

Comparative Constitutional Design

Professor Tom Ginsburg
Spring 2007

Course Description and Objectives

Recent constitutional reconstructions in Iraq and Afghanistan have called new attention to the problems of institutional design of political systems. In this course we will examine the design and implementation of national constitutions. In particular, we will address the following questions. What are the basic elements of constitutions? How do these elements differ across time, across region, and across regime type? What is the process by which states draft and implement constitutions? What models, theories, and writings have influenced the framers of constitutions?

In the first half of the course, we will review the historical roots of constitutions and investigate their provisions and formal characteristics. We will also discuss the circumstances surrounding the drafting of several exemplary or noteworthy constitutions, from various regions of the world. We will then examine particular features of institutional design in depth. These will include judicial review, presidentialism vs. parliamentarism, federalism, and the relationship of the national legal system to international law. The course concludes with an analysis of lessons learned and the prospects for constitutional reconstruction in the Middle East.

Course Web Site

Information for this course will be posted on the course portal. There you will find updates to this syllabus, electronic copies of selected readings, instructions for submitting assignments, and regular announcements.

Requirements and Grading

This is a seminar and the expectation is that you come fully prepared to discuss the week's topic. Readings should be completed by the beginning of each class. Your grade will be based on the following components:

- (1) *Reaction papers and class participation (60%)*. For at least six of the sessions, you will be required to respond to the readings in a short reaction paper. You may choose which of the six weeks you turn in papers. Reaction papers are short (two page, double-spaced) essays in which you reflect on the readings and address any criticism(s) or reactions to the readings. Some weeks we might ask you to address a particular question, but for most weeks you can address the issues or questions of your choice. For more guidance, see the handout, "Instructions for Writing a Reaction Paper," which is available on the course website.

Reaction papers for each week must be posted on the website by **5 PM on the day before class**. See the handout for specific instructions on how to post your paper. I will read the papers in preparation for class and recommend that you do the same.

- (2) *Essay (40%)*. You will be expected to produce a medium-length essay (12-15 pages) in which you expand on one of the themes addressed in the course. The topic will be arranged

individually in consultation with the instructor and will be flexible as long as it relates to the themes of this course. Depending upon your experience, skills, and interests you may choose to write one of several different kinds of papers including: (1) a critical review of the literature on a particular topic; (2) an empirical article focusing on a single country or on multiple cases; (3) an empirical article focusing on a single country or case; (4) a theoretical or conceptual article; (5) a research design.

The essay will be due the last day of the finals period at 5 pm.

Office Hours

Professors Ginsburg will hold office hours by appointment. He will be in Professor Burbank's office all semester.

Required books

Tom Ginsburg, *Judicial Review in New Democracies* (Cambridge, 2003).

Sanford Levinson, ed. *Responding to Imperfection: Theory and Practice of Constitutional Amendment* (Princeton, 1995).

Ray Moore and Donald Robinson, *Partners for Democracy* (Oxford, 2005).

Jack Rakove, *Original Meanings: Politics and Ideas in the Making of the Constitution* (Knopf, 1996.)

Schedule of Topics and Readings

January 9 Constitutions: Purposes and Patterns

Jackson, Vicki and Mark Tushnet. 1999. *Comparative Constitutional Law*. New York: Foundation Press. Pp. 190-234.

Weingast, Barry. 1997. "The Political Foundations of Democracy and the Rule of Law." *American Political Science Review* 91:245-63.

For further reading:

Stephen Holmes. 1988. "Precommitment and the Paradox of Democracy" in Jon Elster and Rune Slagstad, eds, *Constitutionalism and Democracy* 195- 241 Cambridge University Press.

Hardin, Russell. 1989. "Why a Constitution?" In *The Federalist Papers and New Institutionalism*, ed. B. Grofman and D. Wittman. New York: Agathon Press.

January 16 American Foundations

Rakove, Jack N. *Original Meanings: Politics and Ideas in the Making of the Constitution*. New York: A.A. Knopf, 1996, chapters 2-5, 10

Weingast, Barry. 2005. "Self-Enforcing Constitutions: A Theory and Application to the United States." Manuscript.

For further reading:

Lutz, Donald S. "The Relative Influence of European Writers on Late Eighteenth-Century American Political Thought " *The American Political Science Review* 78 (1):189-97.

January 23 Constitutional Design at Gunpoint: Japan

Moore, Ray, and Donald L. Robinson. 2002. *Partners in Democracy*. Oxford: Oxford University Press, chapters 1-10, 21.

Gordon, Beate Sirota. 1997. *The Only Woman in the Room*. New York: Kodansha. Pp. 103-25.

January 30 Constitutional Construction and Reconstruction: Latin America/Eastern Europe

Reading TBA

February 6 Processes of Constitution-Making

Jon Elster, "Forces And Mechanisms In The Constitution-Making Process" 45 Duke L J 364 (1992).

Jennifer Widner, "Conflict and Constituion-Writing in Africa" manuscript

Ghai, Yash, and Guido Galli. 2006. "Constitution Building Processes and Democratization." In *Democracy, Conflict, and Human Security: Further Readings*: IDEA.

Donald Horowitz “Constitutional Design: Proposals versus Processes” in Andrew Reynolds, ed. *Architecture of Democracy* (1999).

Diamond, Larry. 2005. *Squandered Victory: The American Occupation and the Bungled Effort to Bring Democracy to Iraq*. New York: Henry Holt and Company. Pp. 11-25, 140-178.

Suggestions for further reading:

Heckathorn, Douglas D., and Steven M. Maser. 1987. "Bargaining and Constitutional Contracts" *American Journal of Political Science* 31 (1):142-68.

Shugart, Matthew Soberg. 1998. "The Inverse Relationship between Party Strength and Executive Strength: A Theory of Politicians' Constitutional Choices " *British Journal of Political Science* 28 (1):1-29.

February 13 Constitutional Borrowing

Julian Go, “A Globalizing Constitutionalism?” in *International Sociology* 18(1) (2003)

Mark Tushnet, “The Possibilities of Comparative Constitutional Law” 108 *Yale Law Journal* 1225 (1995), excerpt.

Sujit Chaudhry, “Introduction” in Chaudhry, ed. Forthcoming. *The Migration of Constitutional Ideas*. Cambridge: Cambridge University Press.

Eric Posner and Cass Sunstein, “The Law of Other States” 59 *Stanford Law Review* 131 (2006).

Suggestions for further reading:

Watson on Legal Transplants

Boli, John, George Thomas, John W. Meyer, and Francisco O. Ramirez. 1987. *Instituting Structure: Constituting State, Society, and the Individual*. Beverly Hills: Sage.

February 20 Issues in Institutional Design I: Presidentialism versus Parliamentarism

Juan Linz, "The Perils of Presidentialism," *Journal of Democracy*, Vol. 1, no. 1 (Winter 1990), pp. 51-69

José Cheibub, "Introduction," and Conclusion in Jose Cheibub, *Presidentialism, Parliamentarism and Democracy* (2006).

Tom Ginsburg, “Constitutional Choices in Taiwan: Implications of Global Trends” available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=877154

February 27 Issues in Institutional Design II: Managing Ethnic Diversity

Arend Lijphart, *Democracy in Plural Societies* (1977), pp. 1-52, 142-76

Donald L. Horowitz, "Ethnic Conflict Management for Policymakers," in Joseph V. Montville, editor, *Conflict and Peacemaking in Multiethnic Societies* (1990), pp. 115-30.

Katherine Belmont *et al.*, "Introduction: Institutional Design, Conflict Management, and Democracy," in Andrew Reynolds, editor, *The Architecture of Democracy* (2002), pp. 1-9.

March 13 Constitutional Review

Tom Ginsburg. 2003. *Judicial Review in New Democracies: Constitutional Courts in Asian Cases*. Cambridge, UK: Cambridge University Press.

Christopher Elmendorf, "Advisory Counterparts to Constitutional Courts" manuscript

March 20 Issues in Institutional Design III: Emergencies

Bruce Ackerman, "Our Emergency Constitution" Yale L.J.

March 27 Rights-written and actual

Davenport, Christian A. 1996. "Constitutional Promises" and Repressive Reality: A Cross-National Time-Series Investigation of Why Political and Civil Liberties are Suppressed " *Journal of Politics* 58 (3):627-54.

Linda Camp Keith, Judicial Independence and Human Rights Protection around the World, *Judicature*

Andrew Nathan, *Chinese Democracy* 107-133 (1985)

Cass Sunstein. *Designing Democracy* 221-37 (2001).

April 3 NO CLASS

April 10 International Law

Tom Ginsburg, *Locking in Democracy: Constitutions, Commitment and International Law*, 38 *NYU J. INT'L L. AND POLITICS* __ (2006).

Jide Nzelibe and John Yoo, *Rational War and Constitutional Design*, Yale L. J.

Tom Ginsburg, Irrational War and Constitutional Design: A Reply to Professors Nzelibe and Yoo, __ *MICH. J. INT'L L.* __ (2006).

April 17 Amendment

Sanford Levinson, ed. *Responding to Imperfection*, various chapters.

Ferejohn, J. (1997); The Politics of Imperfection: The Amendment of Constitutions, *Law and Social Inquiry* 22: 501.

Rasch, B.E., R. Congleton (2006); Constitutional Amendment Procedures, in: R. Congleton (ed.): *Democratic Constitutional Design and Public Policy - Analysis and Evidence*, Cambridge: MIT Press.

April 24 Constitutional Duration/Stability & Change

Daniel Berkowitz and Karen Clay, “American Civil Law Origins: Implications for State Constitutions” *American Law and Economic Review* (2005?)

Zachary Elkins, Tom Ginsburg, and James Melton. 2005. “The Lifespan of Written Constitutions” Manuscript.

Giovanni Sartori, *Comparative Constitutional Engineering* (2d ed., 1997), pp. 195-201.