

Principles of Constitutional Design

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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

or unexpected institutional effects; and (4) the cumulative effect of decisions made by the legislature, executive, and judiciary.

ASSUMPTION 2. In political systems that are constitutional, in which constitutions are taken seriously as limiting government and legitimating the decision-making process they describe, important modifications in the operation of the political system need to be reflected in the constitution.

If these two assumptions are used as premises in a deductive process, they imply a conclusion that stands as a further assumption.

ASSUMPTION 3. All constitutions require regular, periodic modification, whether through amendment, judicial or legislative alteration, or replacement.

“Alteration” (as noted earlier) refers to changes in a constitution through judicial interpretation or legislative action. However, I am initially more concerned with the use of a formal amendment process. Amendment rate, a key concept, refers to the average number of formal amendments passed per year since the constitution came into effect. Many scholars criticize constitutions that are much amended. However, constitutionalism and the logic of popular sovereignty are based on more than simplicity and tidiness. Any people who believe in constitutionalism will amend their constitution when needed, as opposed to using extraconstitutional means. Thus, a moderate amendment rate will indicate that the people living under it take their constitution seriously. The older a constitution is, under conditions of popular sovereignty, the more successful it has been, but also the larger the number of amendments it will have. However, it is the *rate* of amendment that is important in this regard, not the total number of amendments.

A successful constitutional system would seem to be defined by a constitution of considerable age that has a total number of amendments that, when divided by the constitution’s age in years, represents a moderate amendment rate – one that is to be expected in the face of inevitable change. A less-than-successful constitutional system will have a high rate of constitutional *replacement*.

This raises the question of what constitutes a “moderate” rate of amendment. Because I hope to illuminate the question empirically, rather than in an a priori manner, I must initially use a symbolic stand-in for “moderate rate of amendment.” Since a moderate rate is likely

to be a range of rates, rather than a single one, the symbol will define boundaries such that any document with an amendment rate above or below its limits will have an increasing probability of being replaced or an increasing probability that some extraconstitutional means of constitutional evolution is being used. I shall use <#> to represent this moderate range of amendment rates symbolically.

The **first proposition** is frequently found in the literature, but it has never been systematically verified, or its effects measured.

PROPOSITION 1. The longer a constitution is (the more words it has), the higher its amendment rate, and the shorter the constitution, the lower its amendment rate.

Commentators frequently note that the more provisions a constitution has, the more targets there are for amendment and the more likely that it will be targeted because it deals with too many details that are subject to change. While this seems intuitively correct, the data that are used usually raise the question, Which comes first, the high amendment rate or the long constitution? This is because a constitution's length is usually given as of a particular year, rather than in terms of its original length. Is a constitution long because it had a high amendment rate, or did it have a high amendment rate because it was long to begin with?

My **second proposition** is also a common one in the literature, although it too has never been systematically tested before.

PROPOSITION 2. The more difficult the amendment process, the lower the amendment rate, and the easier the amendment process, the higher the amendment rate.

As obvious as this proposition is, it cannot be tested until one shifts from the number of amendments in a constitution to its amendment rate and until one develops an index for measuring the degree of difficulty associated with an amendment process. I shall present such an index as part of what is needed to develop a way of predicting the likely consequences of using one amendment process versus another.

The literature on American state constitutions generally argues that these documents are much longer than the national constitution because they must deal with more governmental functions. For example, if a constitution deals with matters like education, criminal law, local government, and finances, it is bound to be more detailed and longer and thus have a higher amendment rate than one that does

not address these matters. From this, I generalize to the following proposition.

PROPOSITION 3. The more governmental functions dealt with in a constitution, the longer it will be and the higher its rate of amendment will be.

Constitutions are usually replaced for one of three reasons: a regime change may leave the values, institutions, or implications of the old constitution seriously at odds with those preferred by the people now in charge; the constitution may fail to keep up with the times; the old constitution may have changed so many times that it is no longer clear what lies under the encrustations, so that clarity demands a new beginning. A moderate amendment rate is an antidote to all three.

PROPOSITION 4. The further the amendment rate is from the mean of $\langle \# \rangle$, either higher or lower, the greater the probability that the entire constitution will be replaced and thus the shorter its duration. Conversely, the closer an amendment rate is to the mean of $\langle \# \rangle$, the lower the probability that the entire constitution will be replaced and thus the longer its duration.

A low rate of amendment in the face of needed change may lead to the development of some extraconstitutional means of revision – most likely, judicial interpretation – to supplement the formal amendment process. I can now, on the basis of earlier discussion, generate several propositions that will prove useful toward the end of my discussion on the implications of the major competing forms of formal constitutional amendment.

PROPOSITION 5. A low amendment rate associated with a long average constitutional duration strongly implies the use of some alternative means of revision to supplement the formal amendment process.

PROPOSITION 6. In the absence of a high rate of constitutional replacement, the lower the rate of formal amendment, the more likely the process of revision is dominated by a judicial body.

PROPOSITION 7. The higher the formal amendment rate, the less likely that the constitution is being viewed as a higher law, the less likely that a distinction is being drawn between constitutional

matters and normal legislation, the more likely that the document is being viewed as a code, and the more likely that the formal amendment process is dominated by the legislature.

PROPOSITION 8. The more important the role of the judiciary in constitutional revision, the less likely the judiciary is to use theories of strict construction.

I shall test propositions 1–4 using data from the American state constitutions and then seek further verification by examining the amendment process in nations where constitutionalism is taken seriously and does not serve merely as window dressing. The American state documents are examined first because data on them are readily available and easily compatible, because the similarities in their amendment process reduce the number of variables that must be taken into account, and because together they constitute a significant percentage of human experience with serious constitutionalism.

Amendment Patterns in American State Constitutions, 1776–1991

Albert L. Sturm summarizes the literature as seeing state constitutions burdened with the effects of continuous expansion in state functions and responsibilities and the consequent growth of governmental machinery; the primary responsibility for responding to the increasing pressure of major problems associated with rapid urbanization, technological development, population growth and mobility, economic change and development, the fair interests for constitutional status; and continuing popular distrust of the state legislature, based on past abuses, which results in detailed restrictions on governmental activity.⁹ All of these factors contribute to the length of state constitutions, and it is argued that not only do these pressures lead to many amendments – and thus to greater length – but that greater length itself leads to the accelerated need for amendment simply by providing so many targets for change. Thus, length becomes a surrogate measure for all of these other pressures to amend and is a key variable.

Table 5.1 shows basic data for duration, length, and amendments for the U.S. Constitution and the constitutions of the fifty states. It also

⁹ Sturm, *Thirty Years of State Constitution-Making*.