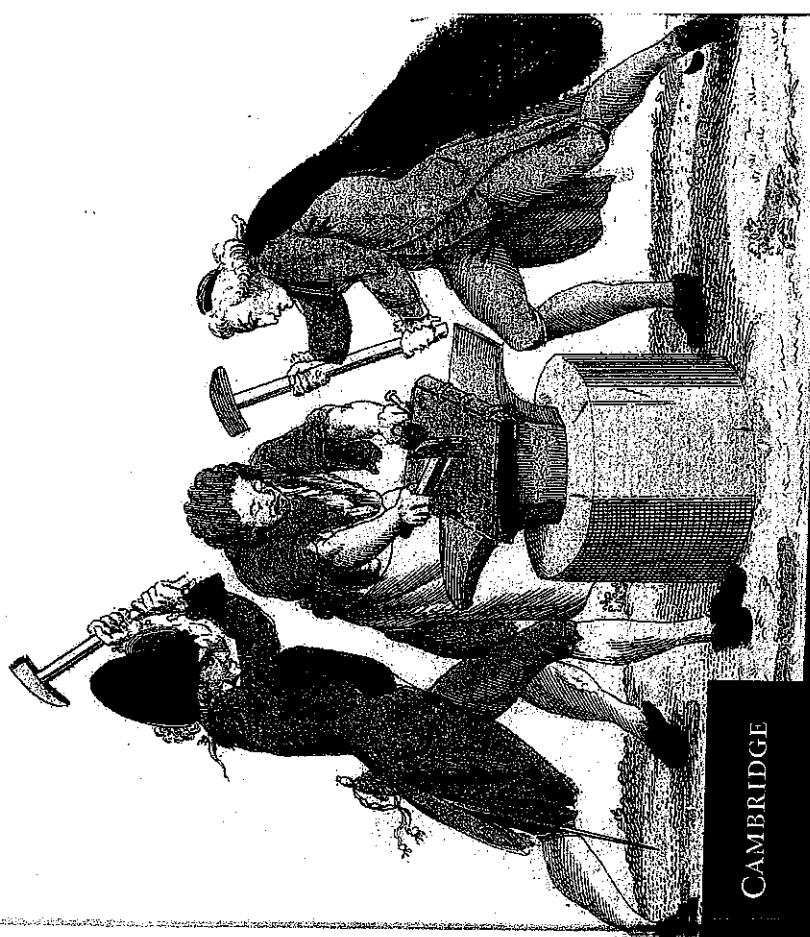


# Comparative Constitutional Design

EDITED BY TOM GINSBURG



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GINSBURG **Comparative Constitutional Design**

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This volume brings together essays by many of the leading scholars of comparative constitutional design from myriad disciplinary perspectives, including law, philosophy, political science, and economics. The authors collectively assess what we know – and do not know – about the design process as well as particular institutional choices concerning executive power, constitutional amendment processes, and many other issues. Bringing together positive and normative analysis, it provides the state of the art in a field of growing theoretical and practical importance.

**Tom Ginsburg** is the Leo Spitz Professor of Law and Political Science at the University of Chicago. He is the coauthor of *The Endurance of National Constitutions* (2009, with Zachary Elkins and James Melton), which won the best book award from the Comparative Democratization Section of the American Political Science Association. His other books include *Rule by Law: The Politics of Courts in Authoritarian Regimes* (2008, with Tamir Moustafa) and *Judicial Review in New Democracies* (2003), which won the American Political Science Association's C. Herman Pritchett Award for best book on law and courts.

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## Constitutional Amendment Rules

### *The Denominator Problem*

*Rosalind Dixon and Richard Holden*

Formal procedures for constitutional amendment play a number of important functions in a constitutional democracy. In cases of major constitutional change, they help ensure that change occurs via legal, rather than extralegal, means (Griffin 1998). In other cases, they provide legislatures with the means to alter or "update" specific constitutional rules, or to engage in "dialogue" with courts about the interpretation of more open-ended constitutional provisions (see Dixon 2010; and compare also Denning & Vile 2002; Forbath 2003).

Over time, there may also be increasing demand for constitutional amendment procedures to play both this kind of rule-updating and dialogic function. Changing social circumstances and understandings will often make specific constitutional rules outmoded, yet in most countries, courts do not respond to this by changing their interpretation of such rules (Dixon 2010). Courts also tend over time to engage in more interpretation in aggregate (Samaha 2008) in a way that invites greater scope for legislative disagreement – or dialogue. As an empirical matter, there is certainly evidence that older constitutions tend to be amended more frequently than newer ones (see Lutz 1995: 253; Ferejohn 1997: 524; Elkins, Ginsburg, and Melton 2009).

At the same time, as constitutions age, they may also become more difficult to amend. One reason for this is that in most jurisdictions, the population tends to increase over time in a way that directly raises the costs of, or hurdles to, successful constitutional amendment.<sup>1</sup>

A number of authors have suggested the possibility of this kind of a "denominator problem" in the context of constitutional amendment rules (see, e.g., Samaha 2008). James Buchanan and Gordon Tullock, for example, have argued that "[e]veryday experience in the work of committees of varying size confirms... [the] direct functional relationship between the individual [bargaining or decision] costs

<sup>1</sup> See United Nations (2007, p. vii). Another reason is that constitutions may become more venerated over time, in ways that increase the political costs of proposing amendments; see, e.g., Griffin (1998).

of collective decision-making and the size of the group required to reach agreement (Buchanan and Tullock [1962] 2004: 55). Because there is greater uncertainty in larger decision-making bodies about what others will do, and therefore in the benefits of cooperation, they have also posited a direct relationship between the size of a collective decision-making body and holdout costs, or the "opportunity cost of bargains that are never made" (Buchanan and Tullock [1962] 2004: 65-66). In other words, we have also suggested that successful constitutional amendment may be more difficult in larger decision-making bodies, simply as a result of *the law of large numbers* (Holden 2009; Dixon 2010, 2011).

In this chapter, we provide the first empirical test to date of these hypotheses, by gathering and analyzing a unique year-by-year data set on constitutional amendment rates at a state constitutional level in the United States. Using this data set we show a clear, statistically significant negative relationship between the size of legislative voting bodies and the rate of constitutional amendment in various states under various specifications. We further suggest that this finding has potentially important – yet hitherto overlooked – implications for the design of constitutional amendment rules.

The chapter is divided into four sections. The first section briefly sets out the existing theoretical arguments about the relationship between the size of constitutional decision-making bodies and the costs, or hurdles, to constitutional amendment. The second section sets out the basic empirical findings of this work. The third section discusses possible implications for constitutional design, including the role mechanisms such as (1) sliding-scale constitutional amendment rules; (2) a low, as compared to high, constitutional supermajority rules; and (3) constitutional convention could play in addressing the denominator problem identified, along the potential disadvantages as well as advantages, of each mechanism. The final section offers a brief conclusion.

#### CONSTITUTIONAL AMENDMENT, DIFFICULTY AND SCALE: THEORETICAL ARGUMENTS

The size of a particular voting body will have the potential to influence the effective difficulty of constitutional amendment for two interrelated reasons: one having to do with the *decision costs* associated with the process of constitutional amendment; and another with the statistical *likelihood* that (at least quasi-) independent decision makers will ultimately favor a particular proposed amendment.

In most constitutional settings, there will be some practical limit on the number of constitutional amendments that will be feasible for a legislature, or population as a whole, to adopt. The higher the decision costs are, for any given successful constitutional amendment, the fewer the amendments there will therefore be, overall. According to almost all theories of constitutional decision making, the decision costs

associated with a successful process of constitutional amendment will also have a clear capacity to increase, along with the size of the relevant constitutional voting body.

For many constitutional theorists, a key function of constitutional amendment rules is to ensure that adequate deliberation occurs about the potential advantages and disadvantages of any proposed constitutional change, before such change occurs (see, e.g., Michelman 1986; Ackerman 1991). In most countries, this means that the process of constitutional amendment requires some degree of legislative, not just popular, involvement. Where this is the case, the time – and therefore also opportunity cost – of debating proposed constitutional amendments will have a clear relationship with the size of the relevant voting body. The more members there are in a given decision-making body, the more time it will take to hear from each member. Because deliberation involves an exchange of ideas, adding new members to a legislative body will also increase the time taken for existing members to absorb and respond to the arguments of new members, and also to debate with one another, about those new arguments. As the size of the legislature increases, deliberation-based decision costs ("deliberation costs") therefore have the potential not only to increase but also to do so exponentially.

For other constitutional theorists, constitutional amendment rules embody a more outcome-oriented trade-off from the perspective of individual citizens; between, on the one hand, the danger of "external costs," and on the other, the likely magnitude of "bargaining" – and also "hold out" – costs (see, e.g., Buchanan and Tullock [1962] 2004). External costs are those that individuals must bear as "a result of the actions of others over which he [or she] has no direct control," or in a constitutional context, the costs to an individual of constitutional changes that he or she does not favor (Buchanan and Tullock [1962] 2004: 43). Bargaining costs are the costs individuals must incur in seeking to bargain, or negotiate, collective agreement in favor of a proposed constitutional amendment they favor; and holdout costs are the "opportunity cost of bargains that are never made" (Buchanan and Tullock [1962] 2004: 65-66). According to scholars such as James Buchanan and Gordon Tullock ([1962] 2004), both forms of decision cost may also increase significantly with the size of a collective decision-making body. "Everyday experience in the work of committees of varying size confirms," Buchanan and Tullock suggest, the "direct functional relationship between the individual [bargaining] costs of collective decision-making and the size of the group required to reach agreement" (Buchanan and Tullock [1962] 2004: 55). Holdout costs will also tend to increase, along with the size of a collective decision-making body, because greater uncertainty about what others will do, and therefore the benefits of cooperation, may make individuals "more reluctant to grant concessions" (Buchanan and Tullock [1962] 2004: 55).

Decision costs aside, we have argued that successful constitutional amendment may also be more difficult in larger politics, simply as a result of the law of large numbers

Probability of Successful Amendment under 2/3 Rule

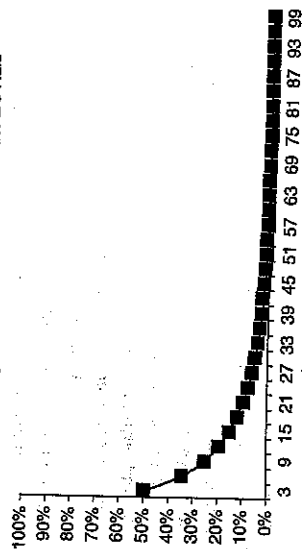


FIGURE 8.1. Scale and probability of amendment given supermajority rule.

(Holden 2009; Dixon 2001). The reason for this is that, in larger voting bodies, there will tend to be less idiosyncratic variation in the distribution of voter preferences, relative to the underlying views of the median voter, and therefore less likelihood of there being a supermajority position in favor of a change to the status quo.

Assume, for example, that the median voter in a given polity is more or less indifferent when it comes to whether or not to amend the constitution; that the views of the median voter on this question do not tend to change radically with the scale of the polity; and that the views of a particular representative voting body – such as the legislature or a subsection of voters who choose to vote at a particular election – are drawn at least semi-randomly from the voting population as a whole. Under a supermajority voting rule, the law of large numbers means that, even absent any change in decision costs, it is far less likely in a large decision-making body than in a smaller such body that there will be an idiosyncratic draw of preferences or types in favor of amendment.

Consider the probability, shown in Figure 8.1, of obtaining a majority vote in favor of ratifying a constitutional amendment by way of a coin toss – “heads” being a vote in favor of changing the status quo and “tails” being a vote for the status quo. For a voting body with, say, three or six members, the probability of successful amendment is 50 percent or 34 percent, respectively, whereas for a voting body of even twelve or twenty-four members, the probability is as low as 19 percent or 8 percent, respectively. For a voting body with 100 members, the probability of successful amendment falls below 1 percent.

As one of us has shown elsewhere, this effect is also quite general and does not depend on the binary nature of outcomes in the coin-toss setting (see Holden 2009). Rather, it applies even where there is a continuum of voter preferences and policy choices. The only limitation on this effect is that it is likely to apply most strongly

at the lower, rather than higher, ranges of population size – that is where the law of large numbers is yet to apply.

In a legislative setting, both decision costs and the law of large numbers suggest that, after controlling for other factors, such as the relevant constitutional amendment rule, there should be quite clear negative relationship between the size of a legislative voting body and the effective rate of constitutional amendment (hypothesis 1).

In a popular setting, by contrast, it seems much less likely that there will be a statistically significant relationship between the scale of a polity and the rate of amendment, considering that, in such a setting – where there is both limited opportunity for deliberation and bargaining and sufficiently large population from the outset – a principle of diminishing returns (to the law of large numbers) is likely to apply. However, to the extent that there is any relationship found between the size of the overall population and the effective rate of constitutional amendment, in states with a popular ratification requirement (i.e., all states other than Delaware), both theories would also predict that the relationship should be negative rather than positive (hypothesis 2).

#### THE DATA ON AMENDMENT RATES AND DENOMINATORS

To test the two relevant hypotheses empirically, we collected data for forty-one states on state population size, legislative size, the formal requirements for constitutional amendment, and the annual amendment rate, for each state constitution, from the time of adoption of the present constitution to the present.<sup>2</sup> This generated 4,372 observations. For each constitution in our data set, we also obtained data on the length of the relevant constitution, its life span or number of years in existence, and its coexistence with other constitutional restrictions such as a single-subject rule and a double-passage requirement.

The key advantage of obtaining year-by-year data of this kind, rather than simply aggregate data such as that used by Donald Lutz (1995) in his pioneering earlier work in this area, is that it allowed us to test state-level types of constitutional heterogeneity.<sup>3</sup> Because there have been several changes to amendment rules within

<sup>2</sup> These data were collected from the text of the state constitutions, the National Bureau of Economic Research (NBER) state constitutions project, the U.S. Census Bureau, and numerous copies of *The Book of the States*, The Council of State Governments, Lexington, KY. The states for which data were not available were: Alabama, Georgia, Illinois, Indiana, Maryland, Minnesota, Missouri, Tennessee, and Wyoming. For these states, data were available on amendment rates, but not on the size of the state legislature for relevant time periods.

<sup>3</sup> On the more general advantages of longitudinal count data such as those assembled here, see, e.g., Neyman (1965); Hausman, Hall, and Griliches (1984) (in the context of patents research and development). For an excellent overview and extension to more general stochastic processes, see King (1986). As Hausman, Hall, and Griliches (1984) pointed out in their pioneering work, there are certain additional complications involved in the analysis of panel count data. The two main issues are how to allow for

TABLE 8.1. Panel summary statistics

Variable	Observations	Mean	Standard deviation	Min	Max
vap	5285	2156768	5498174	1069828	1.29E+08
amendis	4335	1.822933	6.148128	0	130
amend	4335	0.322161	0.4673558	0	1
legbuck	5198	2.193959	0.8885848	1	4
init	5315	0.5029351	0.8033729	0	2
doublepass	5315	0.2957667	0.4564296	0	1
limit	5315	0.1047977	0.3063214	0	1
exposure	5315	66.8984	46.86321	1	226
house	5315	18.6591	73.25775	31	749
singsub	5315	0.2425212	0.4286481	0	1
length	5315	3617.12	47408.06	9200	340136
vapsquared	5285	3.49E+13	4.87E+14	1.14E+08	1.66E+16

various states, over time, the use of all state constitutions, both past and present, also provided us with useful additional variation in testing our hypotheses. As John Ferejohn (1997) has shown in a closely related context, using all the available variations in the data has significant advantages in this context, and can even lead to different conclusions. Table 8.1 presents summary statistics of these variables.

VAP is the voting-age population in a given year, and VAP Squared is the square of this. INITIATIVE is a categorical variable measuring the possibility of popular initiatives, which takes the value 0 if initiatives are not possible, 1 if the requirement is less than 10 percent of the voting population (usually measured as the percentage of those who voted in the last gubernatorial election), and 2 if 10 percent or more such signatures are required. DOUBLEPASS is a dummy variable that takes the value 1 if amendments must pass the legislature in two successive sessions, and 0 otherwise. LEGBUCK is a series of dummy variables that measure the voting rule for passage in the legislature: it is denoted 1 (i.e., LEGBUCK<sub>1</sub>) if the rule is 50 percent, 2 if it is 60 percent, 3 if there is a two-thirds requirement, and 4 if there is a three-quarters requirement.<sup>4</sup> EXPOSURE is the number of years the current constitution has been in place. HOUSE is the number of members of the lower house of the state legislature in a given year. LENGTH is the length of the constitution in words.<sup>5</sup> SINGSUB is a dummy variable that takes the value 1 if the constitution has a single-subject rule for constitutional amendment.

<sup>4</sup> persistent state effects (i.e., fixed or random effects), and how to allow for disturbances in the equation for a discrete probability distribution. The negative binomial specifications we use address these issues.

<sup>5</sup> For all fifty states, the current voting rule is the same in the upper and lower houses of the state legislature, and hence we do not separate upper and lower house voting rules.

<sup>6</sup> We do not have this data available on a year-by-year basis, and thus use the current length for all years.

TABLE 8.2. Aggregate summary statistics

Variable	Observations	Mean	Standard deviation	Min	Max
proposed	49	215.42139	209.3933	8	1063
passed	50	13.52	140.8594	8	766
conbuck	50	3859319	5.003019	1	20
vagepop	50	1.378804	3905686	366316	2.00E+07
rate	50	0.2465116	1.277779	0.2465116	7.158878
popadopt	50	1039159	1879353	1069828	7865581
housenow	50	110.24	55.58614	40	400
legbuck	49	2.204082	0.9124951	1	4
adopted	50	1899.32	52.96762	1780	1986
initiative	50	0.56	0.8121526	0	2
doublepass	50	0.24	0.4314191	0	1
limit	50	0.1	0.3030458	0	1
singsub	50	0.26	0.4430875	0	1
length	50	35985.08	47816	9200	340136

We also assembled data on the aggregate number of amendments for each of the fifty state constitutions, since adoption. Table 8.2 presents summary statistics of these variables.

Many of the variables are the same as those in the panel data, but there are some differences. PASSED is the total number of amendments to a constitution since its inception. ADOPTED is the year in which the constitution was adopted. RATE is the number of amendments per annum. HOUSENOW is the number of members of the lower house in each state, whereas HOUSEADOPT is the number of members when the constitution was adopted. VAGEPOP is the voting-age population of the state. Finally, CONBUCK is a measure of the difficulty of constitutional amendment, with 1 representing the lowest level of difficulty and 20 the highest.<sup>6</sup> CONBUCK is an aggregate measure of the overall difficulty of constitutional amendment, and includes

<sup>6</sup> This measure is similar to the measures used by Lutz (1995), Lijphart (1999), and Elster (2000), but different in some respects. Lutz (1995) considers seventy possible different amendment requirements in three general categories: legislative majority, double-passage requirements, and referendum requirements. He then assigns cardinal values to different requirements. For example, he assumes that if an amendment must pass two houses of parliament, this is twice as hard as if it had to pass only one house. In contrast, we take an ordinal approach to remain agnostic about the exact degree of difficulty. Lijphart (1999: 219) focuses solely on the voting rule (simple majority, 50% to two-thirds, two-thirds plus). Elster (2000: 10) focuses on four categories: legislative supermajority requirements, parliamentary quorum requirements, state ratification, and referendum requirements. Our measure ranks (from easiest to hardest) lexically: popular initiative requirement, then legislative majority rule, then popular majority rule.

consideration of legislative voting rules, voting rules for popular ratification, and the presence and level of difficulty for the proposal of amendments by popular initiative. It is constructed by ordering states lexicographically: first on the popular initiative rule (i.e., the percentage of voters required to initiate an amendment), second on the legislative rule, and finally on the popular rule.

The fact that we are dealing, in this context, with count data – that is, a situation in which the number of amendments over a particular time frame is the dependent variable – means that careful treatment is required to acknowledge that both negative outcomes are impossible (i.e., a state cannot have -7 amendments) and only integer outcomes are possible (i.e., a state cannot have 2.2 amendments in a year). In this setting, Ordinary Least Squares (OLS) estimates are statistically inefficient, do not have consistent standard errors, and can produce the impossible prediction that a negative number of events (here, constitutional amendments) may have occurred. We also found that for a poisson regression, there was a problem of overdispersion in our data.<sup>7</sup> We thus ran a fixed-effects panel negative binomial regression, and used a random-effects specification as a robustness check.

Table 8.3 presents the results of this negative binomial regression for aggregate data on the rate of amendment in each state in our data set, controlling for various measures of the difficulty of amendment and the number of members of the legislature. Given that this is, by necessity, so-called rate data, it also controls for the number of years each constitution has been in effect by including  $\log(\text{EXPOSURE})$  on the right-hand side. Consistent with our first hypothesis, although the relationship was not particularly statistically significant (it had a p-value of 0.166), we found that an increase in the number of members in the house led to fewer amendments, or for a one standard deviation change in the number of house members (compared to an overall average rate of amendment of 1.37 per annum), approximately 0.143 fewer amendments per annum. Conversely, contrary to our second hypothesis, we found that states with a larger population tended to have more amendments.

The other variables we found to be statistically significant were LENGTH, LIMIT, VAP, and LEGBUCKS. As authors such as Lutz (1995) and Ferejohn (1997) have previously found, longer constitutions were amended with greater frequency (Lutz 1995: 249; Ferejohn 1997: 524). Formal limits on the number of amendments permissible in a given year, and a two-thirds supermajority requirement for legislative passage of a constitutional amendment, also led to there being fewer amendments.

<sup>7</sup> The unconditional variance of many variables of interest is greater than the mean, as can be seen from the summary statistics table. A poisson specification imposes a parametric assumption that assumes that mean to be equal to the variance, which may lead to misleading results (Hausman, Hall, and Griliches 1984).

TABLE 8.3. Amendment rates using aggregate data

VARIABLES	Rate
Vagepop	1.53E-07** (7.70E-08)
Housenow	-0.00255 (0.00184)
legbuck_1	-0.408 (0.292)
legbuck_2	-0.549** (0.222)
legbuck_3	-0.215 (0.283)
doublepass	-0.597 (0.427)
limit	-1.039*** (0.22)
init_1	-0.043 (0.361)
init_3	-0.206 (0.401)
singsub	0.0016 (0.295)
length	5.58E-06*** (1.30E-06)
vagepopsq	0 (0)
Constant	-4.157*** (0.419)
Observations	49

However, while these aggregate results are informative, they do not use the full amount of variation available in the data, and therefore we also ran panel data count regressions to obtain more efficient estimates. Table 8.4 reports the results of a negative binomial regression using the full panel structure of our data (i.e., year-by-year amendments rather than total amendments).

Most notably, it shows that the size of the lower house of the state legislature – that is, number of house members – is negative and statistically significant at the 1



TABLE 8.4 Panel negative binomial results

VARIABLES	amends		Random effects
	(1)	(2)	
	Fixed effects		
doublepass	0.0974 (0.107)	0.0998 (0.102)	
limit	-0.00878 (0.127)	-0.0614 (0.120)	
legbuck_2	-0.603*** (0.135)	-0.516*** (0.130)	
legbuck_3	-0.243** (0.105)	-0.218** (0.0998)	
legbuck_4	0.275 (0.425)	0.338 (0.381)	
init_1	0.168 (0.132)	0.159 (0.123)	
init_2	-0.455*** (0.136)	-0.413*** (0.130)	
singsub	0.185 (0.118)	0.147 (0.110)	
house	-0.00363*** (0.000695)	-0.00377** (0.000671)	
exposure	0.00756*** (0.000702)	0.00708*** (0.000692)	
length	1.45e-05** (2.00e-06)	1.46e-05*** (1.93e-06)	
vap	-3.90e-09 (9.59e-09)	2.08e-09 (9.36e-09)	
vapsquared	-0 (0)	-0 (0)	
Constant	-2.179*** (0.153)	-2.152*** (0.146)	
Observations	4390	4390	
Number of stateid	41	41	

Standard errors in parentheses \*\*\* p&lt;0.01, \*\* p&lt;0.05, \* p&lt;0.1

percent level, and therefore provides strong confirmation of our first hypothesis. The magnitude of this effect is also quite significant. For example, a one standard deviation in the number of house members is associated with 0.27 fewer amendments per annum – or 2.7 fewer per decade. This represents a 14.6 percent reduction in the number of amendments relative to the mean.

Contrary to our findings for the aggregate amendment data, it also shows that in this setting, there was no statistically significant relationship between VAP, or VAP\_SQUARED, and the rate of amendment, but that to the extent there was a relationship between the two, it was negative. This confirms our second hypothesis.

Also of note is the finding that neither the presence of a double-passage requirement nor a single-subject rule had a statistically significant effect on the overall rate of amendment. Other factors we did find to have a statistically significant effect were LEGBUCK<sub>2</sub>, LEGBUCK<sub>3</sub>, INITIATIVE<sub>2</sub>, EXPOSURE, and LENGTH. As panel 1 shows, compared to a 50 percent majority voting in a state legislature, a 60 percent supermajority rule reduces number of amendments by 0.603 per annum (compared to a mean number across all states of 1.823 per annum), and a two-thirds majority rule by 0.243 per annum.<sup>8</sup> These effects were also clearly statistically significant – at the 1 percent and 5 percent levels, respectively. EXPOSURE and LENGTH were also significant at the 1 percent level, indicating that, as Lutz (1995), Ferejohn (1997), and others have found in the context of aggregate data, both longer-lived and longer-in-length constitutions tend to be more prone to amendment (see Lutz 1995: 253; Ferejohn 1997: 524).<sup>9</sup>

The effect of an initiative provision on the ultimate rate of constitutional amendment appears more complex. Only in the case of a relatively demanding initiative requirement (i.e., INITIATIVE<sub>2</sub>) did we find that there was any positive and statistically significant effect on the overall rate of amendment. For less demanding initiative rules (i.e., INITIATIVE<sub>1</sub>), the presence of an initiative rule in a constitution had no statistically significant effect on the overall rate of amendment, most likely because it was possible for proponents of constitutional change to propose an amendment without first building a broad base of political support.

As panel 2 shows, the random-effects model also produced almost identical estimates for these findings, with no change in which variables are significant, and little change in magnitudes, under this model.

As an additional robustness check, we also considered the possibility that our results could be affected by the presence of multiple amendments in a given state

<sup>8</sup> Because LEGBUCK is a categorical variable, LEGBUCK<sub>1</sub> (equal to 1 if and only if a state has a 50% legislative rule) is dropped from the regression for standard collinearity reasons. It is immaterial which of the four variables is dropped, but dropping LEGBUCK<sub>1</sub> makes the interpretation easier.

<sup>9</sup> For similar findings in a global context, see Elkins, Ginsburg, and Melton (2009).

in a particular year, followed by few amendments in other years;<sup>10</sup> therefore, we recoded our data to include a variable AMEND, the value of which is set at 0 if no amendments are made in a particular year and 1 if the constitution is amended. Because this produced a binary dependent variable, we then ran three different econometric specifications: a linear probability, a logit model, and a probit model. Table 8.5 reports the results of these three regressions, with standard errors clustered by state.

Consistent with our results in Tables 8.3 and 8.4, it shows that for three of these specifications, we found that the size of the legislature had a clear negative relationship with the overall amendment rate – and again that this result was statistically significant at the 1 percent level. As before, it also shows that variables such as DOUBLEPASS, SINGSUB, LIMIT, and INIT<sub>1</sub> had no statistically significant effect.

For a linear probability model, as panel 1 shows, the only major difference in our findings was that LEGBUCK<sub>2</sub> and LEGBUCK<sub>3</sub> were no longer statistically significant, and that the effect of INIT<sub>2</sub> was both less statistically significant and reversed – none of which affected our core hypothesis or findings.<sup>11</sup> For a logit model, as panel 2 reports, the only change in the results is that LEGBUCK<sub>4</sub> becomes significant at the 10 percent level, with a positive coefficient indicating that a 75 percent legislative rule makes it harder to amend. For a probit model, which panel 3 reports, EXPOSURE, LENGTH, and HOUSE were all significant at the 1 percent level. The interpretation of the coefficient on HOUSE is that a one standard deviation change in the number of house members leads to a 7 percent decrease in the probability of amendment in a given year (at the mean).

As a final check of robustness, we also considered the possibility of common shocks across states as an explanation for these findings, and thus reran our original year-by-year negative binomial regression for a number of time subsamples of the data.<sup>12</sup> One period in particular that we focused on was the 1960s, because this was a period in which there were both a relatively large number of observations in our data set and large-scale parallel changes across different states in the functioning of many state and local governments, and also in the recognition of various civil rights claims at a state as well as national constitutional level (see, e.g., Williams 1985: 1210–12). Not surprisingly, given the smaller number of observations in this

<sup>10</sup> This could reflect a mechanical effect where a change to the constitution requires multiple textual changes, or bundling of disparate changes as a result of legislative bargaining or other factors.

<sup>11</sup> One explanation for this increased difficulty of amendment in INIT<sub>2</sub> states may have something to do with informal attitudes toward the legitimacy of amendment in such states; compare Vermeule (2006) and Sullivan (1995).

<sup>12</sup> Given that there was no variation within decade (or overall) in certain variables such as the legislative amendment rule, length, and, crucially, the number of house members, it was not statistically feasible to run our main specification including time dummies for each decade.

TABLE 8.5. Estimates of amendment probability

VARIABLES	amend		amend		amend	
	(1)	(2)	(2)	(3)	(3)	Probit
vap	9.79e-09 (9.58e-09)	-0.0155 (0.245)				-0.0168 (0.150)
doublepass	-0.00933 (0.0506)	-0.255 (0.218)				-0.149 (0.133)
limit	-0.0519 (0.0451)	0.00600*** (0.00173)				0.00361*** (0.00106)
exposure	0.0017*** (0.000376)	-0.00506*** (0.00156)				-0.00277*** (0.000845)
legbuck_2	-0.0605 (0.0575)	-0.251 (0.264)				-0.161 (0.162)
legbuck_3	-0.0147 (0.0422)	-0.0427 (0.202)				-0.0325 (0.113)
legbuck_4	0.0634 (0.0546)	0.453* (0.265)				0.251 (0.159)
init_1	0.0323 (0.0362)	0.138 (0.186)				0.0840 (0.108)
init_2	-0.0637* (0.0375)	-0.335** (0.170)				-0.195* (0.105)
singsub	0.0361 (0.0316)	0.122 (0.147)				0.0810 (0.0804)
length	3.78e-06*** (9.65e-07)	4.58e-08 (4.62e-08)				1.08e-05*** (2.62e-06)
vapsquared	-0 (0)	-0 (0)				2.82e-08 (2.63e-08)
house	-0.00074*** (0.000253)	1.78e-05*** (4.32e-06)				-0 (0)
Constant	0.200*** (0.0534)	-1.228*** (0.268)				-0.777*** (0.160)
Observation	4390	4390				4390
R-squared	0.064	0.064				0.064

Robust standard errors in parentheses \*\*\* p<0.01, \*\* p<0.05, \* p<0.1

subsample than our overall data set, we found that our result was somewhat weaker in this context. However, we found that it was nonetheless still present and statistically significant at the 9 percent level.

Thus, overall, we find quite clear support, at a state constitutional level in the United States, for the existence of a scale-difficulty trade-off in the process of constitutional amendment.

#### SCALE, AMENDMENT RULES, AND CONSTITUTIONAL DESIGN

For constitutional designers, this finding also suggests that there is a clear potential for a denominator problem to arise in the operation of constitutional amendment rules.

It is certainly possible that, in some contexts, a progressive increase in the difficulty of constitutional amendment could be beneficial. However, in most cases, the weight of opinion on constitutional amendment favors the idea that the difficulty of amendment should at least remain stable, if not actually decrease over time (for discussion of this more Jeffersonian view, see, e.g., discussion in Holmes 1995: 158–61).<sup>13</sup> This will also be especially true if, as noted at the outset, there are legitimate reasons why the demand to use constitutional amendment procedures may increase with time.

This part, therefore, considers three potential ways in which a constitutional designer might go about attempting to address this denominator problem – (1) sliding-scale constitutional amendment rule; (2) a low, as compared to high, constitutional supermajority rule; and (3) constitutional convention mechanisms – as well as the potential strengths and weaknesses of each when it comes to concerns about political party dominance, minority rights protection, and constitutional stability.

#### Three Possible Design Solutions

##### Sliding-Scale Voting Rules

In the European Union, as the size and membership of the Union have changed over time, so too have both the actual and proposed requirements for “qualified majority” voting in the Council of the European Union. In many instances, these changes have reflected a concern on the part of larger member states to prevent the progressive enlargement of the EU from unduly diluting their voting power (see, e.g., Dinan 2005: 253–54).<sup>14</sup> However, in more recent years, changes have also been

<sup>13</sup> Two reasons to avoid substantially decreasing the difficulty of amendment, over time, are the desire to protect successful constitutional experiments as well as the decision costs and uncertainty associated with whole-scale constitutional revision. Compare Strauss (1996: 910).

<sup>14</sup> For example, in 2004, in the wake of ten new members joining the Union, Article 205 of the Nice Treaty introduced new requirements for qualified majority voting requiring that proposed legislation

proposed to these rules that would make the requirements for EU voting *less* rather than more demanding, in the face of increases in the size of the relevant voting body (see Paris Treaty).

It also seems quite feasible to imagine that a similar model could be adopted at a national constitutional level so as to create a sliding-scale constitutional amendment rule, whereby the level of majority support required for a particular amendment decreased as the size of a relevant voting body increased (or potentially also vice versa). Such a sliding-scale rule could, for example, be derived by combining two separate findings in our data: one relating to the relationship between changes in the scale of the legislature and the difficulty of amendment, and the other concerning the relationship between the formal difficulty of amendment and effective rate of amendment. In our data, we find, for example, that in the first context, a one standard deviation increase in the size of the lower house of a legislature leads to a decrease in the rate of constitutional amendment of approximately 2.7 amendments per decade; and in the second context, that a one-step increase in the formal amendment rule (i.e., the move from LEGBUCK<sub>1</sub> to LEGBUCK<sub>2</sub>, or from 50 percent to 60 percent) is associated with an increase in the amendment rate of approximately 6 amendments per decade. If one combines these findings, and also assumes linearity in respect of the effect of changes in the formal amendment rule, this would imply that the formal difficulty of amendment should decrease by 5 percent for every standard deviation increase in the size of a state legislature – at least up to a lower threshold of 50 percent.<sup>15</sup>

#### Lower Supermajority Rules

While they are far less common than supermajority voting requirements for constitutional amendment (see Elkins, Ginsburg, and Melton 2009), simple-majority rules apply in fifteen states in the United States in the context of legislative amendments to the constitution; and also in many national constitutions, particularly those influenced by the United Kingdom’s noncodified constitutional model (see, e.g., Young 2007). In other countries, such as India, simple-majority requirements also apply to the amendment of a particular subset of constitutional issues.<sup>16</sup>

obtain the support not only of 50% of member states – or 72% of Council members – but also 62% of the total population of the EU, upon a request for such a count (Official Journal of the European Union [OJEU] 29.12.2006 C 321 E/156–157). Subsequent proposed reforms, such as those contained in the Treaty of Lisbon, have also attempted to go further in this same direction, by imposing a supermajority requirement of 55% of member states and 65% of the total EU population (OJEU 17.12.2007 C 306).

<sup>15</sup> This result is, of course, potentially highly sensitive to the assumption of linearity.

<sup>16</sup> Constitution of India, Article 368.

TABLE 8.6. House-legislative rule interaction

VARIABLES	Amends
doublepass	0.0464 (0.109)
limit	-0.0611 (0.129)
legbuck_2	-0.0929 (0.259)
legbuck_3	0.269 (0.246)
legbuck_4	0.838* (0.488)
init_1	0.106 (0.135)
init_2	-0.413*** (0.138)
singsub	0.170 (0.118)
house	-0.00419*** (0.000744)
exposure	0.00799*** (0.000728)
length	1.38e-05*** (2.03e-06)
vap	-1.31e-08 (1.05e-08)
vapsquared	0
houserulesinteract	(0)
Constant	0.0054*** (0.00234)
Observations	-2.560*** (0.226)
Number of states	4390 41

Standard errors in parentheses \*\*\* p<0.01, \*\* p<0.05, \* p<0.1

Probability of Successful Amendment under Simple Majority Rule

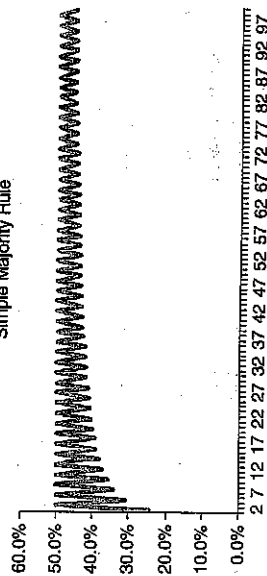


FIGURE 8.2. Scale and probability of amendment given simple-majority rule.

At an empirical level, we also found clear evidence to suggest that simple majority rules of this kind help counteract, at least to some degree, the effect of increases in scale in the legislature on the difficulty of constitutional amendment.<sup>7</sup>

As Table 8.6 shows, for example, when we reexamined the panel data reported in Tables 8.4 and 8.5 and included an interaction term between the number of house members and whether a state has a 50 percent legislative rule (interact HOUSE and LEGBUCK<sub>1</sub>), we found both that the previously estimated variables were essentially unchanged and that there was a clear positive interaction effect, statistically significant at the 5 percent level, between these two variables. The implication of this finding is that when there is an increase in the size of the legislature, the presence of a simple majority rule will tend, all else being equal, to lead to a clear increase in the number of successful constitutional amendments per year.<sup>8</sup>

At a theoretical level, one potential explanation for this, compared to more demanding supermajority voting rules, lower supermajority rules will tend to be more robust to changes in the size of the underlying voting population, particularly from the perspective of the statistical likelihood of there being independent support for a particular amendment. As Figure 8.2 demonstrates, if votes are drawn entirely randomly and independently, as they are in a coin-toss setting, the probability of successful amendments under a simple-majority rule will (subject to integer rounding considerations) remain constant at 50 percent.

<sup>7</sup> As a robustness check, we estimate the samples separately (i.e., those states with a 50% rule and the others) and find a significant difference between the coefficient of HOUSE in the two samples.

<sup>8</sup> Ibid.

The strength and discipline of political parties, for example, will tend to have a major impact on the actual difficulty of constitutional amendment in almost all constitutional contexts. This impact may also be particularly pronounced for sliding-scale and simple-majority voting rules. (In the context of constitutional conventions, the influence of political parties will depend almost entirely on the mechanism adopted for the selection of convention delegates.)

Under such rules, the greater the dominance of a single party, for example, the greater the danger (at least in the case of sliding-scale rules; over time) that amendments will be passed without adequate deliberation and support from a diverse range of perspectives (compare Issacharoff 2003). By contrast, the stronger the degree of competition and discipline among two major parties, the more likely it is that political pressures will constrain the use of amendment procedures in a way that makes formally weak supermajority or even simple-majority voting requirements more than adequate to guard against the danger of overly flexible amendment.

The protection of minorities, and particularly "discrete and insular" minorities in the political process (see Ely 1980), will be another important factor for constitutional designers to consider when adopting various amendment mechanisms. One potential advantage to a constitutional convention mechanism, from this perspective, will be that it allows seats to be reserved for particular minority groups (such as, in Australia, indigenous groups; see Twomey 2008). Sliding-scale and simple-majority rules, on the other hand, may raise particular dangers. If they adopt such rules, therefore, constitutional designers may also wish to consider applying them to only some, rather than all, forms of constitutional amendment—that is, to only those amendments that do not touch on basic constitutional rights protections. Implicitly, this is the model adopted in the United States by state constitutions that have simple-majority amendment requirements, given that such amendments are also subject to the Fourteenth Amendment of the U.S. Constitution.<sup>20</sup> Several other countries have also adopted a similar approach by making certain fundamental rights guarantees either unamendable (see, e.g., the German *Basic Law* of 1949; and, as a matter of judicial interpretation, the *Constitution of India* 1950; see, e.g., Diwan and Diwan 1997, Neuborne 2003) or subject to higher-majority voting requirements (see *Constitution of South Africa* 1996, s. 74(1)).

The value of constitutional stability, and maintaining certain kinds of "internal" constitutional precommitment (see, e.g., Ferejohn & Sager 2003), will be another factor for constitutional designers to consider. One of the most serious objections against a constitutional convention mechanism, for example, is that it can empower a small subgroup of voters or representatives to propose whole-scale revisions to

<sup>20</sup> See, e.g., *Romer v. Evans*, 517 U.S. 620 (1996) (invalidating a Colorado constitutional amendment adopted by popular initiative for inconsistency with the Equal Protection clause).

### Constitutional Conventions

In the United States, both Article V of the Constitution and most state constitutions explicitly provide for the possibility that constitutional amendments may be proposed by a constitutional convention rather than the legislature. Similar provisions also exist in the Swiss Constitution (see Tschabeni 1982), as well as more implicitly in the "small-c" constitutional framework of countries such as Australia (see Twomey 2008).

In most jurisdictions where actual conventions have been called, the practices has also been for conventions to be relatively small, at least compared to national or state legislatures. This, various scholars argue, both increases the likelihood of meaningful deliberation among members of a convention and reduces the costs of convening a convention, as a special legislative-like body (compare, e.g., Saunders 1997; Twomey 2008).

Therefore, provided a constitutional designer can ensure that a constitutional convention is, in fact, called where there is a demand for constitutional change, a convention mechanism will offer another potential way in which to respond to the denominator problem identified in the second section of this chapter.

There are also at least two ways in which a constitutional designer could overcome potential hurdles to a convention being called: first, by creating of a lower threshold for the calling of a convention than for the legislative approval of actual constitutional amendments; and second, by making a popular vote on the calling of a convention mandatory, at fixed points in time. Lower voting thresholds frequently apply in state constitutions in the United States, and also countries such as Switzerland, for the proposal of constitutional amendments, as compared to the ratification or approval of amendments (see, e.g., Swiss Federal Constitution 1999, Articles 138–42). At a state level in the United States, fourteen states also explicitly require a regular vote to be held on whether to call a constitutional convention (see, e.g., Twomey 2008).<sup>21</sup>

### Comparative Dangers (or Disadvantages)

In assessing these three potential design solutions, it is, of course, important for a constitutional designer to consider a range of other constitutional structures and values—such as the structure of political parties (Issacharoff 2003), the protection of minority rights (see, e.g., Rawls 1993; Sager 2001), and the importance of constitutional stability—and not simply the effect of a denominator problem.

<sup>21</sup> The relevant states are: Alaska (every ten years), Connecticut (twenty years), Hawaii (nine years), Illinois (twenty years), Iowa (ten years), Maryland (twenty years), Michigan (sixteen years), Missouri (twenty years), Montana (twenty years), New Hampshire (ten years), New York (twenty years), Ohio (twenty years), Oklahoma (twenty years), and Rhode Island (ten years).

a constitution, when the initial popular demand is for a much narrower form of constitutional updating or dialogue. Whatever the formal legal limits on a particular convention (and there has been a major debate in the United States in particular on this question: see, e.g., Dellinger 1979), as a political matter, most commentators agree it will be extremely difficult to restrain a "runaway convention" that exceeds the bounds of its mandate for constitutional change, and, therefore, the calling of such a convention always represents some threat to constitutional stability.

Compared to more demanding supermajority requirements or even-sliding scale rules, simple-majority voting rules can also pose a threat to constitutional stability. For sliding-scale rules, there will be an initial period in which amendment is more difficult and, therefore, also less likely; thus, our findings in the second section suggest, can have a significant impact on the subsequent likelihood of actual constitutional amendment.<sup>27</sup> This is also another reason, beyond considerations of minority protection, why if they choose such a simple-majority rule, constitutional designers might wish to limit its use to more minor amendments, as opposed to more large-scale forms of constitutional revision (compare, e.g., Article XVIII of the California Constitution), or to certain subjects that do not touch on the "basic structure" of a constitution.

#### CONCLUSION

Political scientists and economists have long hypothesized that there is a connection between the size of a decision-making body and its output, in terms of constitutional amendment; in this chapter, we show that, at a state constitutional level in the United States, there is significant empirical support for this prediction. Our results show that for all states in the United States for which house size data is available, a larger house of representatives leads to a significantly lower probability of constitutional amendment: one standard deviation in the number of house members in a particular state, we found, was associated with 2.7 fewer amendments per decade – or a 14.6 percent reduction relative to the mean number of amendments. These results were also robust to the inclusion of a number of controls, as well to various different specifications in unreported robustness checks.

Our focus in the third section is on exploring the possible normative implications of this for the design of constitutional amendment rules, and in particular on the way in which three design mechanisms – namely sliding-scale voting rules, simple-majority voting rules, and constitutional convention mechanisms – may be able to

<sup>27</sup> In our data we found, for example, that if state amended its constitution in a given year, it was 2.8 times more likely than other states to amend it again 2 years later, and 1.9 times more likely to do so 4 years later. There was also a strong degree of persistence for this effect, with the odds ratio of amendment still standing at 1.4 after 10 years. These findings were also statistically significant at the 1% level.

help address potential denominator problems in amendment procedures over time. The empirical findings of the chapter, however, also have potential relevance to a range of other constitutional debates, including debates about the optimal size of legislatures (see Taagpera and Shugart 1989) and even nations (see, e.g., Alesina and Spolaore 2003). These are simply questions that, because of their complexity, are beyond the scope of this short chapter to address.

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## Collective-Action Federalism

### A General Theory of Article I, Section 8

Robert D. Cooter and Neil S. Siegel

#### INTRODUCTION

The federal system was created with the intention of combining the different advantages which result from the magnitude and the littleness of nations.

de Tocqueville, *Democracy in America*, 2003

Under the Articles of Confederation, Congress lacked the power to protect the states from military warfare waged by foreigners and from commercial warfare waged by other states. The states proved unable to solve these difficulties on their own. They acted individually when they needed to act collectively, and the Framers of the U.S. Constitution concluded that the states could not reliably achieve an end when doing so required two or more of them to cooperate. The solution lay with the establishment of a more comprehensive unit of government - a national government with the authority to tax, raise and support a military; regulate interstate and international commerce, and act directly on individuals. The Constitutional Convention thus instructed the midsummer Committee of Detail that Congress would possess the power to "legislate in all Cases for the general Interests of the Union, and also in those Cases to which the States are separately incompetent, or in which the Harmony of the United States may be interrupted by the Exercise of individual Legislation" (Farrand 1966). The Committee subsequently produced Article I, Section 8.

The Framers lacked the tools and language of modern social science, but they knew a collective-action problem when they saw it. When activities spilled over from one state to another, the Framers recognized that the actions of individually rational states produced irrational results for the nation as a whole - the definition of a collective-action problem. The federal government is the smallest unit that internalizes these spillovers. By internalizing the effects, the federal government is more likely than the states to solve the problem of interstate spillovers. So