

Principles of Constitutional Design

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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

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.

constitutions be written by a popularly selected convention, rather than the legislature, and then ratified through a process that elicited popular consent – ideally, in a referendum. This double implication was established in the process used to frame and adopt the 1780 Massachusetts and 1784 New Hampshire constitutions, although the referendum portion of the process did not become standard until the nineteenth century.

Americans moved quickly to the conclusion that if a constitution rested on popular consent, then the people could also replace it with a new one. John Locke had argued that the people could replace government but only when those entrusted with the powers of government had first disqualified themselves by endangering the happiness of the community to such a degree that civil society could be said to have reverted to a state of nature. Americans went well beyond Locke by institutionalizing the power to change the constitution and civil society whenever they wanted. It is of considerable importance that this included not only replacing the constitution but also formally amending it.

The first new state constitution in 1776, that of New Jersey, contained an implicit notion of amendment, but the 1776 Pennsylvania document contained the first explicit amendment process – one that used a convention process and bypassed the legislature.⁵ By 1780 almost half the states had an amendment procedure, and the principle that the fundamental law could be altered piecemeal by popular will was firmly in place.

In addition to popular sovereignty, the amendment process was based on three other premises central to the American consensus in the 1770s: an imperfect but educable human nature, the efficacy of a deliberative process, and the distinction between normal legislation and constitutional matters. The first premise, identified and clearly explicated by Vincent Ostrom,⁶ held that humans are fallible but capable

⁵ While this was the first explicit amendment process in a state constitution, a formal amendment process was first used in William Penn's 1678 *Frame of Government*, which may explain why Pennsylvania was the first state to adopt one. See John R. Vile, *The Constitutional Amending Process in American Political Thought* (New York: Praeger, 1992), pp. 11–12.

⁶ Vincent Ostrom, *The Political Theory of the Compound Republic*, 2nd ed. (Lincoln: University of Nebraska Press, 1987).

of learning through experience. Americans had long considered each governmental institution and practice to be in the nature of an experiment. Because fallibility was part of human nature, provision had to be made for altering institutions after experience revealed their flaws and unintended consequences. Originally, therefore, the amendment process was predicated not only on the need to adapt to changing circumstances but also on the need to compensate for the limits of human understanding and virtue. In a sense, the entire idea of a constitution rests on an assumption of human fallibility, since, if humans were angels, there would be no need to erect, direct, and limit government through a constitution.

A belief in the efficacy of a deliberative process was also a part of the general American constitutional perspective. A constitution was viewed as a means not merely to make collective decisions in the most efficient way possible but to make the *best possible* decisions *in pursuit of the common good* under a condition of *popular sovereignty*. The common good is a more difficult standard to approximate than the good of one class or part of the population, and the condition of popular sovereignty, even if operationalized as a system of representation, requires the involvement of many more people than forms of government based on other principles. This in turn requires a slow, deliberative process for any political decision, and the more important the decision, the more deliberative the process should be. Constitutional matters were considered more important in 1787 America than normal legislation, which led to a more highly deliberative process distinguishing constitutional from normal legislative matters. The codification of the distinction in constitutional articles of ratification and amendment resulted in American constitutions being viewed as higher law that should limit and direct the content of normal legislation.

Popular sovereignty implies that all constitutional matters should be based upon some form of popular consent, which in turn implies a formal, public process. Human fallibility implies the need for some method of altering or revising the constitution. A distinction between normal and constitutional matters requires a distinctive, highly deliberative process and thus implies the need for an amendment procedure more difficult than that used for normal legislation.

Together these premises require that the procedure be neither too easy nor too difficult. A process that is too easy, not providing enough

distinction between constitutional matters and normal legislation, thereby violates the assumption of the need for a high level of deliberation and debases popular sovereignty, whereas one that is too difficult, interfering with the needed rectification of mistakes, thereby violates the assumption of human fallibility and prevents the effective utilization of popular sovereignty.

The literature on constitutions at one time made a distinction between major and minor constitutional alterations by calling the former “revisions” and the latter “amendments.” As Albert L. Sturm points out, the distinction turned out in practice to be conceptually slippery, impossible to operationalize, and therefore generally useless.⁷ Because “revision” is used in the literature to mean several different things, I shall use “amendment” as a description of the *formal* process developed by the Americans and “alteration” to describe processes that instead use the legislature or judiciary. Unless we maintain the distinction between formal amendment and other means of constitutional modification, we will lose the ability to distinguish between competing forms of constitutional modification, and we will lose the ability to distinguish competing constitutional theories.

The innovation of an amendment process, like the innovation of a written constitution, has diffused throughout the world to the point where less than 4 percent of all national constitutions lack a provision for a formal amending process.⁸ However, the diffusion of written constitutions and the amendment idea do not necessarily indicate widespread acceptance of the principles that underlie the American innovation. In most countries with a written constitution, popular sovereignty and the use of a constitution as a higher law are not operative political principles. Any comparative study of the amendment process must first distinguish true constitutional systems from those that use a constitution as window dressing and then recognize that among the former there are variations in the amendment process that rest on assumptions at odds with those in the American version. Indeed, my chief concern is the efficiency with which study of the amending process reveals such theoretical differences.

⁷ Albert L. Sturm, *Thirty Years of State Constitution-Making: 1938–1968* (New York: National Municipal League, 1970).

⁸ Henc van Maarseveen and Ger van der Tang, *Written Constitutions: A Computerized Comparative Study* (Dobbs Ferry, N.Y.: Oceana, 1978), p. 80.

At the same time, a comparative study of amendment processes allows us to delve more deeply into the theory of constitutional amendments as a principle of constitutional design. For example, we might ask the question, what difference does it make if constitutions are formally amended through a political process that does not effectively distinguish constitutional matters from normal legislation? Why might we still want to draw a distinction between formal amendment and alteration by normal politics as carefully and strongly as possible? One important answer to the question is that the three prominent methods of constitutional modification other than complete replacement – formal amendment, legislative revision, and judicial interpretation – reflect declining degrees of commitment to popular sovereignty, and the level of commitment to popular sovereignty may be a key attitude for defining the nature of the political system.

Basic Assumptions and Propositions

Every theory has to begin with a number of assumptions. We have seen how the original American version rested on the premises of popular sovereignty, an imperfect but educable human nature, the efficacy of a highly deliberative decision-making process, and the distinction between normal and constitutional law. Although these help define the working assumptions of one theory of amendments (albeit the original one), they do not provide a complete basis for describing either the American theory or a general theory of amendment. I turn now to developing a theory that includes the American version but also provides the basis for analyzing any version of constitutional amendment. The intent of the analysis is to provide guidelines for constitutional design in any context – guidelines that will allow framers to link the design of a formal amendment process securely to desired outcomes.

My first and second working assumptions have to do with the expected change that is faced by every political system and with the nature of a constitution, respectively.

ASSUMPTION 1. Every political system needs to be modified over time as a result of some combination of (1) changes in the environment within which the political system operates (including economics, technology, foreign relations, demographics, etc.); (2) changes in the value system distributed across the population; (3) unwanted