Principles of Constitutional Design

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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]

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[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

A comparative, empirical study of the amendment process in these eighty-two documents leads to four specific conclusions about the amendment process, as well as four more general conclusions about constitutions. The first specific conclusion is that the variance in amendment rate is largely explained by the interaction of two variables: the length of the constitution and the difficulty of the amendment process.

Second, it is possible to manipulate these two variables to produce more or less predictable rates of amendment. The strong linear effects of length and the hyperbolic curve that describes the effects of difficulty together allow us to formulate an equation that generates a pattern of amendment rates close to what we found empirically. If we let A represent the amendment rate, D the score on the index of difficulty, and L the length of a constitution in words, the equation representing their interrelationship is

$$A = [1/D + ((L/10,000) \times .6)] - .3$$

One part of the equation factors the effects of length in by dividing the number of words in the constitution by 10,000 and multiplying by .60. The second part of the equation approximates the effects of amendment difficulty by using the formula for a hyperbolic curve: $A = 1/D$. However, this is only approximate, and subtracting .30 from the effects of amendment difficulty results in the curve of best fit for the raw data scores.

Third, there is evidence that the amendment rate affects the probability that a constitution will be replaced and that a moderate amendment rate (between .75 and 1.25 amendments per year) is conducive to constitutional longevity.

Fourth, beyond a certain point, making the amendment process more difficult is an "inefficient" way to keep the amendment rate in the moderate range. Rather, it is easiest to do so by avoiding the extremes of either the legislative dominance or the referendum strategies and

countries. For Israel between 1949 and 1991 with a constitution of 10,000+ words, the amendment rate is 2.5+ and the index of difficulty is .50. For the United Kingdom between 1900 and 1991 with a constitution of 250,000+ words, the amendment rate is 7.5 + and the index of difficulty is .60.

combining either the legislative complexity or the intervening election strategy with a relatively short document (10,000 to 20,000 words).

Among more general conclusions, the first is that institutions have consequences and that the effects of institutional definitions in constitutions can be studied empirically.

Second, the similarity in amendment patterns between the American state constitutions and the national constitutions raises the possibility that for other aspects of constitutional design, one set of documents may be useful in developing propositions for studying the other set and therefore that there are basic principles of constitutional design operating independently of cultural, historical, geographic, and short-term political considerations.

Third, the first two general conclusions together suggest the possibility of discovering a set of principles that can be used to design constitutions with predictable results.

Fourth, the study of the amendment process strongly suggests that constitutional institutions cannot be studied in isolation from each other. Just as the operation of the legislature may strongly affect the patterns we find in the amendment process, the design of the amendment process may affect the operation of the court; and seemingly unrelated aspects of constitution (e.g., its length and formal amendment process) may be linked in their consequences.

Finally, it is interesting that Buchanan and Tulloch's rational cost analysis receives some empirical support, although with a twist. Their general principle holds that constitutional choice rests on a trade-off between decision costs and external costs.[17] Because constitutions contain important political settlements, any amendment carries with it the danger of serious externalities. Although an apparently rational actor might seek a very difficult amendment process in order to minimize externalities, such a one might also attempt to minimize externalities by constitutionalizing its interests, since the more specific the policy content of the constitution on a topic, the less danger there is that unwanted externalities will be imposed. This latter analysis would imply a fairly easy amendment process. However, a process that allows one actor to safeguard its interests allows all actors to do so. The data in this study indicate that the more policy content a constitution has, the longer

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[17] Buchanan and Tulloch, *The Calculus of Consent*.

it becomes. Both an easy amendment process (which leads to greater length and thus a higher amendment rate) and a very difficult amendment process (which leads to a very low amendment rate) produce a higher probability that a constitution will be replaced entirely. Thus, the two short-range types of behavior likely to be engaged in by a rational actor are irrational in the long run, because when a constitution is replaced, everything is once again up for grabs – a situation in which constitutional safeguards against external costs are no longer in effect at the very time externalities are threatened on all serious political matters. Therefore, a truly rational actor would seem to be one who attempts to avoid constitutional replacement and instead avoids an amendment rate that is too high or too low. This would seem to argue for constitutional brevity and a moderately difficult amendment process on grounds of rationality.

Still, while an empirical study of the amendment process can suggest some general solutions to a common problem faced by constitutional republics, as Table 5.9 indicates, a number of broad strategies are available to framers of constitutions just as any number of specific possible solutions exist within one of the broad strategies. In the end, those designing a constitution face a more important and difficult problem than simply designing an amendment process. They must find a way to make this institution, and the other institutions in the constitution, "match the people" if the political system generated by the constitution is to endure and prosper. What might be meant by "matching a constitution to the people" is thus a topic worthy of extended, careful discussion. It is to that topic we now turn.