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INSTITUTIONS FOR AMENDING CONSTITUTIONS

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9.1 Introduction

Constitutions may be seen as contracts or coordination devices, typically containing basic rules on the machinery of government clauses on the assignment of rights and procedures for the change of the constitution itself (Hardin 1989; Elster 1995; Voigt 2009).* Although the average lifetime of formal constitutions since the late eighteenth century has been around twenty years (Elkins et al. 2009), many constitutions have evolved gradually over long periods of time. For example, in many European countries, a series of piecemeal constitutional changes transformed constitutional monarchies into parliamentary democracies (Congleton 2011). For several reasons, pressure to adjust the constitutional framework will always build over time. The demographic, economic, and technological environment within which the constitution operates may change. Popular beliefs and preferences may change as well, partly because people are learning more about the effects—some of which are unexpected and unwanted—of current rules. Anticipating the need for future adjustments, constitution-framers may make their amendment more or less difficult. Thus, one can distinguish between flexible and rigid constitutions on the basis of the hurdles built into their amendment procedures.

Lutz (1994) was among the first to analyze more systematically whether the design of constitutional amendment procedures has had the expected consequences. He formulated a number of general propositions and tested them with data from U.S. state constitutions and a sample of thirty-two national constitutions from different countries in the world. The questions Lutz raised have been refined and reanalyzed with different operationalization of core variables and for other samples of constitutions (e.g., Lorenz 2005; Roberts 2009; Closa 2012; Negretto 2013). The Comparative Constitutions Project

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(CCP) improved the situation dramatically by making information on every constitution since the late eighteenth century available for analysis (Elkins et al. 2009). However, a well-developed and empirically supported theory of constitutional change hardly exists. There is no agreement on how to classify constitutional amendment procedures according to their rigidity, and not even an unambiguous and generally accepted way to measure the adjustment of constitutions. In what follows, we focus on constitutional amendment procedures and try to substantiate these claims.

Thus, the chapter is divided into two parts. The first part (section 9.2) reviews formal constitutional amendment procedures and the various mechanisms that can be used to increase the difficulty of the constitutional revision process. Thereafter, we consider other means through which constitutions can be changed, such as judicial interpretation, political adaptation by legislatures and executives, and alternative forms of irregular (or unconstitutional) change. The second part (section 9.3) mainly—but not exclusively—concentrates on the relationship between amendment procedures and the frequency of constitutional revisions cross-nationally, as well as the challenges involved in measuring procedural rigidity and constitutional changes. Section 9.4 offers concluding remarks.

9.2 Types of Constitutional Changes

9.2.1 Constitutional Amendment Procedures

Two hundred years ago, there were far fewer countries in the world than there are today and, based on CCP data, a majority of those existing then did not even have written constitutions. The share of countries with constitutions grew steadily during the nineteenth century, and by the 1920s, almost every independent country had a constitution. Most modern constitutions dating from late eighteenth century onward contain explicit procedures for amending the text. As an illustration of this development, almost half the U.S. states had an amendment procedure in their constitutions by 1780 (Lutz 1994, 356). Constitutional amendment clauses vary a lot and are often remarkably complex. That said, some constitutions may have unamendable provisions—for instance, those related to basic rights—and some have different procedures for changing different parts of the constitution. Many constitutions also specify two or more alternative procedures for change, some of which may be urgency procedures.

In democracies around the world, legislation is typically decided by a simple majority rule. In a few countries, constitutional matters are also dealt with in the same manner. Examples of the latter are the United Kingdom, although a written constitution is lacking, and Israel, with its body of basic laws (Lutz 1994, 369). Simple majority rule is the only positively responsive decision rule for binary choices guaranteeing that all voters, as well as all alternative proposals, are treated equally (May 1952). If a different decision rule than simple majority is used, then anonymity (equality of voters), neutrality

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(equality of alternatives), or both may be sacrificed. Note that neutrality is not necessarily preserved if there is a move to decision-making with more than two alternatives, because then the outcome to some extent depends on agenda design (Miller 1995; Cox and Shepsle 2007). In the multi-alternative context, simple majority rule is also vulnerable to cycling and a other problems (e.g., Cox and Shepsle 2007; Heckathorn and Maser 1987; Novak and Elster 2014).

The move from simple majority rule to more complex and demanding rules stabilizes institutions, protects the status quo, and secures more broad-based consent for important changes than could otherwise be achieved. These mechanisms are also expected to work as devices to "counteract passion, overcome time-inconsistency and promote efficiency" (Elster 2000, 117–118). Many scholars have singled out the stabilizing effects of key hurdles for amending constitutions (Lutz 1994, 363; Lane 1996; Elster 2000, 101; Rasch and Congleton 2006, 327; Congleton 2011, 70–71; Lijphart 2012). A whole range of mechanisms is available. Among the most common are supermajorities, repeated decisions by the same decision-making body, and involvement of several institutional actors. In addition, there could be important nonvoting criteria, such as quorum rules, content restrictions, and temporal requirements (Albert 2014).

A two-thirds majority is the typical variant of the supermajority used in constitutional amendment procedures, but three-fifths and three-fourths majority requirements can be found occasionally.[1] There are many examples of requirements of repeated decisions by unicameral parliaments, typically separated by a specific amount of time. If the decisions are separated by an intervening election, it will not be exactly the same representatives who make the first and second decisions; the more volatile the election, the higher the hurdle becomes (Martin and Rasch 2013). Furthermore, the decision rule could differ for the first and second decisions. In Finland and Luxembourg, for instance, the pre-election rule is a simple majority, and it increases to two-thirds after the election; in Greece, there are two decisions with three-fifths majority before the election and an absolute majority after the voters have elected the new parliament.

In bicameral systems, separate decisions by both chambers are common, either once (Germany) or twice (Italy). Typically, both chambers employ a similar majority threshold. Some countries add a referendum requirement instead of (Ireland) or in addition to (Denmark) an intervening election. Referendums are almost always decided by ordinary majorities, but they may include additional conditions on how comprehensive the majority needs to be. A weaker, but still powerful requirement is a referendum threat, meaning that a referendum is carried out provided it is claimed by a certain number of legislators (one-third of either chamber in Austria) or a sufficiently large group of voters (a possibility in Italy). Additionally, some countries have ratification procedures at a subnational level. In the United States, the main procedure is a two-thirds majority in each chamber of the Congress, followed by ratification in three-fourths of the states. Similarly, the general amending formula in Canada requires majority decisions in both houses of parliament and acceptance by seven out of ten provincial legislatures. In addition, the seven provinces need to make up at least half of the total population of all provinces. For some types of amendments, majority approval in

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each of the ten provincial legislatures is needed; in other words, it is a kind of unanimity at the subnational level.

As most other parts of constitutions, amendment procedures may undergo change over time. Examples are not hard to find, but as far as we know, no systematic analyzes of the stability of amendment procedures exist.

Procedural rights and mechanisms of agenda setting are essential for understanding the outcomes of any decision-making process (Cox 2006; Rasch 2014). Agenda-setting provisions are an integral part of constitutional amendment procedures. However, they are not always formalized, and so there is little systematic, comparative knowledge of this element of amendment procedures. To the extent that submajority rules are used in the initial phases of the amendment processes, agenda power is distributed to minorities (Vermeule 2007). Some innocuous-looking provisions may have significant effects. For example, in Norway, any MP may propose a change in the constitution. The proposal is held over an election, before parliament decides with a two-thirds majority. The vote has to be on a proposal that is identical to the one formulated before the election, which means that the parliament uses a take-it-or-leave-it procedure, or closed rule (Romer and Rosenthal 1978). Thus, the status quo benefits from more protection than it would if the parliament had the opportunity to amend it.

Given the complexity of constitutional amendment rules, a generally accepted typology of procedural hurdles is still missing. The veto-player approach is, however, sufficiently general to help us understand the relationship between the various voting hurdles we have mentioned (Tsebelis 2002). Three conclusions are fairly obvious, everything else being equal (cf. Rasch 2008). First, moving from a simple majority to increasingly more demanding supermajorities makes it harder to amend a constitution. Second, adding decision points or additional veto players never makes it easier to amend a constitution; typically, it becomes more difficult, especially if preferences tend to differ at the various decision stages or between institutional actors. Third, it is not possible to tell a priori whether a supermajority or additional decision points or veto players represent the highest hurdle in constitutional politics. On the contrary, these mechanisms can be seen as equally demanding substitutes or alternative routes to constitutional entrenchment (see also Schwartzberg 2014). For example, is a two-thirds majority a more demanding criterion than a three-fifths majority taken twice by the same assembly? In the latter case of concurrent (super)majorities—to use a term from Calhoun (see Rae 1975)—preferences may change between the decision points and make the de facto coalition needed for change broader than the three-fifths majority at any given time.

It should be noted that the party system is among the factors to consider in discussions of amendment rigidity. As shown by Negretto (2012, 760), rigid amendment procedures can actually be relatively flexible devices in systems with a dominant political party. This may be the case of Mexico under the hegemony of the Institutional Revolutionary Party, but also of Germany, where the (former) dominance of two political parties turned the amendment of the Basic Law into routine practice (Contiades and Fotiadou 2013, 436). In contrast, even flexible amendment procedures may prove insurmountable in fragmented party systems.

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Preferences for supermajority hurdles are designed to block ad hoc majorities from changing the constitution. Alternatively, low majorities combined with a requirement for ratification by referendum, as one may find in Denmark and Ireland, indicate a balancing of constitutionalism and democracy that constitution framers need to consider (Contiades and Fotiadou 2013, 432). Several authors argue for striking a balance between flexibility and rigidity that generates a moderate level of constitutional change. Having too flexible amendment rules produces instability, and may even undermine the purpose of having a written constitution. Very rigid rules can have unattractive consequences, as well. On the one hand, it means that to the extent that the constitution changes at all, it is through informal and implicit adjustments by courts and political actors (Giovannoni 2003). On the other hand, if the need for adjustment is never met, the end result may be total replacement of the constitution.

9.2.2. Constitutional Change by Other Means

Constitutions are changed in a number of ways. Voigt (1999a, 70) proposes a simple typology of constitutional change focusing on the extent to which it is explicit (textual) and legal (in a strict sense). On the one hand, the emphasis lies on the extent to which the wording of constitutional documents is altered. On the other hand, important changes can be carried out through shifts in interpretation and political practice, without leaving any formal marks on the constitution itself (Strauss 2001). In other words, one can differentiate between explicit alterations of the text and implicit changes in the meaning of existing clauses (Karlsson 2016, 255). Whether or not the explicit or implicit changes are carried out legally or in an irregular manner constitutes a second dimension of constitutional adjustment (see also Albert 2009). The four main types of constitutional changes are listed in table 9.1.

We have already presented the first type, which covers lawful and explicit changes and takes place when the constitutional text is revised through formal amendment procedures. Barring exceptional episodes of wholesome constitutional replacement, these are the only means of constitutional change that can be directly observed and compared cross-nationally (Negretto 2013, 19). Consequently, research efforts have

Table 9.1 Main types of constitutional change

	Legal Constitutional Change	**Unconstitutional Change**
Explicit Change (Change of constitutional text)	Formal Amendment Procedures	Irregular Procedures
Implicit Change (Change of constitution without changing the text)	Judicial Interpretation	Political Adaptation

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concentrated on documenting patterns of such constitutional changes cross-nationally (Lutz 2006; Maddex 2008; Contiades 2013).

Constitutional adjustments via judicial interpretation are not uncommon, but they make up a less comprehensive phenomenon than formal changes and are bound to the existing set of constitutional articles. An important example is the landmark *Marbury v. Madison* decision of the U.S. Supreme Court in 1803, which established the principle of judicial review and set a precedent for the invalidation of federal laws on constitutional grounds (Murphy 2000; Vanberg 2005). Strauss (2001) offers several other illustrations of constitutional change without amendment, which he claims is quite a common practice (also in a few situations where a formal amendment has been explicitly rejected). The text of the U.S. Constitution defines in detail the powers of the Congress. However, Congress's powers have expanded far beyond the original formulations by way of judicial interpretation (Strauss 2001, 1470). Furthermore, in some cases the adoption of formal amendments amounts to nothing more than the ratification of changes that have already taken place through interpretation.[2] Similarly, while Norway's constitution did not originally provide for judicial review, the courts introduced it through interpretation during the first half of the nineteenth century (Smith 2003).

It could be argued that constitutional change springing from judicial interpretation belongs mainly to systems with old, short, and general constitutions; both the United States and Norway have constitutions that are more than two hundred years old.[3] This is not always the case, however; countries with newer constitutions have also used judicial interpretation. Some courts have also claimed the power of constitutional review when it was not explicitly granted in the constitution. This was the case of the French Constitutional Council in 1971 and the Dutch Supreme Court in 1996 (Voigt 1999b, 216). However, if one were to pick the European example for the judicial interpretation model, that would be the Italian system of centralized constitutional review, where the proactive jurisprudence of the Constitutional Court is the main channel of informal constitutional change (Groppi 2013). In fact, it is not unusual for the strong Italian Constitutional Court to provide interpretations that go far beyond the written text. For example, in 2013, the court ruled that voting for party lists of candidates and granting an automatic 55% of seats—nationally in the lower house and regionally in the senate—to the winning party or coalition was unconstitutional, as it deprived people of the power to choose their own representatives and it provided incentives for pre-electoral deals. The jurisprudence of supranational courts, such as the European Court of Justice and the European Court of Human Rights, has also had a tremendous effect on member state legislation. For example, the incorporation of the European Convention of Human Rights into the United Kingdom's domestic law in 1998 has considerably empowered the judiciary, as the UK lacked a rights-based constitutional review until then (Contiades and Fotiadou 2013, 440).

Although implicit changes to the constitution are primarily made by means of judicial interpretation, all three branches of government can bring about change (Elster 2000, 69). Courts cannot be conceived as unconstrained actors able to impose their preferences on other policymakers (Vanberg 2005, 169). In fact, Voigt (1999b) shows

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that the judiciary can easily be constrained by other government branches to bring about implicit constitutional change. While the courts are endowed with some discretion in generating implicit changes, their lack of enforcement powers can at least occasionally lead to a failure to secure compliance from policymakers, who may choose to ignore the court's decisions. Under these circumstances, the extent of judicial influence seems likely to depend on the court's ability to impose effective constraints on legislative majorities. Vanberg (2005) argues that public support represents a crucial judicial resource, as elected officials are more likely to respect court decisions when they fear the electoral consequences of a public backlash. Thus, a court's ability to bring about implicit constitutional change depends not only on the legal issues under discussion, the constitutional text, and the court's own competencies, but also on the political environment within which the court operates. The prevailing public opinion, as well as the interests of political parties, governing majorities, and organized interest groups, influences the extent of change that any government branch can bring about.

Normal legislative processes can often trigger mechanisms of de facto constitutional change. This route may be taken by legislators in systems with both flexible and more demanding amendment procedures. The former case is that of the United Kingdom, where any Act of Parliament can change the constitution (Blackburn 2013), while Ireland provides a good example of a country where governments of the day prefer to introduce changes by means of organic laws rather than by formally amending the constitution via referendum (Londras and Morgan 2013). Similarly, European Union membership has made constitutional reforms necessary for the incorporation of EU legislation into national law, most of which have been carried out by member states by means of implicit changes (Karlsson 2016).

Constitutions may also undergo more or less substantial changes through irregular means, which is the third scenario included in table 9.1. The Thirteenth and Fourteenth Amendments to the U.S. Constitution, adopted in the 1860s, emancipated the slaves and gave them suffrage - illustrating this constitution-changing path (Mueller 1999). The amendments would not have been ratified if the ratification process laid down in Article V of the Constitution had been strictly followed, as the southern states had enough votes to block the change. Similarly, formal amendment procedures were ignored in Norway, when the first article of the constitution was rephrased so that it reflected first the union with Sweden in 1814 and then its dissolution in 1905 (Martin and Rasch 2013, 211). On the first occasion, the irregular decision was the outcome of bargaining under the threat of war. In 1905, in contrast, the procedural question was extensively discussed, and legislators chose to apply the same mode of irregular decision for dissolution as had been used for entering the union.

France provides more recent examples of constitutional amendments passed while ignoring formal amendment procedures. The 1962 constitutional amendment introducing universal suffrage for presidential elections was put to referendum by President de Gaulle in complete ignorance of the standard procedure outlined in Article 89, which requires approval by both parliamentary chambers in identical terms before the head of state can decide whether to submit a constitutional bill to referendum or to

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the parliament convened in Congress. Although the president's action was clearly extra-constitutional, the Constitutional Council refused to rule against a decision made by large popular approval (Mastor and Icher 2013, 121).

The fourth constitution-changing path presented in table 9.1 can involve intended or unintended revisions of the constitution by means of political adaptation by legislative and executive actors. This means that behavioral changes take place in areas that are typically regulated by constitutional provisions, and it might imply that some existing articles in the constitution have to be reinterpreted or ignored. An important example is the change from monarchy to parliamentary government in Europe during the nineteenth and early twentieth century (Congleton 2001). Often, the political practice of government formation and removal changed before the constitutions were altered (Beyme 2000; Przeworski et al. 2012).

The Norwegian case is illustrative. The first instance of parliamentary government formation in Norway took place as early as 1884. The constitution had an article saying that the king himself chooses cabinet ministers, which has survived unamended (actually, it is still in force). However, as long as "chooses" is understood simply as something like "formally appoints," the article is not in conflict with a parliamentary form of government. After a generation or two, lawyers and politicians came to see parliamentarism as a kind of constitutional custom that governments had to abide by. It was only in 2007 that negative parliamentarism—which had been practiced consistently for over a hundred years—was formally codified (Article 15). We could have mentioned many similar examples. The details on the evolution of parliamentarism would be different in many European countries, but in the earliest cases, parliamentary government was not the result of formal amendment and conscious constitutional design (Cheibub et al. 2015).

9.3 Constitutional Politics

9.3.1 Measuring Constitutional Difficulty

The amendment process is obviously an important aspect of democratic constitutional design. Anticipating the effects of amendment procedures on the stability and longevity of a constitution is of primary importance for constitution framers. In general, flexible constitutions have a better chance of surviving political and constitutional crises and are likely to endure longer (Elkins et al. 2009, 100). Whether the aim is to lock in certain rights and rules of the game or to allow frequent adjustments reflecting changes in the social and political environment, the drafters of a constitution are in a better position to achieve an "optimal" rate of amendment if they are able to predict how often a constitutional change is likely to occur, which depends on how difficult the amendment procedures are. However, consensus on the measurement of both dependent and independent variables in this relationship has proved nearly impossible to reach. In this section, we outline the challenges associated with measuring the difficulty of amendment

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and the pace of constitutional change, and we discuss the evidence produced by different operationalizations.

Several ways of assessing and comparing the difficulty of amendment procedures across countries with democratic constitutions have been proposed. The most complex measure was advanced by Lutz (1994), who produced an index of difficulty for the amendment steps that can be found in any constitutional document. To do so, he developed a comprehensive additive index comprising "sixty-eight possible actions that could in some combination be used to initiate and approve constitutional amendments, and that together cover the combinations of virtually every amendment process in the world" (Lutz 1994, 361). Each procedural aspect is weighted in terms of difficulty in accordance with observed rates of amendment from U.S. states. Thus, even if the index is institutional, Lutz uses information on both observed amendment rate (for American states) and formal amendment procedures (cross-nationally) to derive the measure of constitutional rigidity. Despite this highly systematic approach, the results of this measure have been contested on various grounds. For example, Martin and Rasch (2013, 214) challenge the face validity of individual country scores, which sometimes show little difference between countries with highly consensual decision-making processes (e.g. Austria and Portugal, where two-thirds majorities are needed in single-majority decisions) and countries with majoritarian constitution-changing rules (e.g. New Zealand, which has the most flexible amendment procedure in Lutz's index).

Elkins et al. (2009) also proposed a cross-national measure of amendment difficulty that is partly endogenous, in that it incorporates information on the observed amendment rate, formal amendment procedures, and other features of the political system (as mentioned earlier, referred to as the CCP measure). However, in contrast to Lutz (1994), and as we have hinted at earlier, these scholars are skeptical about the possibility of judging ex-ante the relative constraints imposed by different amendment procedures. For example, they argue that it would be difficult to determine "whether a constitution that requires a two-thirds vote of the legislature to amend the constitution is more or less flexible than one that requires an ordinary legislative majority with a subsequent referendum by the public" (Elkins et al. 2009, 100). Instead of assigning weights for different amendment procedures, the CCP measure is obtained by regressing the amendment rate on a set of amendment procedure variables and other political, economic, and social factors that might have an impact on a country's propensity for political reform. The measure obtained in this way is the predicted probability of amendment for each constitutional system in the CCP data set (Elkins et al. 2009, 101).

Simpler measures of constitutional rigidity have been proposed by singling out the rules expected to have the strongest impact on amendment rates. Lijphart (2012, 208) focuses on the size of the majority required to pass constitutional amendments and identifies four thresholds: ordinary majorities; between two-thirds and ordinary majorities; two-thirds majorities or equivalent; and supermajorities greater than two-thirds. Anckar and Karvonen (2002) propose a two-dimensional measure that, in addition to voting thresholds in the legislature (none, ordinary, qualified majority), also takes into account whether a simple or qualified majority also needs to support ratification

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by popular referendum (again, none, ordinary, qualified majority). Combining these ideas, Lorenz (2005) proposes a measure that integrates Lijphart's majority scale with the number of voting arenas or actors (e.g., one or two parliamentary chambers or a referendum). Rasch and Congleton (2006) also focus on the degree of consensus and the number of decisions and actors involved in the amendment process. Their four-point indicator of veto points takes into account how many governmental actors must agree to a proposed amendment (at bicameral, presidential, or federal level) and whether a requirement of an intervening elections or ratification by referendum also exists. In this case, a simple majority threshold receives a score of 1, while more demanding requirements where both a supermajority and multiple actors must consent to any changes are scored 4. Perhaps unsurprisingly, given the different definitions used by various authors, as well as the different country samples and periods of analysis, the existing measures of amendment difficulty have been repeatedly shown to correlate rather poorly (Lorenz 2005, 347; Rasch and Congleton 2006, 339; Ginsburg and Melton 2015, 698). The poor correlation of measures may not necessarily indicate that all of them have validity problems, but it surely suggests that different measures of constitutional rigidity capture different procedural aspects and beliefs of what makes amendment procedures difficult.

9.3.2 Measuring the Amendments

Measuring the pace of constitutional change raises similar challenges. Given the difficulty of observing, not to mention measuring, implicit constitutional changes, the operationalizations of amendment rates generally focus on formal amendments (but see Karlsson 2016 for an attempt to measure degrees of implicit and explicit constitutional changes). The difficulties that arise in this case concern definitions of "amendment rate" and "magnitude of constitutional change." Authors interested in the success rate of constitutional amendments rely on yearly averages, which are based on the total number of formal amendments passed during the life of the constitution (Lutz 1994; Lorenz 2005). Still, it is possible to do the count in different ways and at different levels. A common solution is to record article changes (counted as one change even if two separate parts or sentences of the article have been amended at the same time). There are at least two problems with this practice, however. First, the level of change can easily become artificially high. For instance, some countries have abolished their upper chambers of the parliament. This kind of a structural reform is likely to result in the alteration of many articles dealing with the cameral structure and therefore one reform could entail a large number of article amendments. Obviously, counting reforms instead could be a solution, but it is more discretionary and perhaps too ambiguous. The second problem is that counting the number of article changes disregards the qualitative aspects of the amendments. Changing one word in some articles could be extremely important, while removing an entire article could be utterly insignificant. Similarly, innocuous editing of the text and correction of language are article changes of no political interest (this kind of adjustment is of particular relevance for older constitutions).

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Other authors focus on the frequency of revisions and only take into account the number of years in which the constitution was amended (Elkins et al. 2009; Negretto 2012; Tsebelis and Nardi 2016). The assumption here is that once a coalition agrees on a constitutional amendment, the subsequent amendments are easier to pass. As the first amendment is considered the most difficult to pass, if several changes are approved during the same year, they are counted as one (Ginsburg and Melton 2015, 702). Again, there may be problems with this method. Patterns of change may vary over time among constitutional systems (Rasch 2008). In some countries, constitutional reforms come in waves, with a number of reforms—or large reform packages—at certain points while other periods are quiet. For example, in Germany before 2000, there were three reform waves, the last one caused by the unification process of the 1990s (Busch 2000). Counting only the reform years would clearly underestimate the level of change. In other countries, contrastingly, a small number of (incremental) constitutional changes are adopted regularly, though perhaps not every year. In these cases, the level of change could be easily overestimated. Let us again mention Norway as an example. Except for a huge reform package in 2014 (the year of the 200th anniversary of the constitution), a small number of changes have been adopted in most electoral terms since 1905. By custom, constitutional amendments are almost always decided in the same year of the fixed election term. Therefore, the country's value on this variable is completely predictable, but it fails to single out periods of significant constitutional revision.

However, even authors who share a definition of what constitutes a constitutional change may still get different amendment rates if the time span differs. For example, Martin and Rasch (2013, 212) showed that the amendment rate reported by Lutz (1994) for the entire life span of constitutions and by Lorenz (2005), who only registers a recent decade, are only weakly correlated (for a sample of OECD countries). Similarly, the amendment rates generated by Lutz and the CCP measure are only weakly correlated (0.21 for countries where we have both numbers). Roberts (2009) compares amendment rates based on article changes per year and amendments per year for Eastern Europe (1990–2005). Once again, the different measures give quite different impressions of the extent of constitutional change in the various countries. One example is Romania. The post-communist constitution adopted in 1991 was revised only once in 2003, so this is the only year of constitutional change after 1991 (an amendment rate per year of around 0.06 during the time period in question and the same for the CCP measure). Nevertheless, the 2003 reform resulted in nearly 80 article changes. Because measures of amendment rates vary considerably, choosing one or another in empirical studies might be consequential. Additional complications occur when a country possesses more than one document with constitutional status, such as Sweden, New Zealand, or members of a supra-national organization such as the European Union (Lorenz 2005; Closa 2012).

Other attributes of amendments besides their frequency may influence the amendment-counting rule. One of these is the extent of constitutional change, which may be measured in terms of the substantive consequences of the amendments and their potential to change the status quo. For example, while Spain's amendment of article 135 in 2011 changed the way in which the national budget is made, Norway's codification of

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parliamentary government in the new article 15 from 2007 did not trigger any change in the status quo (Martin and Rasch 2013, 213; Ginsburg and Melton 2015, 703). To account for variation in the extent to which constitutional amendments change the constitution, Ginsburg and Melton (2015) analyze the similarity of constitutional documents before and after an amendment is promulgated, and weight the frequency of amendments using the extent of changes made. Their analysis shows that most amendments trigger very little substantive changes, even when constitutional documents are amended almost yearly, such as in Brazil and India. Similar to the case of frequency-based measures of amendment rates, the correlation between the weighted measure of constitutional change and frequency-based measures is notably low (Ginsburg and Melton 2015, 706). Thus, it appears that different measures of amendment frequency and constitutional rigidity may be capturing different concepts of what constitutes constitutional change, and no unproblematic way of quantifying their impact on constitutional documents is available.

9.3.3 Amendment Institutions and Formal Constitutional Change

It seems intuitive that the relationship between the difficulty of the amendment process and the amendment rate should be negative. The fact that the formal procedures for amending constitutions are almost always more demanding than the rules for the adoption of standard legislation suggests that the framers aim to restrict changes to the constitutional framework. Still, the evidence of the impact that rigid procedures have on constitutional stability is mixed.

According to the theoretical model of constitutional change put forward by Tsebelis and Nardi (2016), the expectation of a negative relationship between the difficulty of amendment procedures and the frequency of amendments is not simply an intuition but, also an equilibrium expectation shared by observers and actors alike. Constitutional "locking" mechanisms ensure that the constitution is located in the "constitutional core" of a country. Consequently, "constitutional change requires a point of the previous constitutional core (an article or section of the existing constitution) to be located outside the polity's current core" (Tsebelis and Nardi 2016, 8). The likelihood of constitutional amendments also depends on the "deliberation costs," which vary with the size of the legislative body required to reach agreement and increase significantly in larger polities (Dixon and Holden 2012). Thus, if preference change does occur, then depending on amendment procedures, agenda-setting rules, and the size of decision-making bodies, constitutional change may take place in one form or another.

The expected negative relationship between constitutional rigidity and amendment frequency is illustrated in figure 9.1 (see also Tsebelis and Nardi 2016, 461). The horizontal axis shows a small selection of increasingly rigid amendment procedures. A supermajority requirement (designated by a two-thirds majority) is undoubtedly more

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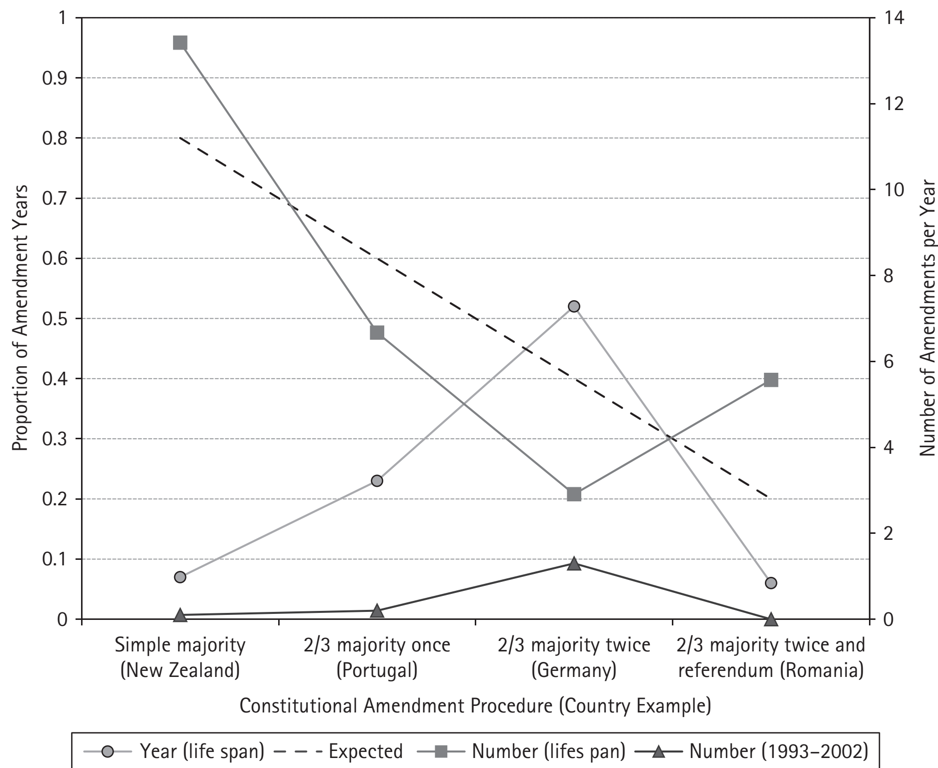

FIGURE 9.1 The Relationship Between Constitutional Rigidity and Amendment Frequency (various measures)

Sources: Lutz (1994); Lorenz (2005); and CCP. The highest amendment rate for Romania is from Roberts (2009) and refers to article amendments.

difficult to meet than a simple-majority threshold. Confirmation of supermajority agreement twice (by the same actor or by different actors) is obviously more demanding than obtaining a two-thirds majority support once. Adding a referendum condition to the repeated two-thirds decision renders the constitution amendment process even more rigid. If a proposal is passed though the latter rigid procedure, it clearly would have succeeded if any of the other procedures had been used. Thus, if we plotted all constitutions characterized by the four amendment procedures shown in figure 9.1, it would be reasonable to expect a lower amendment rate the more rigid the constitution—at least after proper controls. We note that there are many other procedures that would be hard to place on the horizontal axis according to their difficulty. For example, where should a procedure with a simple majority twice before an election and twice after an election go? Is it more or less demanding or rigid than a two-thirds majority vote repeated twice? Any placement would be rather arbitrary. A procedure with a two-thirds majority twice and a referendum is not very uncommon (Japan, Poland, and Romania are examples). However, many countries decide by ordinary majority both in parliament and in the referendum. The trend over time, especially from 1950 on, is that

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more constitutions include supermajority requirements and more constitutions add referendum provisions. Today, half the constitutions of the world require either a supermajority or a referendum, and a third include both in their amendment procedures (Ginsburg and Melton 2015, 690).

Although the procedures become increasingly rigid on the horizontal axis in figure 9.1, it could be the case that the difference in rigidity for all practical purposes is insignificant for all procedures but the extreme ones (i.e., the simple-majority procedure on the one hand and the supermajority with referendum on the other). In other words, politically it might be almost as difficult (or easy) to clear the hurdle of a two-thirds majority once as twice; therefore, the real challenge is to build the first supermajority coalition, while the second follows more easily.

We also note that we find examples of countries' amendment rates almost in all places of the figure depending on how the amendment rate is measured. In figure 9.1, we include three possibilities from the literature. Either long-term (Lutz 1994) or short-term (Lorenz 2005) number of amendments per year (the right axis), or (on the left axis) a measure based on the proportion of years in a constitution's life span where at least one amendment was passed (Elkins et al. 2009; Tsebelis and Nardi 2016). Although we picked only four countries, the results cast doubt on the existence of a straightforward negative relationship between rigidity and amendment frequency in practice. Observing a non-negative relationship between rigidity and change does *not* mean that more rigid procedures do not make it harder to amend a constitution. The logic of the argument certainly holds, but it is obviously hard to meet the *ceteris paribus* clause in practice. Furthermore, the formal amendment procedure may not have a strong restraining effect, and a multitude of other factors play a role in processes of constitutional change as well, blurring the relationship between constitutional rigidity and amendment frequency (Benz and Colino 2011). As Ginsburg and Melton (2015, 699) emphasize, there is a possibility that "institutions will never fully capture the observed variation in patterns of amendment" cross-nationally because other societal attributes are more important.

Empirical analyses have produced conflicting evidence of the relationship between amendment rules and amendment rates. Lutz (1994) was the first to demonstrate a strong inverse relationship between the ease and the frequency of amendments, both in comparative analyses of U.S. state constitutions and in a cross-national sample. His index resulted in the U.S. Constitution, with the two procedures specified in Article V, as the most rigid in the sample of 32 quite varied countries. At the other end of the scale are those of New Zealand (legislative approval by a majority), Portugal (two-thirds majority once), and Austria (the same value despite a referendum threat in addition to two-thirds majority once). In principle, Israel (several basic laws) and the United Kingdom belong to the same category as New Zealand. Lutz counts the number of amendments during the entire life span of constitutions. Cross-nationally, the relationship between the index of difficulty and the amendment rate is strongly negative. The relationship is curvilinear as well, which means that "there is a relatively small part of the curve where most of the effect is concentrated" (Lutz 1994, 363). That is, the index of difficulty soon reaches a point where the curve is almost flat and increasing rigidity no longer impacts the rate

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of change. Upon closer inspection, the flat part of the curve appears when amendment procedures begin to include intervening elections and referendums.

Using the data and procedural information from Lutz (1994), Ferejohn wanted to understand which aspect of difficulty has the strongest effect on the amendment rate. He found the requirement of "special majorities or separate majorities in different legislative sessions or bicamerality" to be the key explanatory factors (Ferejohn 1997, 523). Furthermore, he claims that there is no evidence in the data that popular referendums or state-level ratification requirements have any effects on the amendment rate. Although posing a slightly different question, Ferejohn also emphasizes that special majorities in the legislature may be the necessary and sufficient condition to ensure a moderate amendment rate (one that is neither "too high" nor "too low," both of which could reduce the endurance of a constitution).

The relationship between special-majority requirements and amendment rates has not proven robust, either. In contrast to Ferejohn's (1997) results, Rasch and Congleton (2006) found that special majorities in the legislature have no discernible effect on amendment rates. According to their analysis of 19 OECD countries, the number of veto players and veto points, intervening elections, and referendum threats are the kinds of provisions that systematically impact amendment rates. Finally, using a data set on constitutional amendments at the state level in the United States, Dixon and Holden (2012) reveal that supermajority voting requirements reduce the overall rate of constitutional amendments, while the provision for amendment by referendum increases the amendment rate and the double-passage requirement have no significant effects.

What may explain the inconsistency of these findings? On the one hand, as Dixon (2011, 105) notes, it may well be the case that the number of observations is simply too small for a statistical model to pick up the distinct effects of various hurdles to amendment. On the other hand, though, none of these studies provides a theoretical argument about why supermajorities should increase the difficulty of the constitutional amendment process more than the existence of veto players or the other way round. There is also no explanation of the broader implications of these findings. Given that both supermajorities and veto players increase the rigidity of the amendment process (as figure 9.1 indicates), the lessons that constitution framers can learn from the empirical evidence of no effects across different samples of countries and/or different periods of time are ambiguous, to say the least. Certainly, one would be hard pressed to formulate an a priori expectation about how supermajority requirements and veto players should be combined in order to strike a good balance between flexibility and rigidity.

Not all empirical studies have found that rigidity and amendment frequency are negatively correlated. Analyzing Lutz's (1994) data on American states, Ferejohn (1997, 524) found hardly any support for the idea that the amendment rate can be controlled by the design of amendment rules. More recently, Tsebelis and Nardi (2016, 457) presented intriguing evidence of a nonsignificant, positive relationship between constitutional rigidity and the frequency of amendments in OECD countries: "locking constitutions does not work, since it is not the case that more rigid constitutions are less frequently amended." Their answer to the "puzzling failure of constitutional locking" points to

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the length of the constitution as the missing link between amendment rigidity and frequency: "longer constitutions are more difficult to amend and are also more frequently amended than shorter ones" (Tsebelis and Nardi 2016, 479). In other words, longer constitutions are more frequently amended despite locking, and after control for length, there is a significant positive effect of rigidity on amendment frequency. To be sure, these results are at least partly explained by the use of the measure of amendment difficulty developed by the Comparative Constitutions Project ("Amend Rate"), which is derived by combining both the observed amendment rate and a set of procedural and other institutional variables (as described in section 9.3.1). Strictly speaking, the variable shows the predicted probability that a formal amendment will be adopted for each constitution.[4] We also note that the claim that longer constitutions are more difficult to amend is at odds with other parts of the literature. This is clearly the case if we examine the data in the appendices provided by Lutz (1994). We find a strong negative relationship between procedural difficulty and constitutional length (correlation at -0.58); longer constitutions have more flexible amendment rules. This seems natural if framers in general realize that constitutions that are broader in scope and/or more detailed need to be adjusted more often.

A growing body of literature challenges the purely institutional understanding of constitutional change. Probably the best example for this position is the "amendment culture" argument put forward by Ginsburg and Melton (2015), according to which norms and habits are better predictors of constitutional change than the choice of amendment rules. Drawing on the comprehensive data about the world's constitutions from the Comparative Constitutions Project, this study finds that institutional factors have no systematic effects on observed amendment rates. This is the same conclusion that Tsebelis and Nardi (2016) reached for a much smaller sample. Constitutional culture, measured very indirectly at the level of amendment in a country's previous constitution, restrains amendment activity but not the procedural variables (amendment threshold, number of approvers, multiple sessions required). Although the number of constitutions included in the analysis is truly impressive, the operationalization of some of the core variables is questionable.

Roberts (2009) reaches a similar conclusion while analyzing the politics of amendments in Eastern Europe: contextual changes that occur with the passage of time, and especially democratization processes, drive formal amendment rates to a far greater extent than do political institutions. Similarly, in line with results by Negretto (2012, 2013) mentioned earlier, Reuter and Lorenz (2016) find that, in addition to age, rigidity, and length of constitutions, fragmentation of the party system and government leverage influence the amendment rate in the German Länder. Contrary to initial expectations, strong governments and a high number of effective parties in the Land parliaments are linked to frequent constitutional changes. However, while these characteristics may accelerate the pace of constitutional changes, they do not necessarily have to do so at the expense of locking mechanisms. Thus, recent political science work on the politics of constitutional amendments demonstrates that careful research design can capture the mediating effect of extra-constitutional factors on the effects of locking instruments

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designed by constitution-framerss without undermining the institutional logic of the constitution-changing game.

9.4 Concluding Remarks

There is a large literature dealing with constitution making, endurance of constitutions, and constitutional change in areas of law, political science, and economics, some of which apply a public-choice approach (Ginsburg 2010). Our focus has been on amendment procedures and their consequences for constitutional adjustment. With such a narrow focus, we have not restricted our discussion to the public-choice literature.

No doubt, our understanding of constitutional amendment procedures and their consequences has improved substantially over the last two to three decades. Methods and measures have become more sophisticated. Also, the availability of high-quality data on almost all national constitutions in the last 200 years promises (even) more reliable analyses. Still, challenges persist. The micro-foundations and the detailed mechanisms of constitutional change remain unclear. Instead of investigating constitutional reform in general, a large portion of the literature analyzes topics that are only partly constitutional, like electoral reform (e.g., Boix 1999; Benoit 2004; Renwick 2010) or change of governing system (e.g., Hayo and Voigt 2010).

There is no general agreement on how to classify the hurdles presented in our review of constitutional amendment procedures. Lutz (1994) and a series of other authors (e.g., Lijphart 2012; Lorenz 2005; Rasch and Congleton 2006; Roberts 2009; Negretto 2012) suggest institutional approaches to classify the amendment procedures according to rigidity. The Comparative Constitutions Project (Elkins et al. 2009; Ginsburg and Melton 2015) applies a more complex and less institutional understanding. The measures of Lutz and CCP are clearly more sophisticated than other suggestions, but also less transparent and more problematic. Furthermore, the CCP measure can hardly be used if one is interested in the consequences of institutional features per se.

The literature is not in agreement on the extent to which constitutional amendment procedures influence the frequency of formal constitutional change. Lutz (1994) and many others basically find a negative relationship, although with several nuances and reservations: the more difficult the procedure, the less frequent changes are made to the constitution. Tsebelis and Nardi (2016) surprisingly find a positive relationship in the OECD countries (significant only after control for length). Because they use the noninstitutional measure of rigidity from CCP, their result is hard to trust. Nevertheless, one should be cautious enough not to overestimate the impact of procedural rules on the level of change (Benz and Colino 2011, 393). Amendment institutions at best provide only a partial explanation of constitutional change. The answer to this question must take into account a number of additional factors of a political, economic, and social nature.

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Notes

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1. See Schwartzberg (2014)—and to some extent McGann (2006)—for a general discussion of the origins and properties of supermajority rule.
2. Strauss (2001, 1459) comments that in these cases "the changes produce the amendment, rather than the other way around."
3. Among the written constitutions of the late eighteenth and early nineteenth century, also a third one, the Belgian constitution of 1831, still remains in force (Smith 1995).
4. However, in the OECD sample, we found the correlation between "Amend Rate" and the year-based amendment frequency (CCP) to be as low as 0.03.

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