

Principles of Constitutional Design

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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*.

TABLE 5.1. *Basic Data on American Constitutions, 1991*

| State | Number of Constitutions | Average Duration | Current Constitution Since | Years in Effect | Original Length in Words | Times Amended | Amendment Rate |
|---------------|-------------------------|------------------|----------------------------|-----------------|--------------------------|---------------|----------------|
| Alabama | 6 | 29 | 1901 | 90 | 65,400 | 726 | 8.07 |
| Alaska | 1 | 35 | 1959 | 32 | 11,800 | 22 | .69 |
| Arizona | 1 | 80 | 1912 | 79 | 28,900 | 109 | 1.38 |
| Arkansas | 5 | 31 | 1874 | 117 | 24,100 | 76 | .65 |
| California | 2 | 72 | 1879 | 112 | 21,400 | 471 | 4.21 |
| Colorado | 1 | 115 | 1876 | 115 | 22,000 | 115 | 1.00 |
| Connecticut | 4 | 54 | 1965 | 26 | 8,800 | 25 | .96 |
| Delaware | 3 | 72 | 1897 | 94 | 19,000 | 119 | 1.27 |
| Florida | 6 | 25 | 1969 | 22 | 18,900 | 53 | 2.41 |
| Georgia | 10 | 21 | 1983 | 8 | 26,000 | 24 | 3.00 |
| Hawaii | 1 | 41 | 1959 | 32 | 16,800 | 82 | 2.56 |
| Idaho | 1 | 102 | 1890 | 101 | 18,800 | 107 | 1.06 |
| Illinois | 4 | 43 | 1971 | 20 | 12,900 | 6 | .30 |
| Indiana | 2 | 88 | 1851 | 140 | 9,100 | 38 | .27 |
| Iowa | 2 | 73 | 1857 | 134 | 9,700 | 48 | .36 |
| Kansas | 1 | 132 | 1861 | 130 | 10,200 | 87 | .67 |
| Kentucky | 4 | 50 | 1891 | 100 | 21,800 | 29 | .29 |
| Louisiana | 11 | 16 | 1975 | 16 | 47,300 | 27 | 1.69 |
| Maine | 1 | 172 | 1820 | 171 | 10,100 | 157 | .92 |
| Maryland | 4 | 54 | 1867 | 124 | 25,200 | 200 | 1.61 |
| Massachusetts | 1 | 211 | 1780 | 211 | 11,600 | 116 | .55 |
| Michigan | 4 | 39 | 1964 | 27 | 18,600 | 16 | .59 |
| Minnesota | 1 | 134 | 1858 | 133 | 8,500 | 112 | .84 |
| Mississippi | 4 | 44 | 1890 | 101 | 20,100 | 102 | 1.01 |
| Missouri | 4 | 43 | 1945 | 46 | 39,300 | 74 | 1.61 |
| Montana | 2 | 51 | 1973 | 18 | 11,600 | 15 | .83 |
| Nebraska | 2 | 63 | 1875 | 116 | 16,100 | 189 | 1.63 |

| | | | | | | | |
|-------------------|-----|-----|------|-----|--------|-----|------|
| Nevada | 1 | 127 | 1864 | 127 | 14,100 | 108 | .85 |
| New Hampshire | 2 | 108 | 1784 | 207 | 8,000 | 142 | .69 |
| New Jersey | 3 | 72 | 1948 | 43 | 16,400 | 39 | .91 |
| New Mexico | 1 | 79 | 1912 | 79 | 22,000 | 120 | 1.52 |
| New York | 4 | 54 | 1895 | 96 | 26,800 | 207 | 2.16 |
| North Carolina | 3 | 72 | 1971 | 20 | 10,300 | 27 | 1.35 |
| North Dakota | 1 | 102 | 1889 | 102 | 18,100 | 125 | 1.23 |
| Ohio | 2 | 95 | 1851 | 140 | 14,200 | 145 | 1.04 |
| Oklahoma | 1 | 84 | 1907 | 84 | 58,200 | 133 | 1.58 |
| Oregon | 1 | 132 | 1859 | 132 | 11,200 | 188 | 1.42 |
| Pennsylvania | 5 | 43 | 1968 | 23 | 20,800 | 19 | .83 |
| Rhode Island | 2 | 108 | 1843 | 148 | 7,400 | 53 | .36 |
| South Carolina | 7 | 31 | 1896 | 95 | 21,900 | 463 | 4.87 |
| South Dakota | 1 | 102 | 1889 | 102 | 21,300 | 97 | .95 |
| Tennessee | 3 | 65 | 1870 | 121 | 11,100 | 32 | .26 |
| Texas | 5 | 29 | 1876 | 115 | 28,600 | 326 | 2.83 |
| Utah | 1 | 95 | 1896 | 95 | 13,900 | 77 | .81 |
| Vermont | 3 | 71 | 1793 | 198 | 5,200 | 50 | .25 |
| Virginia | 6 | 36 | 1971 | 20 | 18,100 | 20 | 1.00 |
| Washington | 1 | 102 | 1889 | 102 | 16,300 | 86 | .84 |
| West Virginia | 2 | 64 | 1872 | 119 | 15,900 | 62 | .52 |
| Wisconsin | 1 | 143 | 1848 | 143 | 11,400 | 124 | .87 |
| Wyoming | 1 | 101 | 1890 | 101 | 20,800 | 57 | .56 |
| MEAN | | 77 | 1896 | 95 | 19,300 | 117 | 1.23 |
| U.S. Constitution | 2.9 | 202 | 1789 | 202 | 4,300 | 26 | .13 |

Sources: The data in this appendix are based on James Q. Dealey, *Growth of American State Constitutions* (New York: Da Capo, 1972); Walter F. Dodd, *The Revision and Amendment of State Constitutions*, 2nd ed. (New York: Da Capo, 1970); Daniel J. Elazar, *American Federalism: A View from the States*, 2nd ed. (New York: Thomas Y. Crowell, 1972); Fletcher M. Green, *Constitutional Development in the South Atlantic States, 1776-1860* (New York: Da Capo, 1971); Ellis Paxson Oberholzer, *The Referendum in America* (New York: Da Capo, 1971); Harold W. Stanley and Richard G. Niemi, *Vital Statistics on American Politics* (Washington, D. C.: Congressional Quarterly, 1992); Albert L. Sturm, *Thirty Years of State Constitution-Making: 1938-1968* (New York: National Municipal League, 1970).

presents an index to measure the degree of difficulty associated with each amendment process. The average amendment rate is much higher for the state constitutions than it is for the U.S. Constitution. Between 1789 and 1991 the U.S. Constitution was amended 26 times for a rate of .13 (26 amendments/202 years = .13 amendments per year).¹⁰ As of 1991 the current state constitutions had been in effect for an average of 95 years and had been amended a total of 5,845 times, or an average of 117 amendments per state. This produces an average amendment rate of 1.23 for the states, about 9.5 times the national rate.

Proposition 1 hypothesizes a positive relationship between the length of a constitution and its amendment rate: the longer a constitution when adopted, the higher its rate of amendment. The data on American state constitutions strongly support proposition 1 with a correlation coefficient of .6249 significant at the .001 level. Furthermore, the relationship holds whether we use the original or the current amended length.

The average length of state constitutions increases from about 19,300 words as originally written to about 24,300 as amended by 1991, which raises the interesting question of what difference it makes whether we use a constitution's original length or its current amended length. The surprising answer is that it makes no real difference. The curve of best fit for amendment rates using the original length of a constitution has a slope of .58, whereas that of amendment rates using the amended length results in a slope of .62. There is thus good reason, when testing the propositions against foreign national constitutions, for using either the original or the amended length.

Also, the correlation coefficient between amended and unamended rates is .9936 (significant at the .001 level), which strongly implies that the rate of increase in amendment rate resulting from increasing a constitution's length is virtually constant across all lengths. Finally, since at any point in time the set of constitutions used to test the propositions will vary considerably in age and thus be a mixture of documents ranging from slightly amended to highly amended, we should probably use a composite curve that reflects this inevitable mix. In the case of American state constitutions, the obvious composite curve would be

¹⁰ The addition of the Twenty-seventh Amendment in 1992 results, as of 2002, in the same .13 amendment rate.

one that combined .58 and .62. The resulting amendment rate curve with a slope of .60 indicates that for every ten-thousand-word increase in a constitution's length, the amendment rate will increase by .60.

The relationship between the length of a constitution and its amendment rate is the strongest and most consistent one found in the analysis of data drawn from the American states. The strength of this relationship can be underscored by a partial listing of the variables examined that did not show any significant independent correlation with amendment rate. These variables include geographical size, population, level of industrialization, per capita personal income, per capita state expenditures, size of legislature, partisan division in legislature, geographical region, geographical proximity, and the historical era in which the constitution was written. Controlling for these other variables, the importance of constitutional length remains, whereas controlling for constitutional length, the few weak correlations with these other variables disappear.

State constitutions, on average, are much longer than the U.S. Constitution. Can we account for this difference? Proposition 3 suggests that the wider range of governmental functions at the state level results in significantly longer documents and thus produces a higher amendment rate that makes them longer still (in line with proposition 1).

Data from a recent decade show that amendments dealing with local government structure (4.7 percent), state and local debt (4.3 percent), state functions (9.0 percent), taxation and finance (14.1 percent), amendment and revision (2.6 percent), and local issues (28 percent) compose about 63 percent of all state amendments and pertain to topics that have not been part of national constitutional concern.¹¹

If we exclude these categories of issues from the amendment count, we end up with an adjusted state rate of about .47. This figure is still a bit more than three-and-a-half times the national amendment rate, but by eliminating the amendments peculiar to state constitutions we obtain a figure for comparison with the national rate (.13), using what amounts to the same base. The difference between .13 and .47 represents what we might term the "surplus rate" that still needs to be explained. An interesting question – one that never seems to be

¹¹ These data can be found in Sturm, "The Development of American State Constitutions," *Publius* 12 (1982): 64–98, on p. 90.

TABLE 5.2. *Amendment Rate of a State Constitution, by Average Duration*

| | Average Duration (years) | | | | | | |
|-----------------------------|--------------------------|-------|-------|--------|---------|---------|------|
| | 1-25 | 26-50 | 51-75 | 76-100 | 101-125 | 126-150 | 151+ |
| Amendment rate ^a | 2.37 | 1.95 | 1.26 | 1.10 | .93 | .84 | .64 |
| | (3) | (13) | (13) | (6) | (8) | (5) | (2) |

^a The numbers in parentheses indicate the number of constitutions in that range of average duration.

asked – is whether the state amendment rate is too high or the national amendment rate is too low.

The answer depends in part on one's attitude toward judicial interpretation. Propositions 5 and 6 suggest that for one who prefers judicial interpretation as a means of modifying a constitution over a formal amendment process, the amendment rate for the national document is not too low. However, for one who prefers a formal amendment process, such as an attachment to popular sovereignty, the amendment rate of the U.S. Constitution may well be too low and the amendment rate of the states is to be preferred.

Propositions 5 and 6 assume a low rate of amendment coupled with constitutional longevity. Proposition 4, on the other hand, posits a general relationship between the rate of amendment and constitutional longevity. Dividing the number of constitutions a state has had into the number of years it has been a state produces the average duration of the state's constitutions – a measure of constitutional activity that controls for a state's age. Table 5.2 shows that a high amendment rate is associated with low average duration and thus high replacement rate ($r = -.3561$, significant at the .01 level).

Proposition 4, however, predicts that the rate at which constitutions are replaced will increase as the amendment rate moves up or down with respect to $\langle \# \rangle$. In Table 5.2, the amendment rate is the dependent variable. However, if we make it the independent variable instead, we can test directly for the bidirectional effect. Table 5.3 supports proposition 4.

I turn now to developing an index with which to measure the difficulty of a given amendment procedure. I shall then be ready to look at the constitutions of other nations.

TABLE 5.3. *Average Duration of a State Constitution, by Amendment Rate*

| | | Amendment Rate | | | | | | | |
|-------------------------------|-----------|----------------|-------------|-----------|-----------|-----------|-----------|-----------|-------|
| | | 0-.5 | .51-.75 | .76-1.00 | 1.01-1.25 | 1.26-1.50 | 1.51-1.75 | 1.76-2.00 | 2.00+ |
| Average duration ^a | 71 (7) | 90 (8) | 100 (13) | 86 (4) | 79 (4) | 57 (6) | 40 (1) | 38 (7) | |

Note: The average duration of a state's constitution declines as the amendment rate goes above 1.00 and as it goes below .75. This means that for American state constitutions, an amendment rate between .75 and 1.00 is associated with the longest-lived constitutions and thus with the lowest rate of constitutional replacement. This range, then, will be defined as <#>. The thirteen constitutions with amendment rates within <#> (as just defined) average .89, which we will define as # within <#>.

^a The numbers in parentheses indicate the number of states that fall into this range of amendment rate.

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