

The Role of Procedural Rigidity / Flexibility on Amendment Frequency: A Study of the US State Constitutions

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Abstract

The amendment process of constitutions and their impact on constitutionalism have attracted students of constitutional law from time to time. In this process, the flexibility and rigidity of amendment have been marked as indicators of how constitution makers visualized the future of the constitution. It is a general impression that more rigid constitutions are aimed at keeping the constitution mostly in the original form; and contrarily, more flexible constitutions are there to facilitate easy amendments. Consequently, rigid constitutions are supposed to experience less constitutional amendments, whereas, flexible constitutions should experience more. This author has attempted to examine if the above-mentioned logically understandable consequence of rigidity/flexibility work in case of the state-level constitutions in the United States or not. Surprisingly, a counter-intuitive result has come out.

1. Introduction

A constitution is the fundamental law of a country. In a federal system of government, a state/provincial constitution is also a supreme law, subject only to the provisions and principles of the federal/national constitution.¹ In that sense, the United States has 51 constitutions: 50 State Constitutions plus the Constitution of the United States of America. Now,

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¹ J.B. Whitefield, 'Amending State Constitutions', *Michigan Law Review*, Vol. 11, No. 4, p. 302.

constitutions of all the 50 states provide for amendments by some means or other, when necessary.

One of the basic characteristics of a constitution is its permanence compared to ordinary laws. But in spite of the necessity of permanency of a constitution, democratic polities do warrant changes and adaptations from time to time in keeping with the needs of the changing society. When a state frames or reframes its constitution, the framers cannot foresee all the problems that may unfold in the life of that state in future. Therefore, almost every constitution of the world, including provincial constitutions, contains constitution-amending provisions that may be used for improving a constitution according to the demands of the time.

But there is debate as to the proper procedure of amendment, especially regarding the expected level of rigidity and flexibility employed. Those who support rigidity looks “at constitutions with sanctimonious reverence, and deem them like the arc of the covenant, too sacred to be touched.”²

Those who support flexibility in the amending process advocate that the constitution must develop out of life and aspirations of people, and in order to be useful and lasting, it must go through continuous adaptation.³

Among the constitution-framers of the United States, Thomas Jefferson is known as pro-flexibility—who believed that constitution should go hand in hand with the progress of the human kind, and each generation is free to choose their own way of life. So, he proposed a “periodic repairs” of constitutions every nineteen or twenty years.⁴ But his contemporaries, like James Madison and John Adams believed that constitutions should not be easily amended.⁵ During the enactment of the US Constitution, the rigidity argument prevailed over the flexibility argument, since a rigid constitution was deemed necessary to keep the nation united and free from factional objectives. As a result, we see that in a span of 224 years of its operation, it has gone through only 27 amendments. This paucity of amendment is often attributed to the rigidity of amendment procedure prevailing in the US constitution.

Since the United States has got 50 other constitutions, one may be curious about the constitution-amending experience of those

² Thomas Jefferson, *Letter to Samuel Kercheval* (July 12, 1816) (available at <http://odur.let.rug.nl/1/usa/P/tj3/writings/brf/jefl246.htm>).

³ Sunder Raman, *Constitutional Amendments in India*, (Eastern Law House Pvt. Ltd.: Calcutta, 1989), p. 3.

⁴ *Supra* note 2.

⁵ Anne Permaloff, 'Methods of Altering Constitutions,' 33 *Cumberland Law Review*, 2002-2003, p. 219.

constitutions. It is worthwhile to investigate if the correlation between rigidity and frequency of amendment prevailing at the federal level is also true for state constitutions or not.⁶ From that curiosity, this paper examines all the 50 state constitutions in the USA, and categorizes them according to their level of rigidity or flexibility. And then, it examines whether state constitutions labeled less rigid/flexible (in so far as the amendment procedure concerned) experience less amendments than those states labeled rigid/less flexible. The results of such investigation are important because with those results in mind, we can better understand the nature of state constitutions in a federal system in general, and the amendment dynamics of those constitutions in particular compared to the national constitution of the same country.

2. Research Question

Keeping the factors that contribute to the amendment of a constitution, the concrete question under investigation here is: “At state level in a federal system, is frequency of amendment dependent on the procedural rigidity or flexibility of the amendment process? If so dependent, do state constitutional amendment experiences correspond to the constitutional amendment experience of the federal level constitution in the United States?”

This question is worth investigating because previous studies available on amendments to the state constitutions in the USA did not address this question. Earlier studies addressed issues, like, what are different processes of amendment?; which method of amendment is better than others?; in which methods, people’s participation is better ensured?; what are the philosophical basis of particular amendment process?; what are the strengths and weaknesses of each method of amendment?; how did different methods develop in the states at different juncture of history?; and what are the expected processes of amendment in the USA that commensurate its democratic values?; and so on. No study on the subject categorized the state constitutions based on their amendment procedure. Nor did they draw any conclusion regarding the correlation between amendment process and frequency of amendment at the state level.

⁶ Ibid. p. 220. Permaloff writes referring to Alan G. Tarr, *For the People: Direct Democracy in the State Constitutional Tradition*, available at <http://www.iandrinstitute.org/indepth/TarrDD.pdf>.

3. Methods of Amendments of State Constitutions

If we study all state level constitutions' amendment procedures, we find five methods of amending or altering a constitution. They are: (1) through legislatively proposed amendments, (2) constitutional conventions, (3) constitutional initiatives, (4) constitutional commissions, and (5) judicial interpretation.⁷ Each method has its own strengths and weaknesses. And each method varies in its operation from state to state. At present, all the 50 states have provision for amendment through legislative process, while only 18 states authorize amendments through constitutional initiative, 41 states allow amendment through constitutional convention, and only one state (Florida) expressly made provision for constitutional commission as an amendment process.⁸

3.1 Legislature-proposed Amendments

The primary method that is predominantly used in state level constitutional amendments is the legislative method. Albert L. Sturm in his study found that 90.6 percent (1465 out of 1617) of the total amendments in 1970s came through legislative proposal.⁹ In a recent study, John Dinan found that 20 out of 21 amendments in 2009, 127 out of 166 in 2004-05, 167 out of 200 in 2006-07, and 98 out of 134 in 2008-209 as proposed by state legislatures.¹⁰ Similarly, commenting on 50 years amendment process up to 1980s, Janice C. May writes, "with respect to the methods used to amend constitutions, the legislatures have proposed 90 percent of the total amendments."¹¹

The legislative process of constitutional amendment at state level is not uniform. They vary as to the passage requirement (51% vote in some legislature, 60% or 75% in others), number and condition of sessions (1 session, 2 sessions, 2 consecutive sessions, 2 sessions intervened by election, joint sessions etc.), requirement of ratification (ratification by majority voting on proposal, majority voting in election, no ratification), and so forth.¹² Since a legislature represents the electorate, an

⁷ Supra note 5, p. 217.

⁸ See, Council of State Governments, *The Book of States*, 2010, Ch. 1.

⁹ Albert L. Sturm, 'The Development of American State Constitutions,' in *Publius*, Vol. 12, No. 1, State Constitutional Design in Federal Systems, (Winter, 1982), p.77.

¹⁰ John Dinan, State Constitutional Development in 2009, Council of State Governments, *The Book of States*, 2010, Ch. 1. Pp.3-5.

¹¹ Janice C. May, 'Constitutional Amendment and Revision Revisited,' *Publius*, Vol. 17, No. 1, New Developments in State Constitutional Law (Winter 1987), p. 162.

¹² Supra note 8.

amendment through legislative proposal is seen as a reflection of democracy.

3.2 Constitutional Conventions

The traditional, oldest and the best known method of constitutional change in the states is constitutional convention. As people at large are extensively involved in this method, it is referred to as the “most democratic process” of constitutional change.¹³ According to Alan Tarr, convention as a means of constitutional change came in the 1800s to check special interests that dominated legislatures, and to protect public from the vagaries of legislatures.¹⁴ Paul C. Reardon described convention as the “greatest institution of government which America has produced.”¹⁵

In the conventional process of amendment, legislatures initiate the process of convention call but it needs approval of the electorate. Once people approve convention call, they select delegates from among the people. States vary greatly on whether a popular vote is required to ratify the changes recommended by the convention.¹⁶ Of course, vast majority of states require such ratification by the electorate once again. Since conventions are used for overhauling a constitution, involvement of the people throughout the process gives a constitutional change more legitimacy and endurance. So far, states have convened 232 conventions.¹⁷

3.3 Constitutional Initiative

Constitutional initiative is another method of amending state constitutions where electorates play a direct role in amendments. Currently 18 states provide in their constitution for such method. This method allows electorate, sometimes, to avoid legislatures occupied by special interests and not willing to amend constitutions as per people’s aspirations.

The process begins with the people filing a proposal for amendment to the concerned state officials. If the proposal meets legal requirements, the proposal is circulated to the electorate for signatures. When required number of signatures (a certain percentage of the number of votes

¹³ Supra note 5, p. 225.

¹⁴ Ibid., p. 225.

¹⁵ Quoted by May from Reardon, ‘Massachusetts Constitution Marks a Milestone,’ *Publius: The Journal of Federalism*, 12 (Winter 1982), p. 45.

¹⁶ Ibid., p. 228.

¹⁷ Supra note 11, p. 155.

collected in the last gubernatorial election) is collected, it may be submitted to the electorate directly for vote, or it may be, in some states, sent to the legislature for review (only in Massachusetts and Mississippi).¹⁸ Once it is approved by the electorate, the change becomes valid.

3.4 Constitutional Commission

Constitutional commission is the least used method of constitutional amendment at state level. Only Florida constitution formally provides for such method although other states did also set up temporary commission in the past. In Florida, a Commission of 37 members is to sit every 20 years. The Commission studies the constitution and makes recommendations for its change, if necessary.¹⁹ This method is preferred by legislatures since on the one hand the Commission conducts necessary research making legislatures' task easier; on the other hand, legislatures remain free to accept, modify or even reject the Commission's recommendations.

3.5 Judicial Amendment

Judiciary involves in the amendment process indirectly. When some one challenges a constitutional amendment, courts can determine, through its interpretations, the constitutionality of the amendment, and can make necessary changes in the amendment to bring it in line with constitutional structure. Once judiciary makes such changes, the changed version, not the one made earlier, becomes a part of the constitution.

If we analyze literature, we find that Anne Permaloff concentrated on the strengths and weaknesses of particular methods of amendment. Albert L. Strum focused on the trend of constitutional change throughout the history. John Dinan's focus was to show that "the earth belongs always to the living generations." He strongly argued that there is no justification to claim that state level constitutional amendment process is inferior to the federal constitutional amendment process.²⁰ J.B. Whitefield focused on the due observance of procedure in proposing and ratifying amendments, and to see what is the limit of judiciary in interfering with such procedure. He writes that courts cannot interfere with the legislature

¹⁸ Supra note 5, p. 232.

¹⁹ Supra note 9.

²⁰ John Dinan, "The Earth Belongs Always to the Living Generation": The Development of State Constitutional Amendment and Revision Procedures. *The Review of Politics*, Vol. 62, No. 4 (Autumn, 2000), pp. 645-674.

in the exercise of its power to propose amendment, nor can it interfere with any administrative non-compliance of due process.²¹ Janice C. May thinks that federal and state constitutions cannot be compared since they are “two different traditions”. Of course, she points out that there are three main differences between these two traditions: popular participation in the amendment process, frequency of amendments and role of politics in amendment. Although she admits that popular participation is unparallel in these two traditions, frequency of amendment and politics is very much present at federal level, though in disguise.²²

What is missing in these studies is the investigation as to the causes of extremely high frequency of amendments at state level; and whether the amendment process is responsible for this or not. Although May acknowledges the differences between federal and state level amendment frequency, she did not examine the role of amendment process in this difference. Although it is true that amendment process is not the sole influence behind the frequency of amendment, perhaps it is an important one. So, this paper investigates the correlation between the stricture of amendment process and the frequency of amendment in state constitutions.

In this paper, we take legislative process as a unit of analysis to determine the rigidity and flexibility of procedure, and will try to project its impact on the frequency of amendment. This is because around 90% of the state level amendments are initiated through this process.

4. Hypothesis and the Reality

Based on popular belief and literature on this subject, we hypothesize that like national constitutions, frequency of amendments to state constitutions in the USA depends, *inter alia*, on the rigidity/flexibility of amendment procedure prevailing in each state. Common sense-wise, this hypothesis means that states having rigid procedure will experience

²¹ J.B. Whitefield, Amending State Constitutions, *Michigan Law Review*, Vol. 11, No. 4 (February 1913), pp. 305.

²² May thinks that federal constitution is frequently amended through judicial review of the Supreme Court. And although in state level amendments, electoral politics is directly introduced into the mainstream of constitutional change, in federal level it is not done so directly. But the US constitutional amendment process is essentially political. See, *Supra* note, 11. pp. 165-167.

fewer amendments than those states that have relatively flexible procedure for amendments.

So, dependent variable for this study will be “frequency of amendments in state constitutions”, and the independent variable is “rigidity/flexibility of amendment process.” As I operationalize frequency, we actually count number of amendments each state has got in its constitution so far. Similarly, as I operationalize rigidity/flexibility of the process, we make a chronological list of states based on procedural stricture from high to low, states at the top facing comparatively rigid procedure, and states at the bottom facing more flexible process. According to our hypothesis, states at or nearer to the top of the list would show numerically more frequency of amendment compared to states at or near the bottom, which, according to our hypothesis, would show numerically less frequency of amendments.

To determine the level of flexibility/rigidity, I have studied amendment provisions of all the 50 state constitutions, and categorized them all based on their rigidity/flexibility: as “more rigid” those states that need super-majority of legislative vote, and/or more sessions of parliament to pass an amendment bill, and/or higher voting requirement in ratification by the people. On the other hand, if the legislative voting criterion is normal, like a simple majority, and/or it does not need passing the bill in a second session, and/or ratification is not required, we call the state having such procedure as “more flexible”.

In counting number of amendments, I relied on the latest data available in the Book of the States, 2010 that provide statistics of amendments up to January, 2010.

Because of the space constraint, we then take into account 10 states from the “more rigid” spectrum, and 10 states from the “more flexible” spectrum to find out whether our hypothesis of the correlation of amendment frequency with the rigidity/flexibility of procedure holds or not. If we can prove our hypothesis in case of these extreme cases, we can make a conclusion about their correlation.

4.1 Legislatively Proposed Amendment Process: Level of Rigidity / Flexibility

In my study of 50 state constitutions, I find 15 different levels of rigidity/flexibility prevailing in the amendment processes of these states. The rigidity and flexibility were determined based on the requirement of

supermajority or simple majority, number of passages required, requirement of election between two passages, ratification by the electorate or by the legislature and so forth. When an amendment requires all items mentioned above and those also at a higher degree of rigidity, we consider the process rigid; whereas, an amendment not requiring some of the mentioned elements, or requiring them with comparative flexibility makes the process flexible. The 15 different sets of amendment requirements are shown below:

Table 1: Amendment Process in State Constitutions: More Rigid to More Flexible

No.	Amendment Process	State/States Concerned
1.	Must be passed by $\frac{3}{4}$ majority in each House at 1 Session, OR, passed by majority in each House at 2 Sessions intervened by an election + optional 2 nd Session + Ratification	Connecticut
2.	2/3 (at Senate) and majority (lower House) in the 1 st passage+ majority in the 2 nd passage+ Ratification	Vermont
3.	2/3 at each House in the 1 st passage+ Ratification+ majority in each House in the second passage	South Carolina
4.	Majority (Both Houses) in the 1 st passage+ 2/3 (both House) during 2 nd passage+ Ratification	Tennessee
5.	2/3 (Both Houses)+ Second passage not required + Ratification	Maine, Montana, Louisiana
6.	2/3+ No Second passage+ Ratification	Alaska, California, Colorado, Georgia, Idaho, Kansas, Michigan, Mississippi(2/3 included majority of both house), Texas, Utah, Washington, West Virginia, Wyoming
7.	2/3 during first passage + 2/3 during second passage+ no Ratification	Delaware

8.	2/3 in 1 Session OR majority of all in 2 successive Sessions + 2 nd Session is optional+ Ratification	Hawaii
9.	3/5 of all in each House OR majority of all in 2 successive Sessions + 2 nd Session is optional+ Ratification	New Jersey
10.	3/5 while passage+ No Second passage+ Ratification by 3/5 (2/3 for Tax increase)	Florida
11.	3/5 for passage + No Second passage+ Ratification by 2/3 voters participating in the next election	New Hampshire
12.	3/5 for passage + No Second Passage+ Ratification by the majority of voters participating in next election	Illinois
13.	3/5 for passage+ No second passage+ Ratification	Alabama, Kentucky, Maryland, Nebraska, North Carolina, Ohio
14.	Majority for the first passage+ Majority for the second passage+ Ratification	Indiana, Iowa, Massachusetts(majority in joint session), Nevada, New York, Pennsylvania, Virginia, Wisconsin
15.	Majority for the first passage+ No second passage+ Ratification	Arizona, Arkansas, Minnesota, Missouri, New Mexico (for certain elective franchise and education $\frac{3}{4}$ + $\frac{3}{4}$ R), North Dakota, Oklahoma, Oregon (2/3 for Revision), Rhode Island, South Dakota

4.2 Impact of Rigidity/Flexibility on Amendment Frequency

In Tables 2 and 3 below, we take 10 state having most flexible amendment process and 10 most rigid amendment process to see if rigidity/has an impact on the frequency of amendment.

Table 2: Frequency of Amendments in States Having More Flexible Amendment Procedure

State	Total Year Effective	Number of Amendments	Average
Arizona	98 (1912-2010)	143	1.459184
Arkansas	136 (1874-2010)	95	0.698529
Minnesota	152 (1858-2010)	120	0.789474
Missouri	65 (1945-2010)	111	1.707692
North Dakota	121 (1889-2010)	149	1.231405
New Mexico	98 (1912-2010)	157	1.602041
Oklahoma	103 (1907-2010)	179	1.737864
Oregon	151 (1859-2010)	243	1.609272
Rhode Island	24 (1986-2010)	10	0.416667
South Dakota	121 (1889-2010)	214	1.768595
10 States	1069	1421	1.32928

Note 1: Data for this table is collected from "The Book of the States, 2010"

Table 3: Frequency of Amendments in States Having More Rigid Amendment Procedure

State	Total Year Effective	Number of Amendments	Average
Connecticut	45 (1965-2010)	30	0.666667
Vermont	217 (1793-2010)	53	0.24424
South Carolina	114 (1896-2010)	493	4.324561
Tennessee	140 (1870-2010)	38	0.271429
Maine	190 (1820-2010)	171	0.9
Louisiana	35 (1975-2010)	154	4.4
Alaska	51 (1959-2010)	29	0.568627
California	131 (1879-2010)	519	3.961832
Colorado	134 (1876-2010)	154	1.149254
Mississippi	120 (1890-2010)	123	1.025
Total 10 states	1177	1764	1.498726

Note 2: Data for this table is collected from "The Book of the States, 2010"

We find that states having relatively rigid constitutional amendment process does not face less frequency in amendment than those having flexible amendment process. Table 3 shows that states having more rigid constitution amended their constitution (1764 in total) more than those 10 states in Table 2 having relatively flexible amendment process (1421 total).

Of course, in Tables 2 and 3, for lack of data, we did not separate legislatively proposed amendments from amendments made through other methods. Of course, if we take into account that 90% of the amendments come from legislative proposal, the above result should hold correct for legislatively proposed amendments with some margins or error.

In Tables 4 and 5 below, we examine the correlation between rigidity/flexibility of amendment process and frequency of amendment taking into account only those countries that allows amendment only through legislative process.

Table 5: Frequency of Amendments in States Having Only Legislative Amendment Process (More Flexible Procedure)

States	Total Year Effective	Number of Amendments	Average
Indiana	29 (1971-2010)	11	0.37931
Pennsylvania	42 (1968-2010)	30	0.714286
2 states	71	41	0.577465

Note 3: Data for this table is collected from "The Book of the States, 2010"

Table 5: Frequency of Amendments in States Having Only Legislative Amendment Process (More Rigid Procedure)

State	Total Year Effective	Number of Amendments	Average
Texas	134 (1876-2010)	467	3.485075
New Jersey	62 (1948-2010)	43	0.693548
2 states	196	510	2.602041

Note 4: Data for this table is collected from "The Book of the States, 2010"

Tables 4 and 5 also show the same result like Tables 2 and 3. States having flexible amendment process experience fewer amendments than states having more rigid process. Does it mean that state level constitutions experience more amendments if they have relatively rigid constitutions? We do not know because we did not take other constitution amending factors into account. An amendment may have its roots in the culture of a particular state, vigilance of its populace, prevailing democratic spirit among people, the philosophy (pro-flexibility or pro-rigidity) a state population and its legislature adhere to, and so forth. Therefore, reaching to a conclusion as to what factors lead to

frequency of amendment at state level requires an analysis taking into account all possible factors. For now, we can, perhaps, conclude (of course, with some margins of error) that frequency of constitutional amendments at the state level in the USA does not depend on the rigidity/flexibility of the amendment process.

5. Conclusion

State constitutions in the USA present a huge variety regarding its amendment process. Although they provide for at least four different methods of amendment, legislatively proposed amendments account for 90% of the total amendments. Of course, the legislatively proposed amendment method is not uniform in all states. In this study, we have shown that 50 state constitutions present at least 15 combinations of amendment requirements: in case of voting during passage in the legislature, number of sessions required for the passage, and ratification by the public.

In our study, we consistently found that the popular concept that more strict amendment process leads to less frequency of amendment does not hold in case of state constitutions. Rather we found the opposite to be true. The net result is that our hypothesis that flexibility leads to more amendment frequency, and that rigidity leads to less frequency have been disproved in case of state constitutions. This anti-intuitive result indicates that other factors are accountable for amendments at state level. Future studies should attempt to find out those factors that influence or obstruct a state constitutional amendment beyond the rigidity/flexibility dynamics.