Principles of Constitutional Design

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TABLE 5.4. *Method of Initiation and State Amendment Rate, 1970–1979*

Rate and Frequency of Amendment	Method of Initiation		
	Proposed by Legislature	Popular Initiative	Special Convention
Amendment rate	1.24	1.38	1.26
Percentage of amendments using this method	91.5	2.2	6.3
Number of constitutions in category[a]	50	17	5

[a] The total exceeds 50, since many states specify the possibility of more than one method for proposing amendments.

Source: Albert L. Sturn, "The Development of American State Constitutions," *Publius* 12 (1982): 78–79.

Amendment Patterns and the Characteristics of the Amendment Process

In the American states the method of ratifying an amendment can essentially be held constant since every state but one now uses a popular referendum for approval. However, amendments may be initiated by the state's legislature, an initiative referendum, a constitutional convention, or a commission. It is also believed that the initiative has made the process of proposing an amendment too easy and opened a floodgate of proposals that are then more readily adopted by the electorate that initiated them. Another widely held belief is that the stricter or more arduous the process a legislature must use to propose an amendment, the fewer the amendments proposed.

First of all, as Table 5.4 shows, during a recent decade, relatively few amendments were proposed by other than a legislature. One-third of the states use the popular initiative as a method of proposing amendments, and yet in these states the nonlegislative methods received a lot of attention, especially in California, but in fact the popular initiative has had a minimal impact so far.

What has been the relative success of these competing modes of proposing constitutions? The relatively few amendments proposed through popular initiative have a success rate roughly half that of the two prominent alternatives (32 percent versus 64 percent for legislature and 71 percent for convention initiated). The popular initiative is in fact

TABLE 5.5. *Comparative Effect of Majority Size on Amendment Rate in American State Constitutions*

	Required Legislative Majority					
	50% + 1	50% + 1 twice	60%	67%	75%	67% twice
Ratio of difficulty to simple majority[a]	1.00 (11)	1.04 (6)	1.26 (9)	1.62 (19)	1.83 (1)	3.56 (4)

Note: In this table, the decline in the amendment rate produced by each type of legislative majority has been normed against that of the least difficult method. This norming is accomplished by taking the simple (bicameral) legislative majority and dividing it by the success rate of proposals initiated by a two-thirds legislative majority, a three-fourths majority, etc. – always keeping the other variables constant. For example, the data indicate that in the American states, when the method of initiation is stiffened to require approval by a simple (bicameral) legislative approval *twice*, the amendment rate is reduced from the baseline of 71% to a little over 68%. Dividing 71% by 68% results in an index score of 1.04. Likewise, a requirement for a three-fifths (bicameral) legislative majority results in a success rate of 56%. Dividing 71% by 56% produces an index score of 1.26. A score of 2.00 therefore indicates a method that is twice as difficult, a 3.00 indicates a method three times as difficult, and so on. Table 5.3 arrays the empirical results from lowest to highest level of difficulty rather than according to any theoretical prediction. The results are mostly in line with commonsense expectations (although why a second majority vote has so little effect while a second two-thirds vote has so much is not clear).

[a] The numbers in parentheses indicate the number of states using this required legislative majority.

more difficult to use than legislative initiative and results in proposals that are less well considered and thus less likely to be accepted.

What about the varying methods for *legislative* initiation? States differ in how large a legislative majority is needed for a proposal to be put on the ballot, and some states require that the majority be sustained in two consecutive sessions. Table 5.5 summarizes what we find in this regard.

We can derive three conclusions from Table 5.5:

1. Generally speaking, the larger the legislative majority required for initiation, the fewer the amendments proposed and the lower the amendment rate.
2. Requiring a legislature to pass a proposal twice does not significantly increase the difficulty of the amendment process if the decision rule is one-half plus one.
3. The most effective way to increase the difficulty of amendment at the initiation stage is to require the approval of two consecutive legislatures using a two-thirds majority each time.

Beyond these three interesting proposals, it is also useful to discover that the variance in the degree of difficulty between alternative legislative majorities is sufficient to establish the core of an *index of difficulty* for any amendment process. An attempt at such an index is presented in Table 5.6, which lists the numbers assigned by the index to every step required by the amendment processes. Table 5.6 identifies sixty-eight possible actions that could in some combination be used to initiate and approve constitutional amendments and that together cover the combinations of virtually every amendment process in the world. The state data on which Table 5.5 is based generate the index scores for actions 14 through 23, rounding off the score to the nearest .05. If we assume that legislative processes for approval are symmetrical with those for initiation, the index scores for actions 50–59 are the same as those for 14–23. If we assume that a unicameral legislative process is one-half as difficult as a bicameral one, the index scores for actions 4–13 and 39–49 are as indicated. As reported earlier, amendments proposed by popular initiative have almost exactly one-half the success rate of those initiated by the legislature. If we weight the difficulty of legislative initiative according to the number of states using each type of majority, we obtain a combined, weighted index score of 1.50 for legislative initiative, and thus an index score of 3.00 for popular initiatives (action 24).

Also, we know from state data going back to 1776 that the success rate of amendment proposals after popular referenda became the standard means of approval is virtually the same as when the agent of approval was the state legislature. We can thus say that a popular referendum used as a means for approving a proposed amendment (as opposed to initiating one) is about as difficult as having the state legislature approve it. We have just seen that the weighted average for bicameral legislative action is 1.50, and so we assign an index score of 1.50 to action 60, adding further increments for larger popular majorities, actions 61–62. If we assume that special bodies act much the same as unicameral legislatures, the assigning of index scores for actions 2–3 and 32–38 is straightforward.

The use of American state data, in combination with straightforward assumptions, allows the generation of index scores for all actions except numbers 27–30 and 63–68. These actions are assigned index scores that seem reasonable in the context of the other index scores.

TABLE 5.6. *An Index for Estimating the Relative Difficulty of an Amendment Process*

Action	Constitutional Requirement	Add
Initiation Requires Action by		
1	An executive	.25
2	A special appointed body	.50
3	A special elected body	.75
	A unicameral legislature	
	Legislative approval	
4	By a majority of 1/2 + 1	.50
5	*Twice* using 1/2 + 1	.50
6	By an absolute majority[a]	.65
7	*Twice* by absolute majority	.65
8	By a 3/5 majority	.65
9	*Twice* by 3/5 majority	.65
10	By a 2/3 majority	.80
11	By a 3/4 majority	.90
12	*Twice* by a 2/3 majority	1.75
13	If an election is required between two votes	.25
	Action by a bicameral legislature	
	Legislative approval	
14	By a majority of 1/2 + 1	1.00
15	*Twice* using 1/2 + 1	1.00
16	By an absolute majority	1.25
17	*Twice* by absolute majority	1.25
18	By a 3/5 majority	1.25
19	*Twice* by 3/5 majority	1.25
20	By a 2/3 majority	1.60
21	By a 3/4 majority	1.80
22	*Twice* by a 2/3 majority	3.55
23	If an election is required between two votes	.50
	A petition	
24	Of 0–250,000 voters	3.00
25	By 250,000–500,000 voters	3.50
26	By more than 500,000 voters	4.00
	Multiple state	
27	Legislatures, 1/2 + 1	2.00
28	Conventions, 1/2 + 1	2.00
29	Legislatures or conventions, 2/3	3.00
30	Legislatures or conventions, 3/4	3.50
Approval Requires		
31	Action by an executive	.50
	Approval by a special body	
32	1/3 or less	.25
33	1/2 + 1	.50
34	Absolute majority	.65

(continued)

TABLE 5.6 *(continued)*

Action	Constitutional Requirement	Add
35	3/5 majority	.65
36	2/3 majority	.80
37	3/4 majority	.90
38	3/4 majority	.90
	If any of the above acts a second time	
	Action by a unicameral legislature	
	Legislative approval	
39	1/3 majority or less	.25
40	1/2 + 1	.50
41	*Twice* by 1/2 + 1	.50
42	Absolute majority	.65
43	*Twice* by absolute majority	.65
44	3/5 majority	.65
45	*Twice* by 3/5 majority	.65
46	2/3 majority	.80
47	3/4 majority	.90
48	If an election is required between two votes	.25
49	Legislative approval *twice* by 2/3 majority	1.75
	Action by a bicameral legislature	
	Legislative approval	
50	1/3 majority or less	.50
51	1/2 + 1	1.00
52	Absolute majority	1.25
53	*Twice* by absolute majority	1.25
54	3/5 majority	1.25
55	*Twice* by 3/5 majority	1.25
56	2/3 majority	1.60
57	3/4 majority	1.80
58	*Twice* by 2/3 majority	3.55
59	If an election is required between two votes	.50
	A popular referendum	
60	1/2 + 1	1.50
61	Absolute majority	1.75
62	3/5 or more	2.00
	Multiple state	
63	Legislatures, 1/2 + 1	2.00
64	Conventions, 1/2 + 1	2.00
65	Legislatures or conventions, 2/3	3.00
66	Legislatures or conventions, 3/4	3.50
67	Majority of voters *and* majority of states	3.75
68	Unanimous approval by state governments	4.00

[a] "Absolute majority" is used to indicate a requirement for approval by 1/2 + 1 of the *entire body*, whereas "1/2 + 1" indicates a requirement for approval by 1/2 + 1 of those voting.

The index score assigned to the amendment process found in a national constitution is generated by adding together the numbers assigned by the index in Table 5.6 to every step required by that particular amendment process. Where a constitution provides for more than one path to a formal amendment, the score for each amendment path is weighted according to the percentage of amendments passed by means of it during the relevant time period.

How the index works can be illustrated using it with the amendment process described in Article V of the U.S. Constitution. There is more than one path to amendment, and each must be evaluated. A two-thirds vote by Congress, because it requires two houses to initiate the process, is worth 1.60, whereas initiation by two-thirds of the state legislatures is worth 2.25. The latter path leads to a national convention, which uses majority rule in advancing a proposal, thus adding .75 (under the assumption that this special body is elected). The first path still totals 1.60, and the other now totals 3.00. Ratification by three-fourths of the states through either their legislatures or elected conventions adds 3.50. The path beginning with Congress now totals 5.10, while the path beginning with the state legislatures and using a national convention totals 6.50. Even though the second path has never been successful (and one can see more clearly now why), it is still a valid option. For the total amendment process, we can use the lower figure unless or until the more difficult procedure is ever used. That is, because the 6.50 path has never been used, a weighted composite score would be 5.10, which is what I shall use here. Table 5.7 shows the index of difficulty scores calculated for the national constitutions of thirty-two countries, along with other constitutional characteristics.

Performing the same calculation for the American states, I find that the average index score is 2.92, with very little variance. The highest state score is 3.60 (Delaware), and twenty-six states are tied for the lowest score at 2.75. Another sixteen states have a score of 3.10. Thus, although one can detect variance between select subsets of states, the range of variance in general is very small compared with that found in the constitutions of other nations.

We have reached a point where we can now begin to test our propositions using data from the constitutions of other nations.

TABLE 5.7. *Basic Data on Selected National Constitutions*

Country	Amendment Rate	Index of Difficulty	Amended Length in Words	Years	Time Period
Argentina	1.04	2.10	10,600	87	1853–1940
Australia	.09	4.65	11,500	91	1901–1992
Austria	6.30	.80	36,000	17	1975–1992
Belgium	2.30	2.85	10,700	15	1973–1988
Botswana	2.44	1.30	35,600	18	1966–1984
Brazil	6.28	1.55	58,400	18	1969–1987
Chile	.64	3.05	24,200	45	1925–1970
Colombia	1.73	2.75	25,100	95	1886–1981
Costa Rica	1.26	4.10	15,100	33	1949–1982
Denmark	.17	2.75	6,000	39	1953–1992
Finland	.86	2.30	18,300	73	1919–1992
France	.19	2.50	6,500	24	1968–1992
Germany	2.91	1.60	22,400	43	1949–1992
Greece	1.32	1.80	22,100	17	1975–1992
Iceland	.21	2.75	3,800	48	1944–1992
India	7.29	1.81	95,000	42	1950–1992
Ireland	.55	3.00	16,000	55	1937–1992
Italy	.24	3.40	11,300	46	1946–1992
Kenya	3.28	1.00	31,500	18	1964–1981
Japan	0.00	3.10	5,400	47	1945–1992
Luxembourg	1.80	1.80	4,700	19	1968–1987
Malaysia	5.18	1.60	91,400	35	1957–1992
New Zealand	13.42	.50	180,000	40	1947–1987
Norway	1.14	3.35	6,500	178	1814–1982
Papua New Guinea	6.90	.77	53,700	17	1975–1992
Portugal	6.67	.80	26,700	15	1976–1991
Spain	.18	3.60	8,700	24	1968–1992
Sweden	4.72	1.40	40,800	18	1974–1992
Switzerland	.78	4.75	13,300	119	1873–1992
United States	.13	5.10	7,400	203	1789–1992
Venezuela	.24	4.75	20,500	25	1967–1992
Western Samoa	.95	1.80	22,500	22	1962–1984
AVERAGE	2.54	2.50	29,400	52	

Note: Cross-national constitutional data have been taken from the constitutions themselves and from commentaries on these documents, found primarily in Albert P. Blaustein and Gisbert H. Flanz, *Constitutions of the Countries of the World*, 19 vols. (Dobbs Ferry, N.Y.: Oceana, 1987) and supplements.

Cross-National Amendment Patterns

Comparative cross-national data show that the U.S. Constitution has the second most difficult amendment process. This implies, if propositions 2 and 4 are correct, that the amendment rate for the U.S. Constitution may be too low, because its amendment procedure is too difficult, whereas the average amendment rate for the state constitutions is not too high.

An even stronger relationship exists between the length of a constitution and its amendment rate here than I found with the American state constitutions, with a correlation coefficient of .7970 (versus .6249 for the states) significant at the .0001 level.

The curvilinear relationship found between the amendment rate and average duration of American state constitutions is almost duplicated here in shape, strength, and high point. For the national constitutions <#> is .75–1.24 (# = .95), and the high point is 96 years in average duration. See Table 5.8. In comparison, as Table 5.3 shows, for the states, <#> is .75–1.00 (# = .89), and the high point is 100 years in average duration.[12] Both sets of constitutions studied have a similar moderate range of amendment rate that tends to be associated with constitutional longevity.

The index of difficulty among cross-national constitutions has enough variance for us now to test proposition 2 with some degree of confidence. Figure 5.1 illustrates that there is a very strong relationship (significant at the .001 level) between the index of difficulty and the amendment rate. The more difficult the amendment process, the lower the amendment rate, and vice versa.

That the relationship between amendment rate and difficulty of amendment process is highly curvilinear is more interesting than if it were simply a linear one, because there is a relatively small part of the curve where most of the effect is concentrated. This confirms the existence of a range of amendment rates that is more critical and toward

[12] The test for curvilinearity using cross-national data is neither strictly comparable with that used for the American states nor an adequate test of the relationship using national constitutions. Whereas the entire constitutional history for all fifty American states was used, only the most recent period of constitutional stability that exceeded fifteen years was used for the cross-national data. The arbitrary use of a fifteen-year minimum may well exaggerate the average longevity of national constitutions, and the use of only the most recent minimum period may weaken the results.