**HOW MUCH PEOPLE POWER IN CONSTITUTION-MAKING?**

**LESSONS FROM AMERICA**

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A constitution is the fundamental law of a political system, the set of principles and rules that govern all other official acts. These often are set forth in one or more founding documents as new regimes come into being after civil strife, war, decolonization/ or recognition that existing arrangements have failed. At the core of constitutions is the organization of the state-- the relation of its offices to each other and to its citizens. Viewed in this way the constitution distributes power, functionally and spatially.

A critical feature of any constitution is how it evolves in the wake of social and political change. Change occurs both through a formal process of amendment prescribed in the constitution itself and increasingly judicial review of executive or legislative actions by the courts—principally a Supreme or Constitutional Court. Both formal amendment procedures and the practice of judicial review vary across political systems and although the issues of popular sovereignty and legitimacy are pregnant globally, in this talk I focus primairly on the United States and then briefly on Korea.

The rules for constitutional amendment can be compared in terms of the following principles and the leading risk associated with each:

 First, to what extent does the amendment process recognize popular sovereignty and give citizens a direct voice in initiating or approving change. The risk of institutionalizing “people power,” is the tyranny of the majority and the potential erosion of minority and individual rights.

Second, how difficult is it to amend the constitution and does this weigh stability against preventing necessary changes and creating a gap constitutional law from public morality.

Third, how does the practice of judicial review with its benefit of adaptability risk increasing the politicization of constitutional change and the challenge to the very legitimacy of judicial power?

*Lessons from America.*

Today arguably the most powerful person in the United States is Justice Anthony Kennedy. This is because he usually is the swing vote when the divided Supreme Court of the United States decides by a five to four vote what is constitutional in cases dealing with the separation of powers, individual rights, and federalism. Kennedy ascended to the status of Great Decider when Justice Sandra Day O’Connor resigned. Most recently, his decision to vote with the four liberal judges established same-sex marriage as a fundamental right. This occurred without a formal constitutional amendment or ratification by a referendum, as did occur at roughly the same time in Ireland. In fact, the decision the same-sex marriage overturned the majority votes in many state referenda that only heterosexual marriages were legal.

This example illustrates first, that many, indeed most, changes to the U.S. Constitution occur by judicial review rather than the prescribed amendment process. Judicial review is not mentioned in the text of the Constitution, but it was established in *Marbury v Madison* in 1803 and has not been seriously challenged since. Unlike say Canada where provincial and federals parliaments have the right to override judicial decisions regarding the Charter of Rights, the only recourse in the United States (and Korea) is the difficult process of a constitutional amendment. Second, unlike the case of a number of other countries, including Korea, neither constitutional amendments nor Supreme Court decisions are subject to review by voters or by legislative overrides.. Third, because the United States has a federal system of government there often are conflicts between the national and state constitutions. When such conflicts occur, federal law is supreme and can sweep aside what local majorities have decided through legislation or referendums.

The American system gives great power to nine unelected judges with lifetime tenure, opening the door to complaints about politicization and a lack of democratic legitimacy. So later this paper will examine what role public opinion does play in shaping constitutional chance in the United States and the growing marriage between politics and judging.

*Amending the U.S. Constitution is Difficult.*

The amendment process for the U.S. Constitution reflects one of many compromises between nationalists and the advocates of states’ rights. Delegates from the small states insisted that any amendment should be endorsed by a large number of states to offset the power in Congress of the more populous states. The nationalists argued that the Constitution derived its legitimacy from the people and that the citizens alone, through their elected representatives at the federal level, should have the right to approve fundamental change. The final formula accepted parts of both outlooks

. An amendment can be proposed either by a two-thirds vote of both houses of Congress or by an “application” from two-thirds of the states. Ratification requires when three-fourths of the states, acting either through their legislatures or through special conventions accept the amendment proposed by a supermajority of Congress. The voice of the public is felt exclusively through the choices of their elected representatives, not directly.

Given these obstacles, it is unsurprising that the Constitution has been amended only 27 times. The first ten amendments, known as the Bill of Rights were passed immediately after ratification as a condition for winning support for the new form of government. Most of the later amendments have are directed at expanding the right to vote and a few deal with the tenure of the president. Only two—the banning of the sale of alcohol and the repeal of that amendment—deal with specific public policies, a far cry from California and other state constitutions.

 Six additional proposed amendments, including the Equal Rights Amendment aimed at enshrining gender equality, were sent to the states by Congress but failed to win endorsement from a sufficient number within the prescribed time limit. Even a widely popular amendment such as the proposal to make flag-burning constitutional in the wake of a contrary Supreme Court decision died in Congress. Still, each year dozens of amendments are proposed. The electoral college is a frequent target for amendment as it favors small states and can lead to outcomes such as those of 2000 and 2016 when the elected president has fewer popular votes than the losing candidate. In 200 years, there have been more than 700 proposals in Congress to change the role of the electoral college through a constitutional amendment. Despite the American Bar Association deeming the current system “archaic” and a 2013 Gallup Poll showing that 73% supported abolition of the electoral college in favor of electing the President by the popular vote alone, an amendment is unlikely given the incentives for many smaller states to defend the status quo.

*Is the American Amendment Process too hard?*

Many claim that the difficulty of amending the Constitution makes it hard to adapt American law for the modern age. A leading critic, Georgetown Law Professor Louis Michael Seidman, calls the amendment procedure itself undemocratic, in part because of the equal representation of each state in the Senate. He also argues that because some of the Constitution’s provisions are vague and unclear, the inability to use the amendment process to create certainty leads to highly politicized and technical debates that lead away from the practical consequences of proposed policies.

Defenders of the amendment process, such as New York University Law Professor Richard Epstein, say that its strictness prevents the adoption of short-lived and frivolous changes inspired by fleeting interests and passions. The existing system ensures that amendments will enjoy broad support. Even former Justice Thurgood Marshall has pointed out that the current process has allowed the adoption of necessary amendments that enhance the democratic quality of the system by ending slavery and expanding the right to vote. Of course, it took a civil war to achieve some of these necessary changes. Given the political incentives at play, however, it is unlikely that the amendment process will itself be amended. Thus judicial review remains the main path of constitutional change in the United States

*The California Case of Easy Change*

It is far easier to amend state constitutions than the U.S. Constitution. As a result, state constitutions tend to be bloated and often implement particular policies rather than sticking to the structure of government and its general powers. Alabama’s constitution has nearly 900 amendments, California more than 500, and Florida 484 (State Legislatures Magazine, September 2015).

 California can amend its constitution through a proposal supported by two-thirds of each chamber of the legislature and then approved by a majority of voters in a referendum. But voters can also use the initiative process, which gives them the power to propose an amendment without waiting from action from above. The initiative has been used in California more than 150 times and a simple majority brings success. When these “constitutional” initiatives are passed, the only recourse for the legislature is to sponsor a nullifying referendum .and hope the voters agree. A more common attack on some initiatives has been legal challenges questioning their constitutionality and this brings the courts into play.

In California, citizens can place a constitutional amendment on the ballot by obtaining signatures of 8% of the votes cast for all candidates in the last gubernatorial race. In some years low turnout in the governor’s race can it quite easy to reach the 8% target. In the 2014 election only 7,317,581 votes for governor were cast, requiring less than 600,000 valid signatures to propose an amendment to the state constitution.

The initiative process was conceived as a weapon for grass-roots democracy, a device by which ordinary citizens could overcome a legislature seen as beholden to powerful interests. This romanticized version of the initiative process, however, is a thing of the distant past. Proposition 13, a tax limitation measure passed in 1978 over the opposition of all political, business and academic elites, arguably was the last successful product of a popular uprising.

Since the early 1980s, however, a professionalized initiative “industry has developed in California, with the traditional targets of populism-- politicians, rich people with pet ideas, and powerful interest groups-- sponsoring initiatives and constitutional amendments to promote their own goals. Full-service consulting firms run all facets of initiative campaigns. In California today, all it takes to qualify an initiative for the ballot is money, money, and more money. Because it is so easy to amend the California Constitution, it is eight times the length of the U.S. Constitution, and reads like a cluttered and convoluted document, full of policies dealing with crime, taxes, pesticides and more rather than the fundamental principles of founding documents (E. Lascher, F. Feeney, and T. Hodson, “It’s too easy to amend California’s Constitution,” *Los Angeles Times,* February 4, 2009) The number of initiative amendments increased by 30% over the previous decade between 2000 and 2010. Still, it should be noted that a majority of proposed initiatives do not qualify for the ballot and among those that were put to a vote from 1980 on only roughly one third passed (*At Issue,* Public Policy Institute of California, October 2013).

The problems caused by the easy path to amending the California Constitution can only be fixed by more amendments. Ironically for advocates of change, the simple majority for passage may be an asset in this regard. Among the suggestions for toughening up the process are to increase the number of signatures on must obtain to qualify a measure, to raise the threshold for approval from a simple majority to two-thirds or to require that passage occur in two elections, the rule in Nevada today. For now, though, the California Constitution is certain to experience frequent politically-motivated changes, many purporting to correct the flaws of relatively recent earlier amendments.

*Whom do we Trust?*

In a sense, the difference between the federal and California rules centers on the level of trust in the judgment of voters. Initiatives ask ordinary citizens to make decisions on complicated and emotional issues. The writers of the American Constitution had limited confidence in the capacity of citizens to make such decisions, preferring to rely on the judgment of “enlightened” representatives. At every election, Californians are presented with a booklet outlining lengthy and complex initiatives. Few, the present writer included, read this fully or carefully. Instead, voters are guided (or misguided) by the ballot label and what they know about the supporters and opponents. The wording of ballot measures is crucial and opinions are easily swayed by how an issue is framed. In sum, enlightened judgment is hardly pervasive.

This reality may speak to the virtue of limiting the scope of referenda on constitutional matters. For example, it is easier to expect voters to voters to decide whether the president or governor should be allowed to serve more than two terms than to vote on a complicated set of rules regarding budgetary powers. And even if one has faith in the judgment of ordinary people, it seems wise to require a broad consensus rather than a simple majority before making fundamental changes in the political system.

Despite widespread recognitions of the flaws in the initiative process and the possibilities of elite manipulation, the popularity of initiatives and referenda remains strong. In California, the respected Field Poll found in 2011 that 54% of voters believe that initiative elections were a good thing, compared to 13% who considered them a bad thing, and 26% offering a mixed opinion (The Field Poll, October 13, 2011), The same poll found that by a margin of 71 to 29 percent Californians believe that the voting public is more likely than their elected representatives to consider the broad public interest in making decisions about state laws.

A more recent 2016 Public Policy Institute of California Poll similarly found that more than two thirds of voter felt it was a good thing that “a majority of voters can make laws and change public policies by passing initiatives. . On the other hand, 80% believed that special interests now controlled the initiative process and a majority favored changes such as more disclosure of proponents and contributors. Even so, in a context of broad cynicism about the motives and competence of legislators, the public wants to hold on to the voice that direct democracy provides.

At the national level, trust in government has sunk to a historical low (J. Citrin and L. Stoker, “Political Trust in a Cynical Age,” *Annual Review of Political Science,* 2018). So it is not surprising that in the United States as a whole there is support for national referenda. A 2013 Gallup Poll found that by a margin of 61 to 33 percent Americans favored requiring “a nationwide popular vote on any issue if enough voters signed a petition to request a vote on the issue. Earlier polls showed similar findings. But the issue is not high on the public agenda, making it easier to sustain the gap between constitutional reality and public sentiment.

*The Politics of Judicial Review*

 In the United States, nine judges, often bitterly divided, have transformed the law governing individual rights and governmental power, seemingly following their own well-established preferences. Similar complaints about the political basis of constitutional decisions are appearing in other countries such as Canada, Britain, Germany, and Korea, where the judicialization of politics has spread and Constitutional Courts have made controversial decisions that thwart popular opinion.

 The famous political scientist Robert Dahl wrote that “the Supreme Court follows the election returns, after a time lag.” By this he meant that a President will naturally nominate someone sharing his party’s ideology but that it takes time for openings in the Court to give him the opportunity to do so. Indeed, the longevity of Justices has meant that the opportunity to appoint “one’s own” is unpredictable. Still the nomination process assures that politics matters very much in the staffing of the judiciary and the attitudinal model of Segal and Spaeth means that the electoral majority can shape judicial decisions.

When the preferences of the Court and those of the the winning electoral coalition are at variance for a long time, attacks on the judiciary mount. After Franklin Roosevelt’s election in 1932, the Supreme Court he inherited struck down as unconstitutional the key elements of his New Deal legislation. FDR responded by proposing to expand the size of the Court and pack it with his own supporters. Two Justices switched votes on key cases to ward off the threat and Roosevelt soon had numerous openings and a Court that almost unfailing supported the national government’s power to regulate the economy. Protecting the legitimacy of the Court from attack by a popular President also is a plausible interpretation of Bush appointee Chief Justice Roberts’s innovative opinion giving “Obamacare” a 5-4 victory.

 Even on so-called hot button issues, the Court’s decisions have moved in tune with the tide in mass opinion. *Roe v. Wade* established a constitutional right to an abortion at a time when many states already were legalizing the practice and the public was becoming more favorable. Similarly, the constitutionality of same-sex marriage was established following a remarkably rapid shift toward majority approval in the public. When the Court decided by 5 to 4 in 1972 that the death penalty as then practiced was “cruel and unusual” punishment and hence unconstitutional, there was an immediate political backlash. States adjusted their procedures and three years later the Court reversed itself.

Nevertheless, the polarized Supreme Court of today is a reflection of the wide ideological gap between Republican and Democratic elites. In this context, judicial nominations, particularly for the Supreme Court, have become heated battles, taking on all the features of a political campaign, with outside groups lobbying frantically to promote or prevent the appointment of some with immense power to decide divisive cases.

One lesson from America is that even in the absence of a blunt instrument like the referendum, politics, via elections, the appointment process, potential constitutional amendments, threats of impeachment from Congress, and the Supreme Court’s sensitivity to tidal changes in opinion, give “the people” influence over the state of constitutional law. But a second lesson is that the bitter fights over nominations, the practice of making votes transparent and publicizing dissenting opinions all make the Court appear to the general public as just another political body. For a variety of reasons, courts are taking on more and more issues once left to legislative politics and federalism has reared its ugly head with states attacking actions of the federal government—take immigration and environmental policies as recent examples—placing the courts even more in the crosshairs of public opinion. Politicization erodes legitimacy and this makes judicial restraint within the Court itself, a general strategy of deference to the ‘political branches,” and reducing the Court’s agenda an antidote to the dangers of straying too far from majority opinion.

 *The Supreme Court in the People’s Court*

Public approval of the Supreme Court has declined over time. In 2002 Gallup found that 62% approved of how the Court was handling its job compared to 25% who disapprove. By mid-2017, only 47% approved, compared to 45% who disapproved. Still, confidence in the Supreme Court is consistently higher than that in Congress or the executive branch. And the decline in approval does not mean that people want the role of the Court changed. Only 24% in a recent Gallup Poll agreed that “We should do away with the Court if it consistently makes decisions most people disagree with” and 71% believed that “the Supreme Court can generally be trusted to make decision that are good for the country as a whole.

These mixed results are partly a function of the low esteem in which other political figures and institutions are held. But the fact that more engaged and active citizens are more divided about the power of the judiciary and more likely to change their views with the partisan composition of the Court is a warning that the legitimacy of the current mode of constitutional development in the United states is fragile.

*American and Korea*

 America does not allow for a referendum on amendments to the national constitution; Korea does provide for this after a legislative decision to propose an amendment. As the accompanying charts show a number of countries—Ireland, Switzerland, Denmark, Finland, and Australia among others-- do require popular votes on constitutional amendments, although these are not always binding. In a few countries—Switzerland, where people power is at a maximum, Croatia, New Zealand, and Finland, the public can play a role in initiating and amendment. So amendment is more accessible to people power in many countries other than the United States or Korea, although nowhere is it as open as in California.

 In Korea constitutional amendment is covered by articles 128, 129, and130 of the Constitution. A majority of the members of the National Assembly or the President, (something absent in the United States) can proposed an amendment. Then follows a twenty days of public notice and within sixty days if it wins two-thirds support of the votes in the National Assembly. Finally, there is a national referendum within thirty days and it the amendment is adopted if a simple majority votes yes and more than 50% of eligible voters cast ballots. So compared to the United States the time constraints on passage are stricter but the nominal role of the public is greater.

Most early amendments to the post-World War II Korean Constitution evolved centered on the powers and the term of office of the President. This frankly is a common occurrence in new, post-colonial regimes. Given the political divisions within Korea during its post-1987 democratic era, most scholars agree that the amendment power is difficult. In a polarized party system, winning two-thirds support for anything seems a bet on hope over experience. This has engendered another similarity to the American experience. Korea’s Constitutional Court through judicial review often is seen as having the “last word.” And as in the United States, this power of the Constitutional Court has raised complaints about a “democratic deficit” or “counter-majoritarian difficulty” (Chaihark Harm, “Beyond law vs. “politics in constitutional adjudication: lessons from South Korea,” *International Journal of Constitutional Law,* volume 10, January 2012, pp. 6-34).

 According to Professor Harm, Korea’s Consitutional Court has waded into questions such as the regime’s legitimacy, deciding what it means to be a Korean, and even the location of the nation’s capital (pp.13-14.). The Constitutional Court played a role in the impeachment of popularly elected President Roh, something that went beyond the judiciary’s role in America’s impeachment case against President Clinton. Over time, as a result of tweaks in the law, appointment to the Constitutional Court has become more open and more political, a process akin to the American practice that can only increase charges that the Court itself is ultimate a “political” rather than a “neutral” institution.

 It must be said that constitutional adjudication is a relatively new phenomenon in Korea, properly dated from 1987as compared to 1803 in the United States. Yet in both instances, a difficult amendment procedure, the need for judicial review, a polarized political system, and the global trend toward throwing political issues to the judiciary for decision have pointed constitutional practice in a similar direction. These developments all raise the specter of a potential crisis of legitimacy for the judiciary, but to date popular support has been shored up, ironically, by the greater public contempt for elected officials. This is a fragile basis of approval, however, and nothing is forever.

 Democratic regimes require a higher regard for the norms and procedures of the fundamental law than for the allocation of costs and benefits of ordinary legislation. This puts those in charge of responding to demands for constitutional change in a difficult positon. Popular sovereignty is a hallmark of democracy, but it would be naïve to believe that ordinary citizens have the capacity to design a new institutional order or to anticipate the consequences of changing rules of the game. But people do respond to the failure of rulers to play by the rules and political systems must be flexible enough to respond to this.

 The United States and Korea differ in the formal role allocated to voters in the process of amending their Constitutions, although Korea wisely has eschewed the promiscuous process of California. Despite their historical and cultural differences, both countries now live with the benefits and costs of judicial review and the task of making this process compatible with democratic sentiments. Still, the inescapable lesson is that constitutions always are a political document and hence the storm center of contending viewoints.