratization and Countermajoritarian Institutions: Power and Constitutional Design in Self-Enforcing Democracy*, *in* COMPARATIVE CONSTITUTIONAL DESIGN 69, 69-70 (Tom Ginsburg ed., 2012).

24.   DARON ACEMOGLU & JAMES ROBINSON, ECONOMIC ORIGINS OF DICTATORSHIP AND DEMOCRACY (2006).

25.   CARLES BOIX, DEMOCRACY AND REDISTRIBUTION (2003).

authoritarian in power and a democracy-seeking opposition.[26] Democratization will occur when the authoritarian faces such costs from the opposition that they prefer democratization rather than attempting to stay in power. This simple model has the authoritarian choosing either to democratize, in which case the game ends, or to continue as an authoritarian regime, in which case the opposition can challenge the authoritarian, or else acquiesce.[27]

By relaxing the assumptions of this model, however, Alberts and colleagues show how a stable democracy can be reached. The erstwhile authoritarian needs to be sufficiently powerful after democratization to ensure that the opposition has incentives to honor the constitutional bargain once it has power.[28] Otherwise, the opposition will prefer to topple the authoritarian rather than maintain the democratic bargain. Thus, democratic stability after an authoritarian transition requires that neither side be too strong.[29] The authors quote Montesquieu: "So that one cannot abuse power, power must check power."[30]

In other words, the model predicts that democratization is both more likely to occur, and more likely to be stable, when authoritarians can choose counter-majoritarian institutions. Unfortunately, this is not tested with a large-n data-set. However, Chile's political experience from 1973 to the present serves as a central case study to illustrate how the model plays out in practice.[31] While the authors admit that democracy in Chile could not be considered consolidated until various undemocratic provisions were removed, they argue that it would be wrong (as is often done) to portray these provisions in a negative light.[32] Only through having such anti-democratic provisions could politics be as stable and moderate as it was. Growth and greater equality were the results.[33]

The normative conclusion of Alberts and colleagues, then, is that we should not necessarily shy away from counter-majoritarian, undemocratic institutions, even if they favor warlords, the corrupt, or the most unpalatable politicians. Such unsavory institutions "may also help pave the way toward self-enforcing majoritarian or moderate counter-majoritarian democracy," and may be "at the core of successful democratization."[34] This is an interesting, persuasive, and timely conclusion, particularly when constitution-making in the wake of the Arab Spring—and quite possibly in the near future for Syria—is at the forefront of international politics. It might be politically unappealing to give special

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26.   Alberts et al., *supra* note 23, at 75.

27.   *Id.* at 76.

28.   *Id.* at 85.

29.   *Id.*

30.   *See id.* at 69.

31.   *Id.* at 87.

32.   *Id.* at 94.

33.   *Id.*

34.   *Id.* at 97-98.

protection to the governing Alawite minority in Syria, but it might nevertheless be necessary to ensure that future conflicts in the region involve words rather than rockets.

While Alberts and colleagues consider the stability of authoritarian regimes transitioning into democracy, Adam Przeworski, Tamar Asadurian, and Anjali Thomas Bohlken consider a subset of issues concerning constitutional provisions and stability: the constitutionalization of monarchs' power, and the observance of the norms of parliamentary responsibility.[35] Parliamentary responsibility can be defined as the collective political responsibility of governments to the parliament, and can be observed, for example, through a vote of no confidence. This study of the origins of parliamentary responsibility is the first of its kind. Were the chapter to be simply novel, that would make it a worthy contribution. However, their scholarship also contains a fascinating finding: "countries in which the principle of parliamentary responsibility was written into constitutions did not practice it, whereas some practiced it long before it was constitutionalized."[36]

In these authors' view, the decline of monarchs' political power was inevitable—but whether they managed to keep the crown was no foregone conclusion.[37] When both the monarch and anti-royalists observed the equilibrium balance of power, there was no need to formalize the relationship in a constitution.[38] Thus, the norms of parliamentary responsibility were followed without needing to write them down. In contrast, when the balance of power tilted such that a monarch's powers could be constitutionalized, either the monarchs attempted to keep power by dissolving unfavorable parliaments and violating parliamentary responsibility, or they were overthrown or abolished by increasingly powerful anti-royalist parliamentary forces.[39]

Przeworski and colleagues have tackled an understudied aspect of constitutions in great detail, and while their results are interesting, the relevance of monarchies in the twenty-first century is minimal. The authors could expand on their general finding that the conditions that lead to the codification of certain powers may also lead to their abuse, and consider how this may be relevant to modern-day constitution-formation and transitions from authoritarian regimes. Which aspects of modern constitutions follow the authors' counter-intuitive result and are observed when not codified, or abused when they are?

One aspect of constitutions that is near-universally codified is the requirements for constitutional amendment. It is self-evident that constitutional

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35. Adam Przeworski, Tamar Asadurian, & Anjali Thomas Bohlken, *The Origins of Parliamentary Responsibility*, *in* COMPARATIVE CONSTITUTIONAL DESIGN 101, 101 (Tom Ginsburg ed., 2012).

36.   *Id.*

37.   *Id.* at 111.

38.   *See id.* at 110.

39.   *See id.* at 111-12, 117-27.

amendment will be harder to pass if the threshold proportion of votes required for an amendment is higher rather than lower. But theory suggests that it is not just the *fraction* of required votes that is important—the *absolute* number of votes required also affects the difficulty of passing a constitutional amendment. There are two reasons for this "denominator problem." Firstly, decision costs are higher when it is necessary to secure more votes because, for example, the time required for deliberation increases when the size of the legislature increases, and bargaining is more costly when more individuals need to be convinced.[40] Secondly, in a larger voting body, because of the law of large numbers, there is less variation in voters' preferences relative to the median voter; therefore, the probability of a supermajority in favor of constitutional amendment is lower.[41]

Rosalind Dixon and Richard Holden are the first to empirically test this "denominator problem." Using data from the American states, the authors find strong support for their hypothesis that larger legislatures pass fewer constitutional amendments than smaller legislatures. The result is not only statistically significant at the one percent level, but is also of a large magnitude, with a one standard deviation in the size of the legislature representing a 14.6 percent reduction in the number of constitutional amendments relative to the mean.[42]

Dixon and Holden move from the positive to the normative and describe the possible negative effect of this "denominator problem." As a polity gets bigger—with a larger legislature or an increased population (if popular ratification is required)—then constitutional amendments will be harder to pass. To prevent this, one may introduce a "sliding scale voting rule" whereby the required supermajority would decrease as the legislature or population increased.[43] Alternatively, one may choose a lower supermajority rule to begin with, or maintain a high supermajority rule only for specific provisions of the constitution.[44] Finally, a constitution may be revised by implementing, with a lower voting threshold, the recommendations of specially convened constitutional conventions.[45] Of course, one must keep in mind the benefits of supermajority rules in general, and considerations of party strength and discipline will affect the wisdom of implementing sliding-scale or lower-threshold amendment rules. Perhaps even more importantly, in choosing an amendment rule we should carefully consider the protection of minorities. For

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40.   Rosalind Dixon & Richard Holden, *Constitutional Amendment Rules: The Denominator Problem*, *in* COMPARATIVE CONSTITUTIONAL DESIGN 195, 196-97 (Tom Ginsburg ed., 2012).

41.   *Id.* at 197-98.

42.   *Id.* at 204-05.

43.   *Id.* at 208-09.

44.   *Id.* at 209.

45.   *Id.* at 212.

example, a higher threshold could be required for amendments that would specifically affect minorities.[46]

Minorities' rights under a constitution are the focus of Martha Nussbaum's chapter—a case study of personal laws in India.[47] She gives us a detailed historical examination which paints a worrying picture of how a desire to accommodate different religious practices through granting group-based rights can lead to entrenched illiberal practices that are ultimately caught in tension with constitutionally-founded individual rights of equality, liberty, and dignity, and which severely disadvantage women. Nussbaum's desire is to find, within the experience of India, arguments both for and against the delegation to religious bodies of lawmaking in certain spheres of life, especially family law.

Before independence, the British in India allowed personal property law, inheritance law, and family law to be controlled by the major religions, while keeping commercial and criminal law uniform.[48] Alongside secular law in these areas were separate Hindi, Islamic, Parsi, Jewish, and Christian laws. This may be seen as a British attempt to ensure religious autonomy while India was part of the Empire, but a more sinister incentive may have been to allow Indian men some degree of autonomy in their lives while controlling other aspects of law.[49]

Once India arrived at independence, the leaders of the religious minorities (as well as the Hindu majority), desired to maintain the parallel systems of personal law, as they were wary that the Hindu-dominated legislature might infringe on their religious liberties if uniform laws were introduced.[50] Slowly, women have won equal rights with men. For example, in 2001, Christian women won the right to divorce on grounds of cruelty, and in 2005 Hindu women won equal shares in agricultural land.[51] One reason that reform is so slow, at least for minorities, is that those advocating for equal rights have multiple hurdles to jump: first, some religious figures have to be persuaded to listen to women, and then to convince the religious establishment themselves; and second, the establishment has to formulate and pass the proposals in the legislature.[52] The Indian constitution has guarantees for equality of rights between all citizens, but in the fight between group rights and constitutional rights, women have often lost.

Nussbaum shows that these personal laws are akin to accommodation of religious pluralism, but that their existence is also similar to the establishment of a state religion. To the extent that accommodation is akin to establishment, it

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46.   *See id.* at 213.

47.   Martha C. Nussbaum, *Personal Laws and Equality: The Case of India*, *in* COMPARATIVE CONSTITUTIONAL DESIGN 266, 266 (Tom Ginsburg ed., 2012).

48.   *Id.* at 267.

49.   *Id.*

50.   *Id.* at 269-70.

51.   *Id.* at 272.

52.   *Id.*

threatens the equality of religions and citizens both symbolically and practically.[53] Even India's "plural establishment" of multiple religions brings problems. Nussbaum identifies seven, the chief among which are: first, that not all religions can be treated equally in terms of establishment, as there will always be those that are left out; second, that the laws that attach to one community will be more or less favorable to a citizen in a given situation compared to another from a different community; and third, that too much power is entrusted in the (not-democratically-elected) religious leaders of the various communities.[54]

There are, then, some benefits to India's plural establishment and continued use of parallel religiously-backed personal laws. They grant power to religious minorities in a system where the interests of minority religion would otherwise be swamped by the majority.[55] But their existence is undemocratic, often denies equality to women, and creates large barriers to change. Nussbaum proposes a resolution: accommodation of disparate religious practices should be allowed up to the point at which such accommodation would violate fundamental constitutionally-founded rights.[56]

This is not the route that India has chosen. However, Nussbaum recounts two Indian Supreme Court cases that have essentially arrived at the same result by relying on the commonplace principle of statutory interpretation.[57] A law, if possible, must be interpreted to be consistent with the constitution, so courts have interpreted personal laws that seem to discriminate against women as though they were, in fact, intended to treat women equally. Without knocking down religiously-backed laws, the Court has said that no reasonable Hindu or Muslim could have meant to violate the basic rights of women, and therefore the potentially-offending statute must be read in such a way that there is no violation![58] Nussbaum thinks this legal trickery is a brilliant tactic, as it allows for both accommodation of religious practices as well as the protection of individual rights, especially as they relate to women.[59]

Nussbaum's rich and fascinating chapter presents an important warning: that accommodation of religious pluralism through a state's constitutional structure, even if the intention is well-meaning and aimed at securing religious liberty, can lead to intolerable inequalities and undemocratic outcomes. Thus, we must be wary of allowing accommodation that leads to the establishment of religions, or to discriminatory personal laws. Thankfully, Nussbaum also shows

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53.   *Id.* at 277-79.
54.   *Id.* at 280-82.
55.   *Id.* at 285.
56.   *Id.* at 287.
57.   *Id.* at 288-91.
58.   *Id.* at 290.
59.   *Id.* at 290-91.

us how courts deciding constitutional matters can achieve the benefits of accommodation at the same time as securing fundamental rights.

The role of courts in adjudicating constitutional matters is picked up by John Ferejohn and Pasquale Pasquino. While the literature on constitutional adjudication often focuses on the French and German models, these authors make a convincing case for the overlooked Italian model.[60] Each of these three models contains a constitutional court with the sole power over constitutional adjudication.[61] Their differences lie in "when they can overturn a statute . . . , whether they can control legislative or judicial as well as parliamentary and executive actions[,] and what parties are able to gain access to them."[62] The French model allows the constitutional court to overturn a statute before it goes into effect, whereas under the German model the court can overturn statutes that are already in effect. Also under the French model, the court cannot review administrative or judicial decisions, whereas Germany's Federal Constitutional Court can. Finally, only members of the House or Senate can send a statute for constitutional review in the French system, whereas any person can send a constitutional complaint to the court under the German system. The Italian model allows review of statutes (but not administrative or judicial decisions) that are already in effect, and constitutional issues are referred to the court if they arise in a particular case and the judge desires, or is willing, to send the issue to the court.

However, the value of this essay is not merely in accurate taxonomy. Ferejohn and Pasquino show that the Italian model is increasingly widespread (with several post-communist countries[63] and many Latin American countries[64] having adopted elements of the Italian model), and also offers several benefits over the other models. Unlike the French model, the Italian model does not require referral to the constitutional court by political actors, but rather individual citizens can bring claims through the court system. However, since constitutional adjudication under the Italian model requires referral by a lower court to the constitutional court, it does not suffer the extremely heavy caseload of the German Constitutional Court, which receives over 5,000 cases per year and has barely enough time to act as a deliberative body.[65] While the constitutional court in the Italian model is restricted to reviewing parliamentary

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60.   John Ferejohn & Pasquale Pasquino, *Constitutional Adjudication, Italian Style*, *in* COMPARATIVE CONSTITUTIONAL DESIGN 294, 294 (Tom Ginsburg ed., 2012). Constitutional adjudication should not be confused with American-style judicial review. The latter concentrates disputes about constitutional matters to a particular tribunal, rather than being diffused throughout the judiciary; it may permit *a priori* review of legislation; and it considers constitutional questions only in the abstract, not with regard to specific fact patterns. *Id.* at 300.

61.   *Id.* at 295.

62.   *Id.*

63.   *Id.* at 295-96.

64.   *Id.* at 310.

65.   *Id.* at 314.

statutes, the Italian model gives a country that is serious about human rights "a way to give rapid access to rights protections to citizens, avoiding at the same time the flood of individual complaints."[66]

However, the authors' analysis stops just short of considering the benefits of Italian-style constitutional adjudication compared with American-style judicial review. What are the advantages of adjudication of constitutional issues in the abstract, as opposed to the American style of reviewing particular cases? Since the caseload faced by the U.S. Supreme Court is so heavy, is the Italian style of referral from a lower court a better way to keep the docket of the constitutional court not overly burdened? Or is the diffused power of judicial review throughout the U.S. circuit courts a more effective way of deciding constitutional decisions than having a centralized constitutional court? Having identified the Italian model, comparison with the U.S. model would strengthen and complete the analysis.

Intuitively, a strong and independent court with the power to interpret a state's constitution would seem to be a prerequisite to the protection of the rights of that nation's citizens. In many cases, citizens are justified in fearing politicians who, corrupted by power, reach out to take away their fundamental and inalienable rights. Americans in general have a healthy aversion to what can be seen as governmental, and especially executive, over-reach. Eric Posner and Adrian Vermeule, however, find that there is no justification behind this perennial feature of American politics.[67] The authors argue that not only has the threat of dictatorship by the executive never materialized, but neither would it have done so, even if there was not such a strong cultural desire to prevent it.[68] Fear of dictatorship by the executive branch does not prevent dictatorship.[69] Instead, this excessive "tyrannophobia" is merely a misperception of risk which unduly constrains the executive and has little social utility.[70]

Posner and Vermeule first identify the origins of tyrannophobia in America's exaggerated beliefs about the British King's power during the Revolutionary War, and then turn to a comparative international perspective to test whether fear of dictatorship acts as a constraint on the executive. No statistically significant relationship is found: a tyrannophobic public is just as likely to live in a non-democracy as in a democracy.[71] For both democracies and non-democracies, levels of tyrannophobia are not significantly correlated with the type of political regime.[72] Rather, these authors identify both the absolute

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66.   *Id.*

67.   Eric A. Posner & Adrian Vermeule, *Tyrannophobia*, *in* COMPARATIVE CONSTITUTIONAL DESIGN 317, 318 (Tom Ginsburg ed., 2012).

68.   *Id.* at 332-33.

69.   *Id.*

70.   *Id.* at 345-46.

71.   *Id.* at 330.

72.   *Id.* at 339-40.

wealth and the inequality of a society as the most important factors in preventing democracies from slipping into dictatorships.[73]

The authors' normative conclusion is that, because "[t]here is no evidence that tyrannophobia deters low-level executive abuse," and because tyrannophobia may "limit[] beneficial grants of power to the executive,"[74] this pervasive aspect of American political discourse is actually merely a misperception of risk,[75]—one whose costs likely outweigh its benefits.[76] However, we should not be so hasty in disposing of tyrannophobic sentiments. Posner and Vermeule rely on survey results from the World Values Survey to measure levels of tyrannophobia. Specifically, the authors rely on two questions: whether a "strong leader" is desirable, and whether democracies are too indecisive and squabbling. Relying on these is problematic: there are many possible reasons other than tyrannophobia that determine one's answers to such questions, from party affiliation to recent political scandals or gridlock. For example, a Democrat in 2009 would likely respond favorably to having a "strong leader" when the leader in question was Obama, even though they may be tyrannophobic regarding political control of many aspects of the economy. Moreover, the authors' analysis captures cross-sectional data rather than time-series data that would capture changing attitudes over time and allow for a more detailed analysis of the effects of a tyrannophobic culture. Certainly, when it comes to finding reasons for the lack of executive dictatorship, the authors have pushed us towards minimizing the importance of tyrannophobia, and focusing instead on factors such as level of income and income equality. But to say that Georges Lucas and Orwell "ought not to be lionized as defenders of the liberal state, but instead shunned as purveyors of political misinformation" is a stretch.[77]

Following neatly from Posner and Vermeule's analysis of tyrannophobia is a study on the link between constitutional crises and executive term limits—one device used to attempt to counter dictatorship. Much theoretical work has been done on the benefits and drawbacks of executive term limits, but Tom Ginsburg, Zachary Elkins, and James Melton are able to perform empirical analyses of these claims using data from the Comparative Constitutions Project.[78] They find that term limits are usually observed, especially in democracies, making them an effective way of constraining an executive from extending their time in office in a democracy.[79] More surprisingly is that, even in cases where term limits are not

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73.   *Id.* at 332-33.

74.   *Id.* at 345.

75.   *Id.* at 346.

76.   *Id.* at 318.

77.   *Id.* at 346.

78.   Tom Ginsburg, Zachary Elkins & James Melton, *Do Executive Term Limits Cause Constitutional Crises?*, *in* COMPARATIVE CONSTITUTIONAL DESIGN 350, 350-51 (Tom Ginsburg ed., 2012).

79.   *Id.* at 374.

observed, such executive overstay does not lead to future overstay, increase violent political conflict, or lead to declines in levels of democracy. Rather, those who amend or replace the constitution to allow themselves more time in office usually serve just one extra term.[80]

This is a fitting conclusion to the volume. By drawing from a unique data set, which promises to be invaluable for constitutional scholars in the future, Ginsburg, Elkins, and Melton, manage to move a debate about the effects of term limits on the stability of democracies from the theoretical to the empirical. In doing so, the authors' surprising result helps frame issues for further study, and offers guidance for future constitution drafters. Chapters like this, sitting alongside other methodologically diverse chapters, are the reason that *Comparative Constitutional Design* deserves much praise as a collected work. Ginsburg's choice of articles demonstrates the breadth of disciplinary perspectives that can be employed to tackle different aspects of the study of constitutional design. From Elster's theoretical chapters, to heavily empirical chapters like Dixon's and Holden's, and from more normative or philosophical chapters like Nussbaum's, to a game theoretical chapter from Alberts, Warshaw, and Weingast—the multitude of disciplinary perspectives and methodological approaches on display in the book shows just how rich the field of comparative constitutional design can be.

Every year, five to ten countries are engaged in major acts of constitutional design or redesign.[81] Given this context, one great strength of this collection is that most of the chapters discuss the normative considerations of constitutional provisions. Constitutions are not simply foundational political documents. They are often aspirational, seeking to protect the citizens' and the state's well-being, as well as the national, religious, or ethnic identities of those whom they govern. As Ginsburg states, constitution drafters gather "together disparate elements from the real or mythical national past and . . . produce a document to structure government and express fundamental values."[82] It is fitting, then, that the authors in this volume discuss more than simple metrics and empirics. Constitutions seek to set out the rules to form a better political order, and the authors add their perspectives on what is and is not desirable in these rules and in their drafting. Two years on from the initial stirrings of the Arab Spring, and with much doubt hanging over the future of Syria, constitution-making has rarely been so much in the public eye.

This volume is the first in a series on *Comparative Constitutional Law and Policy*, published by Cambridge University Press,[83] and Ginsburg places this

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80. *Id.* at 373.

81. Ginsburg, *supra* note 2, at 4.

82. *Id.* at 1.

83. *See* CAMBRIDGE UNIV. PRESS, http://www.cambridge.org/gb/knowledge/series/series_display/item6173521/Comparative-Constitutional-Law-and-Policy/?site_locale=en_GB (last visited Apr. 8, 2013).

volume in such context, saying that the authors "aspire to the . . . modest goal of raising issues for consideration by designers and students of design, and offer normative suggestions informed by comparative experience."[84] By marshaling these diverse essays, Ginsburg has constructed a volume that is modest in ambition but not in scope, and fascinating and surprising throughout.

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84.   Ginsburg, *supra* note 2, at 10.