

UC Berkeley

The Icelandic Federalist Papers

Title

No. 14: Convention and the Power of Amendment

Permalink

<https://escholarship.org/uc/item/7pc1x6bx>

Author

California Constitution Center

Publication Date

2017-11-28

The Icelandic Federalist Papers

No. 14: Convention and the Power of Amendment

To the People of Iceland:

Today I write about the people’s political power to establish, alter, and reform their government. Central to the idea of democratic, representative government is the view that the people grant a government its powers to be exercised for their benefit. The people’s right to ordain and establish their government, to alter and amend it to meet their needs, and, if necessary, to abolish it—this is the essence of popular sovereignty.¹ Constitutional scholars believe that there are two alternate justifications for this republican principle: consent and delegation. Iceland’s draft constitution is valid on either ground.

A constitution is a social contract that defines a community’s system of rules and the rights and duties of its citizens.² A central purpose of a constitution is to reduce uncertainty over future individual and community behavior (thus reducing transaction and decision costs), while also attempting to achieve optimal welfare and resource allocation. Any constitutional system must confront a difficult balancing problem: How to give government sufficient power to operate effectively while preventing government from getting out of control. The popular sovereignty theory is one solution to this problem.

Questions of popular sovereignty generally divide between the “delegation” theory and the “consent of the governed” theory. In the delegation school of thought, a people forming a government give up their sovereignty by the act of creation. The people have a right to participate in government, which they exercise by choosing their representatives—but once that choice is made, the previously diffuse participation right of the people in general is vested in the representatives, and nothing remains of the people’s right. This view is necessarily dichotomous, describing two distinct groups possessing opposing interests, hoping to strike a balance between the two that keeps the society poised between tyranny and anarchy. In American revolutionary times, popular sovereignty was viewed from the delegation perspective. Several features of the American system’s design reflect this understanding. Specifically, the checks and balances inherent in the divided powers structure of the federal government were intended to mitigate this principal-agent problem. So was the division of the legislature into two houses with different compositions and varied terms of office. It also assumed that the system would self-maintain through periodic amendment.

In contrast with the delegation theory, the consent theory holds that the people retain ultimate sovereignty because consent of the governed is always necessary. Here, a constitution’s legitimacy derives from the extent to which a populace perceives the constitution as something they agreed to and are bound by, and the larger the majority required for ratification the greater the likelihood the constitution will be viewed as binding on all citizens. If governance is a social contract wherein the people cede their sovereignty to representatives only so long as the government promotes the public interest, the contract must be amenable to reformation. Accordingly, modern popular sovereignty theory holds that all political power is inherent in the people, and

¹ See, e.g., California constitution Article II, section 1.

² The discussion in this article drawn from California Constitutional Law: Popular Sovereignty (2017) 68 Hastings L. J. 731 David A. Carrillo, Stephen M. Duverney, and Brandon V. Stracener.

the people only delegate a limited amount of their political power to the government they create to serve them. Government is instituted to serve the people's needs, and the people always retain the power to reform or remake their government when necessary to serve their interests.

Indeed, America's Declaration of Independence proceeds from this revolutionary premise: Whenever the existing government "becomes destructive of these ends [life, liberty, and the pursuit of happiness], it is the Right of the People . . . to institute new Government . . . as to them shall seem most likely to effect their Safety and Happiness." At times, periodic amendment or even wholesale revision may be inadequate to conform the government to the people's needs. And when the public good may require it the people may exercise their power to remake their government, gather in convention to draft a new charter, and approve it by popular vote.

Broadly speaking, the people exercise direct political power to establish and revise their government in two principal ways: by ordaining and establishing their government in constitutional convention, and by altering and reforming the constitution through an amendment process. Through convention, the people's delegates craft a constitution setting forth the fundamental framework of their government, which is then proposed to and ratified by the people (either directly or through their elected representatives). This process ensures that a constitution is the product of reasoned deliberation, compromise, and consent.

So what does this mean for Iceland, and its constitutional change process? If the people are sovereign, then they hold ultimate political power and may use that power collectively to create or remake a government, which may be done in a convention. And when the people gather in convention to draft a new charter, they operate under no substantive limits. This full exercise of the people's sovereignty—the "people's power"—is greater than Althingi's mere legislative power. Yet opponents of the new constitution rely on a consent theory to argue that Althingi can ignore a convention's results. That premise is flawed, because it matters not what constitutional philosophy one holds: the draft constitution is valid in either view. From a delegation perspective, the draft is a lawful product of a process Althingi itself initiated. And from a consent perspective, the entire sovereignty of the people is represented in the convention, which holds the people's organic power of formation or reformation. The character and extent of a constitution that may be framed by the people in convention is freed from any limitations.

Iceland's draft constitution was born of such a process. It was developed in convention, represented first by the National Assembly, and then by the Constitutional Assembly, followed finally by the Constitutional Council. The product of this convention has been presented to the people and Althingi, and it cannot be ratified without Althingi's assent. But the excessively onerous voting rule for approving amendments to the existing constitution has prevented the draft from being adopted.

Every voting rule choice requires a cost-benefit analysis. For example, unanimity encourages compromise and consensus but has high decision costs; a simple majority has low decision costs but risks minority oppression. The optimal balance of those value sets generally results in submajority rules being confined to low-importance contexts, while supermajority rules are restricted to ultimate substantive decisions. A significant factor in determining voting rules is the degree to which consensus is desirable and achievable. Those twin concepts are in some tension, and are inversely related: the unanimous consent of all voters is very desirable, but very difficult to achieve, whereas approval by a plurality is easily achieved but undesirable. Requiring a supermajority for a convention or ratification has advantages (greater consensus lends legitimacy), but requiring a supermajority for all subsequent changes risks unduly protecting the status quo and

giving disproportionately greater effect to the views of an increasingly remote founding generation. That is Iceland's situation today.

This is the balance that the United States sought in providing for amendments to its Constitution. The U.S. Constitution affords both the legislature and the states the power to propose amendments, which must be ratified by a supermajority of the states. Power is dispersed, but consensus is required. In defending this procedure, James Madison explained that “[i]t guards equally against that extreme facility, which would render the Constitution too mutable; and that extreme difficulty, which might perpetuate its discovered faults.”³ And in reflecting on the U.S. Constitution's amendment process, U.S. Supreme Court Justice Joseph Story offered the following observation:

It is obvious, that no human government can ever be perfect; and that it is impossible to foresee, or guard against all the exigencies, which may, in different ages, require different adaptations and modifications of powers to suit the various necessities of the people. A government, forever changing and changeable, is, indeed, in a state bordering upon anarchy and confusion. A government, which, in its own organization, provides no means of change, but assumes to be fixed and unalterable, must, after a while, become wholly unsuited to the circumstances of the nation; and it will either degenerate into a despotism, or by the pressure of its inequalities bring on a revolution. It is wise, therefore, in every government, and especially in a republic, to provide means for altering, and improving the fabric of government, as time and experience, or the new phases of human affairs, may render proper, to promote the happiness and safety of the people. The great principle to be sought is to make the changes practicable, but not too easy; to secure due deliberation, and caution; and to follow experience, rather than to open a way for experiments, suggested by mere speculation or theory.⁴

Iceland should heed this guidance and seek a similar balance—a stable government, with the flexibility to address constitutional defects through a cautious and deliberative (but practicable) process. The ability to make structural reforms is necessary to enable Iceland to adapt to changed circumstances. The existing amendment procedure and even the possibility of holding another convention are poor solutions. As the political inaction of successive Icelandic governments has shown, the supermajority requirement for constitutional amendments is so onerous as to permit a minority faction to forestall any change. And it is simply too costly to hold a convention frequently. A simpler amendment procedure would cure many of Iceland's ills—by enabling Icelanders to cure them. The draft constitution ensures that future constitutional amendments are not made without either direct input from the people *or* strong parliamentary support. Specifically, Article 113 provides that any constitutional amendment passed by Althingi must be ratified by a referendum, though Althingi retains the power to bypass a vote if an amendment is passed by a five-sixths supermajority. This provision acts as a restraint against Althingi using its powers to reform the government without the people's consent.

The improved amendment process addresses a common criticism of the draft constitution: That it should not be ratified because it is imperfect. So too, of course, is the present Icelandic constitution—just as every constitution is, in its own way imperfect and incomplete. As Alexan-

³ Madison, *The Federalist* No. 43.

⁴ Joseph Story, *3 Commentaries on the Constitution of the United States* § 1827 (1833).

der Hamilton remarked in his concluding essay in the Federalist Papers, “I never expect to see a perfect work from imperfect man. The result of the deliberations of all collective bodies must necessarily be a compound as well of the errors and prejudices, as of the good sense and wisdom of the individuals of whom they are composed.”⁵ And in response to calls that further amendments be made before adopting the U.S. Constitution, Hamilton offered the reflection of Scottish philosopher David Hume, who explained:

To balance a large state or society . . . whether monarchical or republican, on general laws, is a work of so great difficulty, that no human genius, however comprehensive, is able by the mere dint of reason and reflection, to effect it. The judgments of many must unite in the work: EXPERIENCE must guide their labour: Time must bring it to perfection: And the FEELING of inconveniences must correct the mistakes which they inevitably fall into, in their first trials and experiments.⁶

This lesson applies equally to Iceland today. Time and experience have guided you in drafting the content and structure of the draft constitution; time and experience will test you further as you learn from and correct its mistakes moving forward. But that is the enduring lesson of the constitutional experiment: That the people ordain and establish a government that is not perfect, but perfectable—and that it is your solemn duty to continue to strive toward that end.

—CIVIS

⁵ Hamilton, *The Federalist* No. 85.

⁶ Hamilton, *The Federalist* No. 85.