Principles of Constitutional Design

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Analyzing the Interaction between Popular Control and the Separation of Powers in the Amendment Process

Why the Amendment Process Is Important in Constitutional Design

We have seen that framers of constitutional republics tend to increase the level of separation of powers as they increase the level of popular control. This principle of constitutional design seems to emerge from some logic inherent in the design process rather than from designers following explicit, articulated normative rules. It was suggested in Chapter 2 that the inherent logic of constitutional design results from humans, on the one hand, seeking to create a supreme power that allows an expanded pursuit of self-preservation, liberty, sociability, and beneficial innovation and, on the other hand, seeking to prevent that supreme power from itself threatening these pursued values. As a secondary principle, framers of constitutions tend to balance the consequences of constituency size with the consequences of legislative size to produce a primary legislature whose size approximates the cube root of the population.

Put another way, under conditions of popular control the elective legislatures that are the core of a constitutional republic should have constituencies that as are as small as possible; but also, under

conditions of popular control, the legislatures should not be so large as to fall under the control of legislative elites. As the population of a constitutional republic grows to a size where the attempt to achieve this balance results in both a constituency size and legislative size too large for preventing government itself from threatening popular control, a second house is usually added to the legislature and gradually strengthened as the population grows larger. This division of power simultaneously helps to control governmental tyranny as it helps to control the effects of public opinion that is increasingly mass-based and subject to temporary passions unchecked by the familiarity and identity with each other that citizens enjoy in small constituencies. The tendency of second branches of the legislature to emerge as population size increases in constitutional republics thus also results from the logic inherent in constitutional design where popular control and the separation of powers interact in pursuit of the benefits of establishing a supreme power.

Another principle tends to emerge with the creation of a constitutional amendment process. There is a straightforward logic that says if a constitution rests on popular consent, and thus on popular control, amending the document should return to the level of popular control that created it. Although constitutions are subject to replacement, replacement is much less frequent than amendment. Analyzing amendment procedures allows us to do several useful things at the same time.

First, it is one of the measures for the relative strength of popular control as the Index of Popular Control indicates. Amending a constitution through a popular referendum on a proposal made through popular initiative, for example, is very direct popular control. An amendment process that combines a popular referendum with a majority in the legislature that proposes the amendment is also quite direct, although somewhat weaker. Amendment by a convention popularly elected only for that purpose would be somewhat weaker still. Other possible amendment procedures can be arrayed along a scale that indicates the strength of popular control relative to these examples.

Second, the amendment process is also a measure of the strength of the separation of powers. Notice how each weakening in popular control of the amendment process involves the separation of functions (usually between the function of proposing and the function of adopting), so that another institution is included in the process. Separating

functions with a sharing in the overall power of amendment is the definition of separation of powers. As the amendment process grows more complex and difficult, the separation of powers has invariably been increased. Difficulty of amendment thus becomes a rough surrogate for the level in separation of powers.

Third, analyzing the amendment process allows us to examine a fundamental principle of constitutional design that has been only implicit in the discussion thus far. This principle is that constitutional outcomes result from the interaction of many institutions embedded in a constitution. Analyzing a single institution in isolation does not tell us very much about constitutional design, whereas analyzing institutional interaction is at the very core of constitutional design.

Finally, a careful, comparative look at the amendment process reemphasizes the need to blend the three parts of a comprehensive theoretical analysis – normative, analytic, and empirical. We can assume rational actors in an analysis, but in the end the predictions of such an analysis must be matched with actual empirical outcomes. It does little good if an analysis predicts minimal winning coalitions if minimal winning coalitions almost never occur empirically in functioning legislatures.[1] By the same token, failure to consider the normative goals that are in competition leaves formal and empirical analyses unanchored for purposes of constitutional choice. Constitutionalism rests on goals, hopes, and values that can be thwarted or undermined by institutional design, especially since these goals, hopes, and values often require that we move beyond the mere "efficiency" of an institution to consider how the total constitutional package invariably requires that we balance and trade off between goals and values that inherently conflict. This was one of the points discussed at length in Chapter 1. The cultural, power, and justice elements contained in a constitution struggle with each other, and choosing between their relative strengths requires a set of normative choices that cannot be resolved analytically

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[1] That minimal winning coalitions are infrequent occurrences in American legislatures is well known to students of Congress and state legislatures. For explicit tests of the hypothesis, see the articles by Donald Lutz and Richard Murray: "Redistricting in American States: A Test of the Minimal Winning Coalition Hypothesis," *American Journal of Political Science* 18 (May 1974): 233–255, and "Issues and Coalition Size in the Texas Legislature: A Further Test of Riker's Theory," *Western Political Quarterly* 28, no. 2 (June 1975): 269–315.

or empirically. Instead, we must be guided by philosophical analysis of the sort exemplified by our discussions of Montesquieu, Bodin, Hobbes, and Madison. Also, as mentioned earlier and discussed at length in the next chapter, matching the constitution to the people is a paramount consideration.

The cross-national examination engaged in here will use a somewhat different set of constitutional republics than was used in earlier chapters. This results from the availability of reliable data on amendments in some countries but not in others. Another departure from earlier chapters will be to begin with an analysis of the amendment process in American states. This departure permits the empirical derivation of an index to be used in the cross-national analysis.

A constitution may be modified by means of a formal amendment process, periodic replacement of the entire document, judicial interpretation, and legislative revision. What difference does it make whether we use one method rather than another? What is the relationship between these four methods? What do we learn about the constitutional system and its underlying political theory by the pattern of choice among these alternatives? These are some of the questions to be addressed.

Although it is true that a constitution is often used as ideological window dressing and that even in places where constitutions are taken very seriously these documents fail to describe the full reality of an operating political system, few political systems, whether dictatorial or democratic, fail to reflect major political change in their respective constitutions. Constitutions may not describe the full reality of a political system, but when carefully read, they are windows into that underlying reality.

This chapter attempts to use a critical, if often overlooked, constitutional device – the amendment process – as a window into both the reality of political systems and the political theory or theories of constitutionalism underlying them. A good deal has been written about the logic of constitutional choice using rational-actor models, but little has been written about the empirical patterns that result from constitutional choice. The classic example of the first approach is the work of James Buchanan and Gordon Tulloch. The second approach is exemplified by the work of Douglas W. Rae; but see also Bernard Grofman,

Adam Przeworski, and Matthew S. Shugart and John M. Carey.[2] I shall use the latter method and attempt to be systematic, comparative, and, to the extent possible, empirical. I begin with a brief overview of the theoretical assumptions that underlay the formal amendment process when it was invented, identify a number of theoretical propositions concerning the amendment process, and then look for patterns in the use of the amendment process in order to create empirical standards upon which to erect a theory of constitutional amendment for those engaged in constitutional design.

The Original Premises Underlying the Amendment Process

The modern written constitution, first developed in English-speaking North America, was grounded in a doctrine of popular sovereignty.[3] Even though many in Britain were skeptical at best, Americans regarded popular sovereignty not as an experimental idea but rather as one that stood at the very heart of their shared political consensus.[4] American political writing had used the language of popular sovereignty before Locke's *Second Treatise* was published, and the early state constitutions of the 1770s contained clear and firm statements that these documents rested upon popular consent. Although the theory of popular sovereignty was well understood in America by 1776, the institutional implications of this innovative doctrine had to be worked out in constitutions adopted over the next decade. Gradually, it was realized that a doctrine of popular sovereignty required that

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[2] James Buchanan and Gordon Tulloch, *The Calculus of Consent* (Ann Arbor: University of Michigan Press, 1965); Douglas W. Rae, *The Political Consequences of Electoral Laws* (New Haven: Yale University Press, 1967); Bernard Grofman, *Electoral Laws and Their Political Consequences* (New York: Agathon, 1986); Adam Przeworski, *Democracy and the Market: Political and Economic Reform in Eastern Europe and Latin America* (Cambridge: Cambridge University Press, 1991); Matthew S. Shugart and John M. Carey, *Presidents and Assemblies: Design and Electoral Dynamics* (Cambridge: Cambridge University Press, 1992).

[3] See Willi Paul Adams, *The First American Constitutions* (Chapel Hill: University of North Carolina Press, 1980); Donald S. Lutz, *Popular Consent and Popular Control: Whig Political Theory in the Early State Constitutions* (Baton Rouge: Louisiana State University Press, 1980); and Edmund S. Morgan, *Inventing the People: The Rise of Popular Sovereignty in England and America* (New York: Norton, 1988).

[4] See Donald S. Lutz, *The Origins of American Constitutionalism* (Baton Rouge: Louisiana State University Press, 1988), especially chap. 7.