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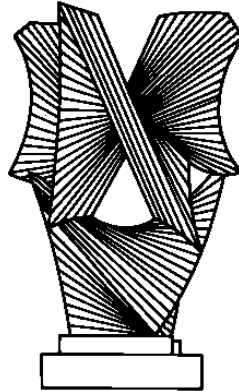
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CONSTITUTIONAL AMENDMENT RULES: A COMPARATIVE PERSPECTIVE

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6. Constitutional amendment rules: a comparative perspective

*Rosalind Dixon**

Formal provision for constitutional amendment is now a near universal feature of national constitutions (see e.g. Lutz 1995; Elkins et al. 2009). However, significant controversy remains over both the function of formal procedures for constitutional amendment and the key determinants of the comparative difficulty of such processes.

An ‘amendment’ denotes the idea of ‘correction/repair or improvement’ (*Oxford English Dictionary*) and, for most commentators, constitutional amendment rules are designed to serve exactly these purposes – that is, to allow for the correction of or improvement upon prior constitutional design choices in light of new information, evolving experiences or political understandings (see e.g. Denning and Vile 2002). Another view, which this chapter explores, is that constitutional amendment processes are designed not so much to allow changes to the constitution’s original design but rather to allow legislative and popular actors greater scope to influence constitutional courts’ evolving interpretation of that design.

Because in each case such processes assume the existence of some prior constitutional instrument as the object of correction or improvement, many constitutional scholars suggest that some forms of constitutional change are too radical or all-encompassing to count as amendments to a prior constitutional instrument (see e.g. Simeon 2009; Zohar 1995: 318). The distinction may have important legal consequences in some jurisdictions (for instance, in California) because different formal requirements apply to processes of constitutional amendment as opposed to ‘revision’ (see Constitution of California, Art. XVIII; and discussion in Grodin et al. 1993).

On the other hand, most constitutional scholars agree that not all forms of constitutional change in fact involve processes of constitutional amendment, properly so-called. While there may be no clear line separating amendment from its alternatives (see e.g. Lessig 1993; Levinson 1995; Michelman 1986), most scholars nonetheless agree that constitutional change by way of some processes – such as by judicial interpretation (Lutz 1995; Strauss 1996), shifts in political practice or convention (Young 2007) or more provisional forms of constitutional ‘workaround’ by the political branches (Tushnet 2009) – does not generally amount to actual constitutional amendment. Rather, constitutional ‘amendment’ is generally understood to require some kind of formal legal deposit in the text of a written constitution (but see Levinson 1995).

Another view (see Ackerman 1991) is that constitutional amendments denote those forms of constitutional change that originate via certain exceptional or ‘higher’ forms of law-making, namely: those involving high levels of popular mobilization and inter-branch collaboration, rather than more ordinary forms of legislative, judicial and executive action. On this view, amendments may or may not be reflected in formal changes to the text of a constitution and also be enacted outside, as well as within, formally pre-defined channels for constitu-

tional amendment (Ackerman 1991).¹ For simplicity, however, this chapter puts to one side this alternative definition of amendments, and instead focuses on the more generally accepted view: that processes of constitutional amendment involve legislative and popular involvement, but also formal change to the text of a written constitution.

Against this background, it considers what existing constitutional experience and scholarship say about (1) the function, danger and difficulty of formal constitutional amendment processes; and (2) what open questions remain, in comparative constitutional scholarship, in this area. Much of the literature and data it draws on in this context are American, in part because of the excellent democratic laboratory American state constitutions provide for testing various hypotheses about constitutional amendment, and also because few countries have amendment rules which have generated the same kind of critical attention as the US (see Griffin 1998; Levinson 1995). However, from a comparative perspective, reference is also made to the constitutional amendment processes in Canada, India, South Africa and Australia; as well as to the findings of large-sample studies of constitutional amendment at a global level. India in particular provides an interesting case-study in this context because of the development by the Supreme Court of India of certain implied limits on the power of constitutional amendment.

1 AMENDMENT FUNCTIONS

In some cases, processes of constitutional amendment will serve much the same function as processes of constitutional enactment or whole-scale revision, namely: to establish (or re-establish) the basic procedural or substantive framework for the process of democratic self-government in a country, or sub-unit of a state. In the US, the leading example of this involves the Reconstruction Amendments (i.e. 13th, 14th and 15th Amendments to the Constitution); and in Canada, the adoption of the Canadian Charter of Rights and Freedoms 1982 (for discussion, see Manfredi). In Australia, there have also been several proposals to amend the Commonwealth Constitution 1901 (so as for example to create an Australia republic) that would have fit this category had they passed (see Winterton 1986; Winterton 2001).

Major constitutional changes such as this can rarely be achieved by formal legal means other than constitutional amendment. In such circumstances, formal constitutional amendment procedures therefore serve not only to promote the chances of large-scale constitutional change, but also to increase the chances that such change will occur (at least more or less) within existing constitutional frameworks, rather than via processes of whole-scale constitutional revision or overthrow (compare Denning and Vile 2002; Griffin 1998; Lutz 1995).² This could also be one justification for including in a constitution explicit provision for broad forms of constitutional revision at the initiation of (say) a constitutional convention (see e.g. US Constitution, Art. V, Afghan Constitution, Art. 150).

In a similar but more routine way, constitutional amendment procedures also help constitutional decision-makers alter certain specific aspects of constitutional procedure or structure. Absent amendment, changes to basic constitutional 'rules' such as this, as opposed to more open-ended constitutional standards, will almost always occur informally, rather than through processes of judicial interpretation or explicit legislative 'updating' (on this distinction see, generally, Sullivan 1995, and also more specifically, Murphy 1995: 165; see also Dixon

2010). By creating formal channels for constitutional change of this kind, therefore, constitutional amendment procedures can help promote commitments both to constitutional transparency (see Rawls 1993) and the 'rule of law' (see e.g. Griffin 1998: 42, 52).

Actual constitutional amendments of this kind have also been extremely common in jurisdictions such as Australia, Canada and even the US. In Australia, in more than one hundred years there have been only eight successful referenda under s. 128 of the Commonwealth Constitution and every one of these has approved changes to basic rules of constitutional procedure or structure of this kind.³ In South Africa, there have been 16 constitutional amendments passed since 1996 and each one has again been directed to clarifying, or altering, the operation of constitutional rules as opposed to standards.⁴ In the US, it has also been the case as John Ferejohn and Larry Sager (2003: 1960) note that with the important exception of the Reconstruction Amendments, the post-Bill-of-Rights amendments have 'almost exclusively been preoccupied 'with mechanical, textually-explicit revisions governing the election of the President, Vice-President, and members of the Senate, presidential terms and success, and the selection of presidential electors by residents of the District of Columbia – all matters ... that have been largely outside the [broadly accepted] interpretive discretion of the judiciary'.⁵

In other cases, constitutional amendment processes tend to be linked more closely to other mechanisms for constitutional change, such as judicial interpretation. The function of constitutional amendment procedures will in such cases also be distinct: instead of being to allow improvement upon (or correction to) prior constitutional design choices, it will be to help legislatures, and thereby also citizens, to engage in more effective forms of democratic 'dialogue' with courts about the court's interpretation of that design. It may do this in two ways: first, by jump-starting or generating new interpretations of the constitution by courts (see Forbath 2003); and second, by trumping existing judicial interpretations (see Dixon forthcoming; and compare also Denning and Vile 2002 on the 'checking' function of amendments).⁶

For citizens in particular, by generating certain kinds of judicial intervention, amendment procedures can help reduce the agency costs associated with representative forms of government (compare Boudreaux and Pritchard 1993; Levinson 2001: 277, 278). This is one logical explanation for why many states in the US and also some national constitutions (perhaps the most notable example being that of Switzerland) contain distinct provisions allowing citizens to initiate processes of constitutional amendment by popular initiative or petition (see Levinson 1996: 113–15). Another is the influence of theories of popular sovereignty, which, some authors argue, further support an implied right to amendment by plebiscite in certain constitutional contexts (see e.g. Amar 1994 on the US; and Elster 2003 on the French experience of response to constitutional amendment proposals by de Gaulle).

Constitutional amendment procedures can perform these generative and trumping functions in two principal ways: first, by changing the textual basis for subsequent processes of constitutional interpretation by judicial and executive actors; and second, by creating a clearer evidentiary record or source of information about legislative or popular constitutional understandings (compare Levinson 2001 at 273). Changes to the text of a constitution do not only have direct legal consequences. They also, in many cases, serve to create a focal point for additional social movement mobilization for constitutional change (see e.g. Siegel 2006; compare also Denning and Vile 2002: 279). At an evidentiary level, constitutional amendments (and indeed even proposed amendments (Dixon forthcoming)) can also affect courts' willingness to respond to democratic pressures for constitutional change at an evidentiary

level, by giving clearer and more principled expression to democratic support for constitutional change.

Good examples of this first effect in the US involve first, the Due Process Clause of the Fourteenth Amendment and the progressive ‘incorporation’ by the Court of various rights-based guarantees against the states; and second, the role played by the Equal Protection Clause in both generating a substantial body of jurisprudence aimed at eliminating discrimination based on race, nationality and gender and also encouraging the Court formally to overrule *Dred Scott v Sanford*, 60 US (19 How.) 393 (1857) in the *Slaughterhouse Cases* (Dixon 2010; Vermeule 2006: 236–7).

An example of the second effect involves the 11th Amendment, as a response to the Supreme Court’s decision in *Chisolm v Georgia*, 2 US 419 (1793), holding that the plaintiff, as a citizen of South Carolina, could file a suit in the original jurisdiction of the Supreme Court against the state of Georgia, as defendant. In reversing this decision in *Hans v Louisiana*, 134 US 1 (1890), the Court held that one reason that it was free to revisit *Chisolm* was: ‘the adoption of the [11th] amendment’ (134 US 1, 118–19. However, it also implied that the significance of the amendment in this context was not so much its legal force but rather its connection with the broader ‘manner in which *Chisolm* was received by the country’ (id).

A similar, if more modest, example in a comparative context of the evidentiary value of formal constitutional amendments, and the generative effect this can have, involves the 1967 amendments to the Australian Commonwealth Constitution 1901, conferring additional powers on the Commonwealth Parliament to make special laws with respect to indigenous Australians. In subsequent cases, such as *Wurridjal v Commonwealth of Australia*, [2009] HCA 2, for example, at least one justice, Justice Kirby, held that ‘[w]hatever exclusions originally intended by the founders of the Constitution, following the amendments by the 1967 referendum it is clear that the reference in s 51(xxxi) [of the Constitution] to “property” is ... not confined to the traditional notions of “property” as originally inherited in Australia from the common and statute law of England [but rather] ... incorporate[s] notions of “property” as understood by indigenous Aboriginals, at least so far as such notions are upheld by Australian law’ (377–8). The reason for this, Kirby held, was that the effect of the 1967 Amendments was to ensure that the Australian Constitution ‘now speaks with equality to [all] Aboriginal Australians’ – including those ‘observing traditional customs as well as those living in ways indistinguishable from the majority population’ – in the same way it does to ‘those of other races’.

There also tends to be a systematic relationship in this context between the aims of particular constitutional amendments and their form. For example, amendments designed to generate new constitutional norms seem generally to be framed in broad and open-ended terms, or at least, so as to remove specific restrictions on what are otherwise open-ended standards (see e.g. the text of the 14th Amendment in the US, and the 1967 amendments to ss. 51 and 127 of the Commonwealth Constitution in Australia⁷). On the other hand, amendments designed to trump prior judicial interpretations of a constitution are more frequently framed in concrete, rule-like terms (see e.g. the text of the 11th Amendment).⁸

Despite these examples, some scholars suggest that, in general, formal constitutional amendments will be irrelevant to the ultimate shape of constitutional meaning (see e.g. Eskridge and Ferejohn; Strauss 1996). David Strauss, for example, argues that in the US, because constitutional interpretation tends to be largely common law- rather than text-based,

the Supreme Court will generally interpret the Constitution more or less in line with the kinds of changes in circumstances, understandings and even majoritarian demands that can lead to successful constitutional amendments (see Strauss 1996; and compare also Dahl 2003, Friedman 1993). Other scholars, such as Bill Eskridge and John Ferejohn, argue that, even where this is not the case, legislatures will generally fill this gap by the passage of ‘super-statutes’ designed to generate significant small ‘c’ constitutional change (Eskridge and Ferejohn 2001).

To a large extent, the degree to which common law-based mechanisms or super-statutes are likely to serve as effective substitutes for formal processes of constitutional amendment will depend on the national constitutional context. As Vicki Jackson and Jarmal Greene note elsewhere in this volume, the degree to which national courts adopt an evolving, common-law-based approach to constitutional interpretation, as opposed to a more strictly textual or originalist approach, varies significantly across countries.⁹ In some countries, the nature of constitutional federalism will mean that national legislatures have broad scope to enact super-statutes with jurisgenerative effect; whereas in others they will have more limited power to achieve these same ends via legislative means. For example, in Australia the external affairs power in s. 51(xxi) of the Commonwealth Constitution has been held to give the federal parliament broad scope to enact legislation aimed at ending gender-based discrimination (see e.g. *Aldridge v Booth*, (1988) 80 ALR 1); whereas in the US, the commerce clause has been held by the US Supreme Court to impose greater limits on the US Congress in this same context (see e.g. *United States v Morrison*, 529 US 598 (2000)).

In some countries, there are also a number of formal potential substitute mechanisms open to the legislature when it comes to trumping particular judicial decisions. In the US and Australia, Congress and the federal parliament have power to remove certain cases from the appellate jurisdiction of the ultimate court of appeal (see Art III. of the US Constitution; and in Australia, s. 75 of the Commonwealth Constitution). In Canada, s. 33 of the Canadian Charter of Rights and Freedoms 1982 (Charter) gives power both to the federal parliament and to provincial legislatures to override or suspend the application of most rights guarantees under the Charter by ordinary majority vote, on a five-year renewable basis.¹⁰ In Australia, at least one state rights charter, the Victorian Charter of Rights and Responsibilities 2006, contains a nearly identical provision; and other statutory charters (like the UK Human Rights Act 1998) contain a similar implied power to suspend the application of rights by the use of clear statutory language.¹¹ There is also a similar, if more limited, power to suspend certain rights (and thus courts’ interpretation of those rights) under s. 37 of the Constitution of South Africa of 1996. In the US and South Africa in particular, there is also some scope for legislators – and not simply the executive – to influence the direction of judicial appointments in a way that can have an indirect influence on the development of common constitutional meaning.

However, even in those countries where such mechanisms do exist, there remains scope for debate about their effectiveness as substitutes for formal processes of constitutional amendment. The generative and trumping effect of potential amendment substitutes may be less rapid than the effect of formal constitutional amendments (compare Denning and Vile 2002). An example of this in the US involves the attempts by Congress and the President during the New Deal to use non-Article V means in order to reverse the Court’s interpretation of the Commerce and Due Process clauses in cases such as *Lochner v New York*, 198 US 45 (1905); *Adkins v Children’s Hospital*, 261 US 525 (1923) and *Hammer v Dagenhart*, 247

US 251 (1918): while such efforts ultimately succeeded in cases such as *West Coast Hotel Co v Parish*, 300 US 379 (1937), *NLRB v Jones Laughlin Steel Corp*, 301 US 1 (1937) and *United States v Darby Lumber Co.*, 312 US 100 (1941), it seems doubtful that, had the 1924 Child Labor Amendment actually passed, the Court would have waited as long as it did to reverse itself in this way (see Dixon forthcoming; see also Denning and Vile 2002).

The efficacy of amendment substitutes may also be less consistent than that of formal constitutional amendments (see Vermeule 2006). This seems particularly likely to be the case where what is involved is an attempt by a legislature to trump a court's interpretation of a specific constitutional rule, as opposed to standards. In such cases, the interpretive freedom enjoyed by courts is generally understood to be much narrower even in instances involving attempts at dialogue by the legislature (see Balkin 2007; Strauss 1996; Dixon 2010). This may also help explain why, in countries such as the US at least, almost every trumping amendment to date (i.e. the 11th and 16th Amendments, as well as the citizenship clause of the 14th Amendment) has focused on the courts' interpretation of specific constitutional rules, as opposed to standards (for discussion of these amendments, see e.g. Stone 1988; Ferejohn and Sager 2003).¹²

Proponents of the amendment irrelevancy also argue, however, that (at least in mature democracies) even successful constitutional amendments generally fail to achieve meaningful constitutional change without sustained popular support, in which case constitutional change by a process of judicial interpretation is in any event likely to occur (Strauss 1996).

Here too there is disagreement within the existing constitutional literature. Strauss, for example, argues that the history of amendments such as the 15th and 19th Amendments in the US provides strong support for this aspect of the irrelevancy thesis, but other scholars question the reliability of drawing general lessons from the history of amendments such as the 15th Amendment, given its relatively unique enactment history (Levinson 2006: 161). There is also scope for disagreement over the lessons to be drawn from the history of the 19th Amendment given that the difficulty of amendment under Article V of the US Constitution seems to have contributed to an unwillingness on the part of amendment proponents to publicize their true purposes and objectives, and thereby also to have suppressed the potential evidentiary function of the relevant successful amendment (Marilley 1997).

In a comparative context, there seems quite a clear link between the generative effect of various successful amendments (such as the 1967 race power amendments in Australia) and the more permissive constitutional amendment norms that apply in those countries. In the *Wurridjal* case, Justice Kirby understood the significance of the 1967 Amendments as favoring the recognition of 'traditional' aboriginal people and their *customs*, not simply urban aboriginal people as individuals entitled to formal individual equality. This understanding was also directly supported by the arguments made by various proponents of the 1967 Amendments, such as Bill Groves, a member for the Foundation of Aboriginal Affairs, who argued publicly that the aims of the Amendments were not simply for indigenous Australians to 'be part and parcel of the community' but also to be part of the community on terms that did not involve 'losing [their] identity as Australian Aborigines' (Attwood and Markus 2007 at 124). Had the requirements for successful ratification of an amendment under s. 128 of the Australian Constitution been more demanding, however, and required (say) a two-thirds as opposed to simple majority support from the states, it seems extremely unlikely that activists such as Groves would have been willing to make such arguments. While support for the 1967 Amendments was predicted to be high in urban Australia, opposition was also expected to be

strong in many parts of rural Australia, particularly Western Australian and Queensland (where there were certain to be electoral consequences flowing from passage of the Amendments and where there were also still numerous laws formally discriminating against indigenous Australians (Attwood)). Under a two-thirds super-majority requirement, opposition in those two states alone would also have been sufficient to block passage of the proposed amendments.¹³

Without more systematic comparative study of the relationship between formal constitutional amendment rules and the nature of public debate surrounding proposed constitutional amendments, therefore, it seems somewhat premature to conclude that the evidentiary function of formal constitutional processes is necessarily illusory.

2 AMENDMENT CAUTIONS (OR DANGERS)

Whatever the valuable functions played by formal processes of constitutional amendment, such processes also, of course, have the potential to ‘render [a] [c]onstitution...too mutable’ (Madison, *Federalist No. 43*).

What reasons do we have to fear excessive constitutional mutability? Existing comparative constitutional scholarship points to two broad reasons why constitutional stability may be valuable: first, its capacity to promote processes of democratic self-government (see e.g. Holmes 1995; Eisgruber 2001; Issacharoff 2003); and second, its capacity to facilitate certain valuable forms of constitutional pre-commitment, particularly those having to do with minority rights and inclusion (see e.g. Elster 2003; Ferejohn and Sager 2003; Sager 2001).

When it comes to processes of democratic self-government, Stephen Holmes likens constitutional amendment rules to rules of grammar in relation to processes of linguistic communication or exchange. ‘Far from simply handcuffing people’, Holmes suggests, ‘linguistic rules allow interlocutors to do many things they would not otherwise have been able to do or even thought of doing’, and constitutions perform much the same function (Holmes 1995). As Christopher Eisgruber notes, they ‘define pathways for action’ in a democracy, without which a polity may be ‘unable to formulate policy about foreign affairs, the economy, the environment’ and all manner of other critically important issues of social and economic policy (Eisgruber 2001: 13). From this perspective, the danger of overly flexible processes of constitutional amendment is that they may lead to ‘a polity [to be] consumed with endless debates about how to structure its basic political institutions’ in a way that undermines the ability of a democracy to engage in this kind of collective action (Eisgruber 2001: 13; Elster 2003: 1759). This is particularly so when one considers that, if constitutional amendments are sufficiently frequent, this tends to suggest not only frequent debate about specific constitutional issues, but also a greater likelihood of whole-scale constitutional replacement (see Lutz 1995; Elkins et al. 2009).

For most constitutional scholars, the idea of constitutional democracy also entails some basic level of political competition among political parties, or at least political elites (see Schumpeter 1962), and from this perspective, another danger of overly flexible constitutional amendment processes is that they may allow a temporary political majority to insulate itself against future political competition (Elster 2003: 1776–9). Indeed, for many, ‘[t]he fixing of the structural rules by which governance occurs, and the assurance that these will not be “gamed” by momentary majorities attempting to lock themselves in power is one of the hallmarks of constitutionalism’ (Issacharoff 2003).

A second argument against allowing overly flexible processes of constitutional amendment is that they may undermine the ability of citizens to enter into mutually beneficial forms of constitutional (pre-) commitment. At time 1, citizens may have strong shared 'internal commitments', or understandings or intentions that at time 2 they are nonetheless tempted to sacrifice for reasons of 'partisan interest' or because of 'momentary passions' (Elster 2003: 1758). Knowing this to be the case, others may also be reluctant to make decisions that rely on their honoring those commitments. However, one way in which citizens can respond to this problem at time 1 is to adopt forms of 'external commitment' that make it more difficult for them, at time 2, to dishonor their earlier commitments (see Ferejohn and Sager 2003: 1938); and onerous constitutional amendment rules are generally considered a leading example of such external commitments in a constitutional context (id; Ferejohn 1997: 506).

From this perspective, the principal concern about flexible processes of constitutional amendment is, therefore, that they will undermine the enforcement of various internal constitutional commitments, such as those involving the protection of property or minority rights (see Ferejohn 1997; Ferejohn and Sager 2003). Such an effect seems also especially troubling in the context of minority rights protections, considering that such protections are arguably central to the legitimacy of a democratic system of self-government (see e.g. Rawls 1993), and in many cases to preserving the integrity of an existing liberal democratic order (see e.g. Sullivan 1995; compare also Lessig 1993 on constitutions with 'conservative' and 'transformative' aims). A secondary and somewhat lesser concern is that overly flexible amendment processes may also serve to discourage actions, such as foreign investment or inter-state or international migration (see Ferejohn and Sager 2003: 1929; see also Dixon and Posner forthcoming), which rely on a wide range of internal constitutional commitments being enforced.

These potential downsides to overly flexible constitutional amendment processes may also help explain why various countries have established various distinct tracks for constitutional amendment that vary according to the subject-matter of a proposed amendment.

In India, for example, while most proposals to amend the constitution require the support of only a simple majority of the Parliament present and voting (provided this is also no less than two-thirds of the total number of representatives), amendments to certain fundamental aspects of the 1951 Constitution, such as its provisions governing the representation of the states and the scheduled castes, are subject to the additional hurdle of ratification by a majority of state legislatures (Art. 368).¹⁴ Likewise in South Africa, while most constitutional amendments require the support of only a two-thirds majority of *either* the National Assembly or six (i.e. two-thirds of) provinces in the National Council of Provinces, amendments that affect the provinces are subject to the more demanding requirement of two-thirds support in both houses; and amendments that purport to alter the fundamental constitutional principles found in s. 1 of the 1996 Constitution require the support of three-quarters, as opposed to two-thirds, of the National Assembly (SA Constitution, s. 74(1), (3)).

One of the key premises of such a multi-track approach is that 'by establishing a separate and [more] difficult track for some political issues, the constitution may focus public attention upon those decisions and improve deliberation about them' (Eisgruber 2001: 44). Inducing this kind of increased deliberation about proposed constitutional amendments has, as Jon Elster (2003: 1765) notes, not only the benefit of promoting the role of reason in processes of constitutional self-government (compare also Rawls 1993 on 'public reason'), but also the further benefit of creating the kind of delay in such processes that can 'give passions time to cool down'.

Another explanation for such a multi-track approach is that for legislative proponents of a particular constitutional amendment, higher super-majority requirements will tend to decrease the initial statistical likelihood of there being the necessary threshold level of support for a particular amendment and will also imply higher ‘bargaining costs’ in order to achieve that threshold (Buchanan and Tullock [1962] 2004). In addition, as Christopher Manfredi notes, the harder it is to pass constitutional amendments on certain questions, the more risk-averse legislators may be about supporting a particular proposed amendment – for fear that, if the amendment turns out to be ill-conceived, it will be extremely difficult to reverse that error by passage of a subsequent amendment (Kelly and Manfredi 2009). (Think, by way of example, of the 21st and 19th and 21st Amendments to the US Constitution, or the 15th and 16th Amendments to the South African Constitution.)

In other constitutional contexts, however, constitutional drafters and even judges have been willing to go even further in seeking to counter the danger of amendment to certain aspects of a constitution by imposing absolute limits on the ability of legislative majorities to change the constitution via a process of amendment.

Given the constraints on the amendment of state constitutions imposed by the US Constitution, this is implicitly the model adopted in many states in the US that otherwise provide for flexible processes of constitutional amendment (see e.g. *Romer v Evans*, 517 US 620 (1996); Ginsburg and Posner 2010; compare also Choudhry and Hume in this volume and Simeon 2009: 15). This is also the model adopted under the US Constitution in respect of the representation of the states in the Senate (Art. II s. 3 cl. 1), which some scholars have relied on to develop a more extensive theory of implied limits on the power of amendment under Article V of the US Constitution (see e.g. Murphy 1995). Precedent for such an approach, however, is also found in a broader comparative context in numerous foreign constitutions, including, most notably, the German Basic Law of 1949, which adopts a relatively permissive voting rule for most amendments, but also makes ‘impermissible’ amendments to key constitutional provisions, such as those provisions governing the division of Germany into *Länder*, and protecting the participation of the *Länder* in the legislative process, and all of the basic rights ‘principles’ laid down in Articles 1–20 of the *Basic Law* (see Art 79(3)) (for discussion in the Eastern European context, see e.g. Holmes and Sunstein 2001).

As noted at the outset of this chapter, a further notable example of such an approach is found in India, where the Supreme Court of India has ‘implied’ certain limits on the scope of the legislature’s power of constitutional amendment under Article 368 of the Indian Constitution (for discussion, see e.g. Neuborne 2003; Jacobsohn 2006). Initially, this involved the Court reading all constitutional amendments as ‘laws’ subject to the other provisions of the Constitution (see *Golaknath v State of Punjab*, 1967 AIR 1643), but has subsequently involved the Court applying a narrower set of limits that protect only the ‘basic structure’ of the Constitution from amendment (see *Kesavananda Bharati v The State of Kerala*, AIR 1973 SC 1461 and discussion in Ambwani 2007; Jacobsohn 2006).

3 THE COMPARATIVE DIFFICULTY OF AMENDMENT

Whatever precise balance between constitutional flexibility and rigidity is ultimately judged optimal in a particular constitutional context, existing comparative constitutional scholarship

is still at a relatively early stage of development in what it tells us about the actual determinants of the rate or difficulty of constitutional amendment in various jurisdictions.

Even when it comes to various formal hurdles to constitutional amendment, scholars have reached different conclusions as to the influence of such hurdles on the rate or difficulty of constitutional amendment.

Donald Lutz, for example, found that, when he ranked state constitutions in the US according to the hurdles to initiation of a proposed amendment or the degree of majority support required for an amendment to pass either or both houses of the legislature, there was a clear, negative correlation between the difficulty of amendment and the actual rate of amendment, so that, for example, a shift from an ordinary to a 60% majority requirement for passage of a proposed amendment reduced a state's rate of amendment by approximately 26% (Lutz 1995: 256–7; but for criticisms of these conclusions, see Ferejohn 1997). In a cross-national study of 30 national constitutions, Lutz likewise found a clear negative relationship between the presence of super-majority requirements for legislative passage of a proposed amendment, procedural hurdles to the passage of a constitutional amendment by national legislatures (such as double passage by a single house, or passage by two houses), a requirement of state-level approval or ratification of proposed amendments in a federal system and of popular approval of proposed amendments by referendum and the overall rate of constitutional amendment (Lutz 1995: 263). Anecdotal support for several of these findings is also found in the experience of several countries considered in this chapter: in Canada in particular, the most notable recent amendment failures, such as those involving the failure to pass the Meech Lake Accords, resulted from the non-ratification of proposed amendments by only two provinces (see Kelly and Manfredi 2009: 123).

However, John Ferejohn (1997) has raised important questions about the robustness of several of Lutz's findings in this context. For example, when he used a more complex regression technique (rather than a tabular method) to calculate the relationship between various formal hurdles to amendment and amendment rates, relying on Lutz's data, Ferejohn found that states that required a super or double majority for legislative approval of a proposed amendment, or included provision for amendment by popular initiative, did not exhibit any statistically significant difference in their amendment rates, compared to other states (Ferejohn 1997: 524). Moreover, in a global context Ferejohn found no evidence that any form of ratification requirement affected the rate of amendment: the only factors he found to be statistically significant were super- and double-majority requirements for legislative passage of proposed amendment, and legislative bicameralism (Ferejohn 1997: 523).

By contrast, in a subsequent cross-national study of 19 OECD countries, Bjørn Rasch and Roger Congleton found that, according to their estimates, the key determinant of the rate of amendment across countries was whether a constitution required that an amendment be ratified by multiple different bodies, and in particular by voters at a referendum, rather than whether it required amendments to pass a super-majority of the legislature (2006: 334).

One potential reason for the inconsistency in these findings is that, for many existing studies, the number of independent observations is sufficiently small that there is not enough statistical power to pick up the distinct effect of various hurdles to amendment. In part to address this difficulty, Richard Holden and I have assembled a large, year-by-year dataset for constitutional amendments at a state level in the US, which we have used to re-examine a number of these questions.

Using this dataset, we found that at least within certain ranges, super-majority voting requirements for legislative passage of a constitutional amendment do tend to reduce the rate of constitutional amendment: the move from a majority to two-thirds super-majority requirement (though not a 60% super-majority requirement), we found, had a clear negative and statistically significant effect on the overall rate of constitutional amendment in a state. We also found that the provision in a constitution for amendment by popular initiative had a positive and statistically significant effect on the overall rate of amendment; whereas in the case of a double-passage requirement or single-subject rule for proposed amendments, neither had any statistically significant effect.

Our analysis also confirmed other prior findings by Lutz, Ferejohn and others about the significance of the length and the age of a particular constitution to its probability of amendment (see Lutz 1995: 249, 253; Ferejohn 1997: 524; Elkins et al. 2009). Like others, we found a clear positive and statistically significant correlation between the cumulative age of a constitution and the rate at which it was amended; and also between the length of a constitution and the rate at which it is amended (Dixon and Holden forthcoming). These results seem unsurprising given that, the older a constitution is, the more scope there is for demands for constitutional change to arise in response to changing social circumstances and understandings; and that the length of a constitution is correlated with the degree to which it contains concrete, rule-like constitutional provisions as opposed to more abstract open-ended standards (i.e. it has the 'prolixity of a legal code'), and that, as Section 1 notes, formal processes of amendment will more often be necessary to altering the common law meaning of constitutional rules, than standards.

An additional finding of our study was that a further, potentially under-appreciated, influence on the rate of constitutional amendment in our dataset was the scale of a state's legislature. We found, for example, that a one standard deviation in the number of house members in a state was associated with 0.27 fewer amendments per annum – or 2.7 fewer per decade – or a reduction of 14.6% in the number of amendments, relative to the mean (Dixon and Holden forthcoming).

We also found quite clear evidence of path dependence in the difficulty of amendment. We found, for example, that if a state amended its constitution in a given year, it was 2.8 times more likely than other states to amend it again two years later; and 1.9 times more likely to do so four years later. There was also a strong degree of persistence for this effect; and again, the statistical significance of this finding was high (i.e. significant at the 1% level). One potential explanation for this is simply that there is a close relationship between the rate at which a constitution is amended, and its overall length, and therefore that this finding simply mirrors other findings about the relationship between constitutional length and rates of amendment. Another potential explanation, however, is linked more closely to political attitudes toward the constitution, and the potential for the repeated use of constitutional amendment processes to increase the perceived legitimacy of such processes in the mind of the public, and the infrequent use of such processes to create the opposite result (see Vermeule 2006; and compare also Sullivan 1995 (criticizing apparent changes of this kind in US attitudes in the 1990s)).

What we know thus far in this area, therefore, suggests that formal constitutional amendment procedures do play an important role in determining the likelihood that various actors will use formal amendments as a means of resetting various constitutional rules, engaging in democratic dialogue or reducing agency costs. This also applies, at least within certain

bounds, to legislatures and citizens alike, given that both higher legislative super-majority requirements, popular ratification and initiative requirements tend to decrease the rate of amendment across jurisdictions. By influencing popular attitudes toward constitutional change and constitutionalism, such requirements can also indirectly affect the long-term rate of constitutional amendment.

At the same time, the existing empirical literature also makes clear that formal constitutional amendment rules are far from an exclusive determinant of the rate of constitutional amendment. Other factors beside formal constitutional procedures, such as a constitution's age, length and a polity's scale, are also important potential determinants of the rate of constitutional amendment in a polity. Substantially more work also remains to be done, both in the US and cross-nationally, in order to understand the precise influence of these, as well as other factors.

Take two factors not addressed by the current empirical literature: the configuration of political parties at a given moment in a particular country; and popular attitudes toward a constitution or constitutionalism. As a logical matter, there seems a significant potential difference between constitutional systems that have only one major or 'dominant' party and those with two major parties (see Choudhry 2007). In the first case, a super-majority voting rule will tend to amount to something like to an ordinary majority voting rule; whereas in the second case, it will often require something close to a unanimity or consensus. (Consider the contrast between South Africa and the US in this context: while both countries have a two-thirds super-majority requirement for legislative passage of a proposed amendment, in South Africa, the African National Congress (ANC) has been able to surmount this hurdle almost without any need for support from other parties, whereas in the US this has required virtual bipartisan consensus (see Mansbridge 1986 on ERA)). Only in systems that have multiple small parties, or rather fluid political coalitions does it seem likely that the difficulty of constitutional amendment will tend closely to track the formal super-majority requirements in the text of a constitution.

Popular attitudes toward a constitution also have a clear logical potential to influence the practical difficulty of constitutional amendment in a jurisdiction. The more the population is attached to or identifies with the constitution, for example, the greater the burden of persuasion facing those attempting to achieve change via constitutional amendment (Griffin 1998: 53). Similarly, the more the population tends to view the domain of the constitution and constitutional politics as distinct from, or 'above', rather than part of more ordinary political processes, the more difficult it is also likely to be, as a political matter, to propose and pass a constitutional amendment (compare Simeon 2009: 5).

At present, however, comparative constitutional scholarship provides almost no guidance in determining the influence of such factors. As Rick Pildes notes elsewhere in this volume, the relationship between political parties and constitutional provisions is a topic which is generally under-developed in comparative constitutional scholarship; and the constitutional amendment literature does no better. When it comes to popular attitudes toward constitutional change, there has been no systematic attempt to compare levels of 'constitutional patriotism' cross-nationally. In part because of this, there has also been little attempt to date to consider the interaction effect between constitutional patriotism and the age and length of a constitution when it comes to rates of constitutional amendment. This is a striking omission when one considers that constitutional patriotism is likely to be both positively correlated with the age of a constitution (compare Madison, Federalist 49 noting the 'veneration ... which time bestows' on constitutions) and negatively correlated with a constitution's length.

Even in areas where we do have good evidence about the determinants of constitutional amendment rates, work remains to be done in assessing the degree to which this provides a basis for comparing the difficulty of amendment, across jurisdictions.

Potentially, at least, the rate of constitutional amendment in a jurisdiction may be affected by a number of factors other than the difficulty of constitutional amendment, including: the level of demand for constitutional change in a jurisdiction, and supply-side factors such as the specific aims and language of particular proposed amendments, or the litigation potential they contain (Kelly and Manfredi 2009). The assumption in the constitutional literature to date has been that these factors are sufficiently uncorrelated across jurisdictions that one can treat the actual amendment rate in a jurisdiction as a proxy for the effective difficulty of constitutional amendment. However, in order for us to have greater confidence in this assumption, there is a clear need for further attention to at least three questions: (i) the number of amendments proposed as well as passed in various jurisdictions (see Rasch and Congleton 2006); (ii) the degree to which various constitutional amendments address single as opposed to multiple issues, or enact concrete rule-like versus more open-ended constitutional provisions (for discussion see Rasch and Congleton 2006); and (iii) the relationship between constitutional amendment rates and judicial interpretive norms, such as norms of judicial restraint or originalist interpretation (bearing in mind that such norms may both affect and also be a product of constitutional amendment rates: compare Forbath 2003: 1980). By studying proposed as well as successful amendments in particular, constitutional scholars could also help address the current gap in our understanding of cross-national patterns of strategic versus sincere legislative voting.

The relevance of all these empirical findings to the design of constitutional amendment rules is also an area which is largely under-developed in existing comparative constitutional scholarship. A key challenge for the next generation of comparative constitutional scholars will therefore be not only to deepen our knowledge of the factors that influence the difficulty of constitutional amendment, but also to develop new and creative solutions to the potential problems thereby identified.

NOTES

* I would like to thank Sandy Levinson and Tom Ginsburg for their helpful comments on this chapter.

1. In the US, an example of the former, according to Ackerman, is the change in constitutional understandings adopted during the New Deal; and an example of the latter the adoption of the Reconstruction Amendments: see Ackerman (1991:74-82).
2. The Reconstruction Amendments are, of course, an instance in which Art. V was involved but somewhat modified in application; see discussion in Levinson (2006: 161).
3. Four referenda approved changes to the Constitution governing the scope of Commonwealth legislative or executive power: so as to expand, or at least clarify, the existence of Commonwealth power to assume prior state debts (1910) or make agreements with the states in respect of state debts (1928); to make laws with respect to 'the provision of maternity allowances, widows' pensions, child endowment, unemployment, pharmaceutical, sickness and hospital benefits, medical and dental services...and benefits to students and family allowances' (1946); and to make laws with respect to indigenous affairs (1967). One of these (i.e. the 1967 referendum), plus three others, approved changes to various constitutional rules governing the terms of office of senators (1906) and federal judges (1977); the method of counting indigenous voters for the purposes of drawing federal election districts (1977); the rights of territory voters to vote in future constitutional referenda (1977); and the method for filling a Senate vacancy (1977). Only two of these sets of change (i.e. those achieved by the 1946 and 1967 amendments) could arguably have been achieved by other formal processes of legal change, such as judicial interpretation.

4. One set of amendments sought to alter the operation of various constitutional time-rules, such as those rules defining the period in which amnesty was available under the truth and reconciliation process established by the original constitution (1st amendment act), the term of municipal councils (2nd amendment act), the time at which elections for the National Assembly or provincial legislatures could be called (4th and 5th amendment acts) and the tenure of constitutional court judges (6th amendment act). A second set of amendments sought to refine constitutional rules governing the eligibility requirements for legislative and executive office holders, including most notably the eligibility requirements for deputy ministers, and the right of local, provincial and national legislators to join or change political parties, while retaining office (the 4th, 6th, 9th, 10th, 11th and 14th amendment acts), and also the designation and swearing in of acting or alternative office-holders, such as an acting president or alternate on the Judicial Services Commission (1st and 2nd amendment acts). A third set of amendments purported to alter the rules governing the drawing of municipal boundaries for those municipalities that crossed provincial boundaries, and also redrew the actual boundary between various provinces (3rd, 12th, 13th, 15th and 16th amendment acts). A fourth class of amendment sought to clarify the method of apportioning membership in the National Council of Provinces (5th and 8th amendment acts). And the fifth and final class of amendments was directed toward changing the name or enumerated powers of various public bodies (2nd, 6th, 7th and 11th amendment acts), including the powers and obligations of the National Assembly and its members in respect of 'financial matters' (7th amendment act) and the power of provincial legislatures in respect of local government matters (11th amendment act).
5. The other far less significant exception is, of course, the two prohibition and anti-prohibition amendments (the 19th and 21st Amendments): see Ferejohn and Sager 2003: 1960.
6. Of course, where a legislature's objection to a court's approach is that it is unduly restrained, the two functions may merge into one, but the distinction nonetheless remains useful in other cases. See further note 12 below.
7. The amendments repealed from s. 51(xxvi) the words 'other than the aboriginal race in any State', and repealed entirely the language in s. 127. The consequence of this was to confer certain additional powers on the Commonwealth Parliament to make special laws with respect to indigenous Australians, and to include indigenous Australians in the census, in a way that had some impact on districting practices in Western Australia and Queensland. Another more arguable consequence was to redefine the scope of the Commonwealth's existing powers in respect of racial minorities, so as to ensure that such powers could only be used for the benefit of such minorities.
8. 'The Judicial Power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State', US Constitution, 11th Amendment (1795).
9. Chapter 32, this volume.
10. Other countries that have or have had such a provision include Romania and Poland: see Gardbaum (2010).
11. In the UK, when it comes to at least quasi-constitutional statutory instruments, such as the Human Rights Act 1998, the Westminster parliament also enjoys an explicit power to derogate from protected rights norms.
12. The one possible exception is the 19th Amendment, which is sometimes classified by scholars as a 'trumping' amendment, given its relationship to *Bradwell v State of Illinois*, 83 US 130 (1872): see Ferejohn and Sager 2003: 1960.
13. There are only six states in Australia and hence three states are required to block an amendment under the current 50% rule, and only two states would be required to do so under a two-thirds super-majority rule.
14. Art. 368(2). This requirement is complicated by the fact that a 1971 amendment to the Constitution purported to confer on Parliament, sitting as a Constituent Assembly, plenary power to amend the Constitution: see Art. 368(1), as amended Constitution (Twenty-fourth Amendment) Act, 1971, s. 3.

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