

Amendmentphobia

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Constitutions are not set in stone. When a constitution does not work or does not work in a way that is desirable, it should be altered or in extreme cases abandoned and replaced with a new governing document. A constitution's amendment procedure provides the mechanism for correcting the constitution's deficiencies. Amending a constitution is serious business; amendments should not be adopted on a whim. At the same time, constitutions should not take on a timeless quality, with the amendment tools effectively read out of the document and textual change rendered near impossible. Among constitutions, amendment procedures, of course, vary. Some constitutions can be amended more easily than others. Some constitutions set explicit limits upon the changes that may be made through the amendment process. Nonetheless, like empires, no constitution is forever. Constitutions do not arrive from on high. They are made and can be remade by human hand.

Apart from the ease or difficulty of the formal amendment procedure itself, fear of amendment – amendmentphobia – can stand in the way of constitutional change. That is, even though there might be a general consensus that provisions of the constitution are not serving the people well and that altering or abolishing those defective provisions would be a useful corrective, amendments can fail because of anxiety about making a revision – any revision – to the constitution.

Amendmentphobia has long afflicted the United States (US). However serious a deficiency may be, whatever the level of support for reform, amending the US Constitution is no longer viewed as a viable option for improving the system of government. Rather, large portions of the American public and of their leaders view the US Constitution in sacred terms such that amending it is at best unwise and at worst akin to sacrilege. Amendments proposed in the US Congress thus die in committee without any further action. Indeed, even talk of amendment signals a lack of connection to reality and raises suspicions of infidelity and treachery.

While amendmentphobia shuts off legitimate uses of a constitution's

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amendment procedures, it does not inevitably leave a constitution to stagnate. Instead, with formal amendments foreclosed, *courts* gain power to adopt, in the name of constitutional interpretation, reforms they themselves view desirable. Such reforms might or might not track popular opinion about needed corrections to governing arrangements.

The text of the US Constitution has been amended just twenty-seven times since it took effect among the original thirteen states in 1789. Reading the US constitution, including those twenty-seven amendments, takes about thirty minutes. Yet that exercise would give a very incomplete understanding of the US Constitution's meaning at various historical periods, how the document has changed, and what it means today. To know those things requires doing what every American law student does when studying the US constitution: reading also thousands of pages of decisions by the US Supreme Court (and lower courts as well). For instance, the US Constitution protects the following rights (among others): to marry a person of the same gender; to burn the American flag without being subject to punishment; to have a state-supplied attorney during police interrogations and at criminal trial; to send one's child to a parochial school; to move from one State to another; to view pornography; to abstain from voting; to refuse medical treatment; to purchase and use contraception; and to obtain an abortion. None of these rights are mentioned in the constitution; none of them came about because the original document was amended to expand the roster of individual liberties. Instead, each of these rights has resulted from judicial interpretation of text that has remained immune to change.

Constitutional change via judicial interpretation has an uneasy relationship to formal constitutional amendment. Popular judicial rulings can fuel amendmentphobia because if the courts can keep us all on the right track, there is no need to gear up the amendment machinery. So, too, if, as a result of the practices of judicial interpretation, a constitution comes to be viewed as the domain of the courts (rather than of the people) and the province of judicial expertise, intervention through amendment can appear additionally problematic and undesirable. On the other hand, correcting an unpopular judicial ruling is all the more difficult when, as a result of a lack of use, the amendment procedures have gone rusty and seem unavailable. As a result, courts can be ever more confident that changes they pursue through rulings on the meaning of the text will not be subject to reversal through the amendment process. Acquiescence to judge-led reforms on the part of political actors and the public thus means also paralysis with respect to judicial rulings, even those that generate criticism and opposition. Once it takes root, amendmentphobia resists displacement.

Compared to the situation in the United States, Italians have been more willing to revise their constitution. That difference might soon disappear. The

failure in Italy of the proposed 2016 reforms raises a serious prospect of amendmentphobia taking hold among Italians, thereby rendering future amendments to the Italian Constitution more difficult. That is, the practical outcome of the 2016 referendum, in which a large majority rejected the proposed reforms, is not limited to a preservation of the pathologies of the existing Italian political system. Instead, the 2016 experience may well make other amendments – however sensible, however desirable – harder to achieve in the future. As a result, future constitutional change in Italy, may, as in the United States, come to depend upon courts (or perhaps other governmental actors) exercising power to interpret and apply the Italian Constitution in ways that achieve reform without any textual modifications to the constitution itself.

Two particular features of the 2016 reforms make amendmentphobia likely in Italy. The first is the very nature of the referendum itself. The process unwisely combined the big and the small. On the one hand, the proposed reforms involved sweeping substantive changes to the Italian Constitution: to alter fully one-third of the existing constitution by amending forty-five articles and repealing a further two out of the one hundred thirty-four articles in force (and one hundred thirty-nine of the original text). On the other hand, voters were presented with a compact yes/no question that read (my translation) as follows:

‘Do you approve the text of the constitutional law concerning ‘Provisions for exceeding the equal bicameralism, reducing the number of parliamentarians, the containment of operating costs of the institutions, the suppression of the *Consiglio Nazionale dell’Economia e del Lavoro* (CNEL) and the revision of title V of part II of the Constitution’ approved by Parliament and published in the *Gazzetta Ufficiale* no 88 of 15 April 2016?’

The problem is that the above text does not reflect anywhere near the actual reforms on the table. Indeed, by itself, the provided text verges on meaningless. The ordinary voter (busy with work, family, and other matters of daily life) who had not paid attention to campaign materials or media reports and who had not consulted the *Gazzetta Ufficiale* would have little idea what the actual referendum question was. Even voters who had followed closely the preceding informational campaigns and debates and who had taken steps to inform themselves of the proposed reforms could easily arrive at the poll confused about the full significance of a yes vote. It would be the rare voter indeed who could have reliably explained what the revised constitution would look like should the yes votes prevail.

A vaguely-worded referendum question that conceals the full scope of proposed change and assumes access to a governmental gazette to find out

what is afoot does not generate trust on the part of voters or their confidence in the officials who seek approval of a proposed constitutional amendment. Going forward, suspicion towards uses of the amendment tools is likely to linger and to arise with respect even to referenda on a small scale (for example, involving individual components of the 2016 package) or in which the ballot question better reflects the precise reform. As a result of the 2016 experience, Italian voters are now primed to wonder whether the question they are asked in any future referendum truly captures the actual scope of the proposal or whether there is some built-in assumption that they have acquired from some other source the necessary information to understand what they are being asked to decide. Under such circumstances, whatever the merits of the proposed change, the natural inclination is simply to vote no.

The second disconcerting feature of the 2016 referendum was Prime Minister Matteo Renzi's announcement that he would resign should the voters reject the proposed reforms. Elections are the opportunity for voters to choose, retain, or replace their political leaders. The amendment process is quite different. Because it results in a change to the Constitution that will apply regardless of who is in power at any particular moment, the amendment process should not be tied to the interests or fate of any political leader or party. Thus, once Renzi made the reforms a *de facto* confidence vote in him and in his Government, voters could no longer be expected to view the referendum purely as an effort to improve the foundational arrangements of the system. Instead, with Renzi's posture, a yes vote represented some degree of approval of Renzi himself.

Muddying constitutional reform with ordinary politics does not bode well for the amendment process going forward. In the future, voters are again likely to view proposed amendments through thick political lenses. Whether or not leaders threaten to resign if the result is not to their liking, amendments will raise suspicions of political opportunism. The reformist who promotes an amendment in a genuine effort to better the polity inevitably bears the mark of political hack and will be suspected of deploying the tools of constitutional reform for partisan gain. Voters can be expected to resist such efforts. Amendmentphobia is the natural result.

Context also matters. In Italy, as in the United States, large numbers of citizens hold their respective national constitutions in high regard. In such contexts, misuses of the amendment tools are readily noticed and condemned. For Italians who revere their constitution, the missteps of 2016 are not easily forgiven or forgotten.

If fear of amendment blocks future changes to the text of the Constitution itself, the question in Italy becomes: how else will reform occur? In the United States, courts have pioneered constitutional reform. That approach, however, has come at significant cost: increasingly, We the People are replaced by We

the Judges. Perhaps Italians can resist a similar displacement of popular authority. Doing so requires an accounting of and a grappling with the full effects of the failure of 2016.