Principles of Constitutional Design

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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.

TABLE 5.8. *The Amendment Rate and Average Duration of Selected National Constitutions*

	Amendment Rate							
	.00–.24	.25–.74	.75–1.24	1.25–1.74	1.75–2.24	2.25–2.74	2.75–3.24	3.25+
Average duration[a]	43 (6)	50 (2)	96 (5)	47 (3)	19 (1)	17 (2)	26 (10)	39 (3)

Note: Index scores are normed to that of a simple majority approval in a bicameral legislature, by dividing the approval rate for this baseline by the approval rate for each of the other possible actions. The increments are the estimated increase in the difficulty of passing amendments relative to the baseline rules.

[a] The numbers in parentheses indicate the number of countries that fall into this range of amendment rate.

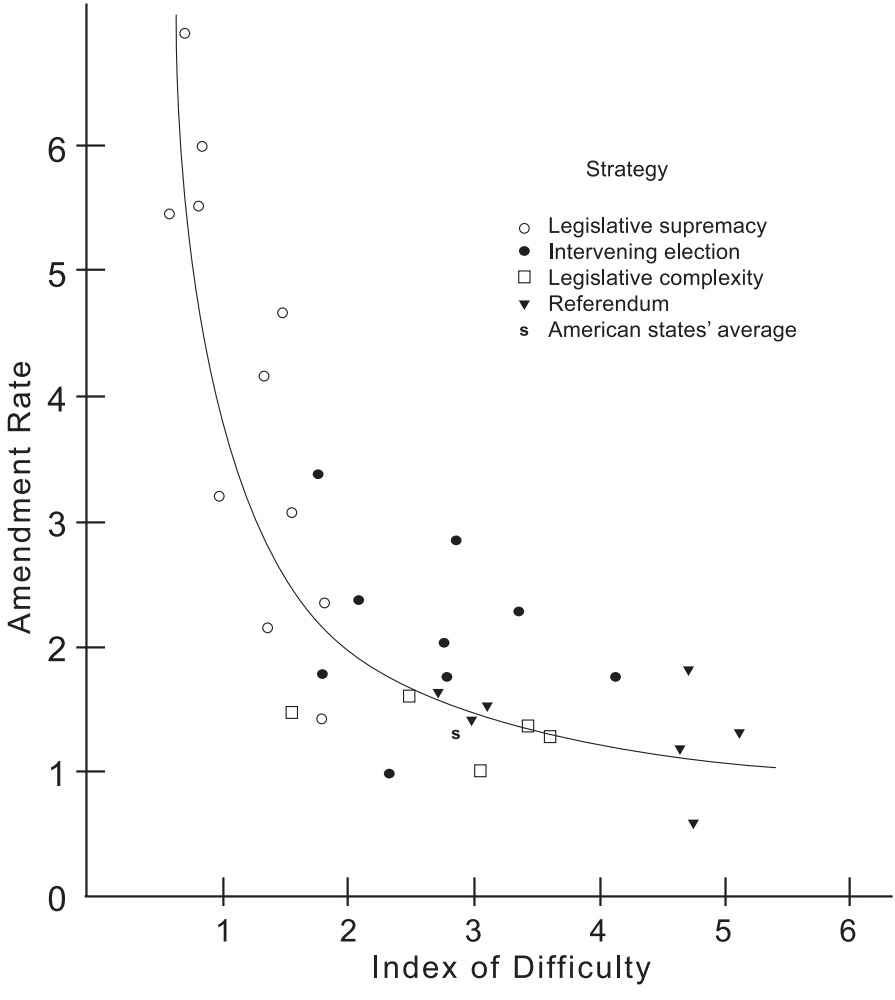

FIGURE 5.1. Cross-national pattern for amendment rate and difficulty, indicating amendment strategy. (The figure was generated using the statistical package STATA and was then reproduced by hand using Geotype overlay techniques to enhance readability.)

which one should aim if constitutional stability is being sought. But it also suggests that one can with some confidence achieve a moderate rate of amendment by selecting an appropriate range of amendment difficulty. This, in turn, suggests that certain amendment strategies are better in this regard than others, the topic to which I now turn.

TABLE 5.9. *Comparison of National Constitutions, Grouped according to Their General Amendment Strategy*

	Amendment Strategies			
	Legislative Supremacy[a]	Intervening Election (Double Vote)[b]	Legislative Complexity (Referendum Threat)[c]	Required Referendum or Equivalent[d]
Average index score	1.23	2.39	2.79	4.01
Length	59,400	13,000	18,300	11,200
Amendment rate	5.60	1.30	1.19	.28

[a] Austria, Botswana, Brazil, Germany, India, Kenya, Malaysia, New Zealand, Papua New Guinea, Portugal, and Samoa.
[b] Argentina, Belgium, Colombia, Costa Rica, Finland, Greece, Iceland, Luxembourg, and Norway.
[c] Chile, France, Italy, Spain, and Sweden.
[d] Australia, Denmark, Ireland, Japan, Switzerland, United States, and Venezuela.

The difficulty of the amendment process chosen by framers of constitutions seems related to the framers' relative commitment to the premises used by the Americans when they invented the formal amendment process: popular sovereignty, a deliberate process, and the distinction between normal legislation and constitutional matters. We can use these assumptions to group our thirty-two national constitutions into one of four general amendment strategies.[13]

Strategy 1 can be labeled *legislative supremacy* (Table 5.9, col. 1). Constitutions in this category reflect the unbridled dominance of the legislature by making one legislative vote sufficient to amend the constitution. The data reveal that the size of the majority required for this vote does not affect the amendment rate. The legislative supremacy strategy

[13] The broad categories were constructed using the theoretical premises developed herein and thus are independent of any categorization schemes developed previously by others. For an instructive comparison, see Arend Lijphart, *Patterns of Democracy, Government Forms and Preference in Thirty-six Countries* (New Haven: Yale University Press, 1999), 189–91. In order for a country to be included, it had to have at least one fifteen-year period free of military rule or serious instability, during which constitutionalism was taken seriously. Reliable data on the number and nature of amendments for that country also had to be available to the researcher. The unavailability of such data explains the absence of the Netherlands, for example, or for Austria before 1975.

reflects a minimal commitment to the three American premises just listed. Strategy 2 is to require that the national legislature approve an amendment by votes in two sessions with an *intervening election* (col. 2 in Table 5.9). The national legislature is still basically in control, but the amendment process is made more deliberative, a clearer distinction drawn between normal legislation and constitutional matters, and the people have an opportunity to influence the process during the election, which implies a stronger commitment to popular sovereignty. Sometimes other requirements diminish legislative dominance; the introduction of a nonlegislative body in the process (e.g., a constitutional commission) is typical. The double vote with an intervening election is the key change, so strategy 2 is termed the Intervening Election Strategy. As we move from strategy 1 to strategy 2, the amendment rate falls by 77 percent. Approximately half (54 percent) of this drop is explained by the 78 percent reduction in the average length of a constitution, and about half is explained by the 94 percent increase in the index of difficulty that results primarily from the double-vote, intervening election strategy.

Strategy 3 relies on *legislative complexity* (col. 3 in Table 5.9), usually characterized by multiple paths for the amendment process, which features the possibility of a referendum as a kind of threat to bypass the legislature. A referendum can usually be called by a small legislative minority, by the executive, or by an initiative from a small percentage of the electorate – and often any of the three. This complexity and easy availability of a referendum emphasize even more strongly the deliberative process, the distinction between constitutional and normal legislative, and popular sovereignty.

The legislative complexity strategy produces only an 8 percent reduction in the amendment rate compared with the intervening election strategy, although this is a 31 percent improvement over what we would expect, given the increased average length of strategy 3 documents. The slight overall improvement is due to the modest (18 percent) increase in the difficulty of the strategy. Strategies 2 and 3 together show most clearly how one can achieve similar amendment rates by trading off between constitutional length and amendment difficulty.

Strategy 4 institutionalizes the most direct form of popular sovereignty and also emphasizes to the greatest extent both the

deliberative process and the distinction between constitutional and normal legislative matters. These countries have a *required referendum* as the final part of the process. The United States is placed in this category because the various appeals to the citizenry required by both amendment paths approximate a referendum and because the United States does not approximate any other strategy even remotely.

Compared with that of strategy 3, the referendum strategy's rate of amendment falls off 76 percent. This reduction to what is barely one-twentieth the rate for legislative-supremacy countries is about evenly explained by the 44 percent increase in difficulty vis-à-vis strategy 3 and a 39 percent reduction in average length.

Table 5.9 also shows that countries that use a referendum strategy, as well as those that use the strategy of an intervening election, have, on average, much shorter constitutions than the countries using the other strategies. They tend to have framework constitutions that define the basic institutions and the decision-making process connecting these institutions. The nations using strategy 1 tend to use a code-of-law form of constitution containing many details about preferred policy outcomes. These constitutions tend to be much longer. A code-of-law form, long documents, an easy amendment process, and legislative supremacy are all characteristics of the parliamentary sovereignty model that dominates the list of countries using strategy 1. New Zealand has perhaps the purest parliamentary sovereignty government in the world, and Kenya, India, Malaysia, Papua New Guinea, Botswana, and Western Samoa are not far behind. Although the countries using strategy 2 still have a fairly low index of difficulty, their much shorter constitutions indicate that a much greater divide has been crossed with respect to strategy 1 countries than the addition of a double vote with intervening election might imply.

Table 5.9 implies several interesting things that require emphasis. First, one can trade off between shorter length and greater difficulty to produce a similar amendment rate or use them together to produce a desired amendment rate. One can relax the level of difficulty and greatly reduce the rate of amendment simply by shortening a constitution. Second, it was determined earlier that the amendment rate correlates highly with the degree of difficulty. It is now apparent that different amendment strategies, which reflect different combinations of assumptions and constitutionalism, have certain levels of difficulty

associated with them. That is, institutions have definite (and, in this case, predictable) consequences for the political process.

Figure 5.1 demonstrates this rather clearly. The eleven nations that use the legislative supremacy strategy are grouped toward the low difficulty–high amendment rate end of the curve. These are left as an open circle. The seven nations that use referendum strategy, each indicated by an inverted triangle, are clustered toward the other end of the curve. Those that use legislative complexity are indicated by an open square, and those that use an intervening election strategy are represented by a filled-in circle. The clustering of the various countries by amendment strategy shows that the averages reported in Table 5.9 represent real tendencies, not merely statistical artifacts produced by mathematical manipulation. The average for the American states is shown by the letter *s*.

Figure 5.1 shows the relationship between difficulty of amendment and amendment rate while controlling for the effects of length, which has the effect of shifting the curve upward a bit from that created by using raw index scores. The shifted curve is almost hyperbolic, which means that the relationship between difficulty of amendment and amendment rate can be approximated by the equation for a hyperbolic curve, $x = 1/y$.

An analysis of American state constitutions, with the difficulty of amendment held roughly constant by the similarity in their formal processes, reveals a relationship between the length of a constitution and its amendment rate that is described by a linear curve of best fit with a slope of .60 – which is to say that on average, for every additional ten thousand words, the amendment rate goes up by six-tenths of an amendment per year. The curve of best fit for the national constitutions, when controlling for the difficulty of the amendment process and when excluding the extreme cases of New Zealand and Japan, has a slope of .59. Those writing a new constitution can expect with some confidence, therefore, that there will be about a .60 increase in the amendment rate for every ten-thousand-word increase in the length of the document.

Finally, we might conclude from Table 5.9 that both the length of a constitution and the difficulty of amendment may be related to the relative presence of an attitude that views the constitution as a higher law rather than as a receptacle for normal legislation. Certainly it seems to be the case that a low amendment rate can either reflect a reliance on

judicial revision or else encourage such reliance in the face of needed change. It is possible that the great difficulty faced in amending the U.S. Constitution has led to heavy judicial interpretation as a virtue in the face of necessity.

The theory of constitutional amendment advanced here has posited a connection between the four methods of constitutional modification. Propositions 1–4 developed the concept of amendment rate in such a way that we were able to show an empirical relationship between the formal amendment of a constitution and its complete replacement. Propositions 5–8 used amendment rate to relate these two methods of modification to judicial and legislative alteration.[14] At this point, I can systematically include these last two methods in the overall theory. Toward that end, it is worth reconsidering briefly propositions 5–8 in light of my findings on the amendment process in national constitutions.

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

The countries that have an amendment rate below <#> (defined as .75–1.24 for national constitutions) and also have a constitution older than the international average of fifty-one years include Australia, Finland, Ireland, and the United States. The proposition implies that these four countries either have found an alternate means (judicial review in the United States) or are under strong pressure to find another means. Denmark, Germany, Iceland, Italy, and Japan are all within a few years of falling into the same category, and if the proposition is at all useful, they should experience progressively stronger inclinations toward either a more active judiciary or a new constitution in the coming decades. A trend toward an active judiciary is already well advanced in Germany and is also becoming apparent in Japan.

> 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.

[14] On this topic, see Chester James Antieu, *Constitutional Construction* (Dobbs Ferry, N.Y.: Oceana, 1982); and Edward McWhinney, *Judicial Review in the English-Speaking World* (Toronto: University of Toronto Press, 1956).

Table 5.9 shows that the lower the rate of formal amendment, the less the legislature dominates. The executive is usually not a major actor in a formal amendment process, so we are left with the judiciary.

Arend Lijphart has found empirical support for proposition 6.[15] A low rate of formal amendment results, as we have shown, from a difficult amendment process. Lijphart and others who work in comparative politics refer to a constitution that is difficult to amend as "rigid." Using his sample of thirty-six countries, Lijphart found a .39 correlation between constitutional rigidity and the use of judicial review (significant at the 1 percent level).

> PROPOSITION 7. The higher the formal amendment rate, the less likely the constitution is being viewed as a higher law, the less likely a distinction is being drawn between constitutional matters and normal legislation, the more likely the constitution is being viewed as a code, and the more likely the formal amendment process is dominated by the legislature.

Discussion of Table 5.9 has supported all parts of this proposition.

> PROPOSITION 8. The more important the role of the judiciary in constitutional modification, the less likely the judiciary is to use a theory of strict construction. In the absence of further research, proposition 8 is a prediction to be tested.

Conclusion

I have examined two sets of constitutions. Each set is composed of documents that are taken seriously as constitutions. Every document in these two sets has a formal amendment process that is self-sufficient – that is, it depends on no other constitution to carry out a formal amendment of itself. The two sets of constitutions examined together comprise at least three-fourths of the existing documents defined by these two characteristics.[16]

[15] Lijphart, *Patterns of Democracy*, chap. 12, especially pp. 225–230.

[16] Canadian provincial and Australian state constitutions are prominent among those remaining to be examined. Also, Israel, Canada, and the United Kingdom, although lacking a simple written constitution, remain to be included. The problem in each of these three cases lies in determining what has constitutional status. An initial attempt to do so, using the content of the New Zealand Constitution as a template, yielded the following very preliminary estimates for two of these legislative supremacy