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The Landscape of Constitutional Amendments

The constitutions of the world are incredibly diverse, and the rules governing what is needed for an amendment vary greatly across countries. In this chapter, I describe a series of constitutional amendment stories with the goal of impressing upon the reader this diversity. I will be describing the institutions and providing information about particular events that bring them into relief. Sometimes these events will refer to constitutionally permitted initiatives, while other times they will be stretching the existing constitutional rules (therefore pushing the countries further away from a democratic status). Also, some amendment rules in US states are quite original and, as such, deserve to be included in a chapter on the diversity of amendment rules even though we will not deal with US states in other chapters. I will divide the chapter into three sections.

In Section 1.1, I present the *elements and combinations* of amendment rules (simple procedures, multiple bodies, qualified majorities, referendums, time, or other constraints) – or, in other words, the *additive or alternative combinations* that create more complicated pathways for amendments.

In Section 1.2, I argue that these procedures are so convoluted, or that interests are so confrontational, that they can generate *institutional conflicts* among different constitutional players regarding what the appropriate process is.

In Section 1.3, I will show that sometimes these procedures may create *constitutional revisions* with the immediate goal of amending the amendment rules themselves so that ordinary amendments will become either feasible or impossible.

This division is not to be understood as creating mutually exclusive and collectively exhaustive categories because each one of the stories I will tell could be classified in different positions. For example, when we have alternative institutional paths for amendment (a case belonging in Section 1.1), it is possible that the actors involved will disagree on which route should be selected (turning it into a case for Section 1.2), and it is also possible that down the road the institutions are changed so that

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these conflicts will be eliminated (becoming a case for Section 1.3). Depending on what I want to focus on, I will classify the case in one of the three categories, and the reader should know that none of my stories has an exclusive belonging.

These complications, once identified and enumerated, will be compared in Chapter 2 where we will study the constitutional amendment rules of all democratic countries and assess constitutional rigidity.

1.1 Elements and Combinations of Amendment Rules

1.1.1 Simple Procedures

In Israel, the absence of a formal, written constitution contributes to the relative simplicity of their procedure for amendments. Israel operates under a set of laws, legal precedents, and parliamentary norms known collectively as the "Basic Laws." The Knesset, the Israeli Parliament, sets identical procedures for the enactment of regular laws and Basic Laws. Thus, a Basic Law can be passed by a simple majority; however, some Basic Laws include entrenchment provisions that require a higher threshold to change them. Specifically, two sections of the Basic Law "The Knesset" (1958) are entrenched, so a two-thirds qualified majority (80 out of 120) is required to extend the Knesset's term (Section 9A[a]) and amend emergency provisions (Section 44). Other provisions (such as the modification of the status of Jerusalem) require an absolute majority (61 out of 120). Clause 6 of the Basic Law "Jerusalem, Capital of Israel" (1980), which prohibits the transfer of authority to a foreign body, was entrenched in 2000, requiring an absolute majority of sixty-one members of the Knesset to amend it (Amendment 1). It was further entrenched in 2018 and now requires a super majority of 80 out of 120 (Amendment 2). Likewise, the entrenchment section itself was entrenched: Any further amendment now requires a majority of sixty-one Knesset members.[1]

The status of Jerusalem has been a multimillennial aspiration of Jewish people, so it is difficult to imagine that it will be disputed. Nevertheless, Article 7 creates a roadmap for institutional conflict: it creates different

[1] "The provisions of article 6 are not to be changed, save by a Basic law adopted by a majority of eighty Members of the Knesset. The provisions of this article are not to be changed save by means of a basic law adopted by a majority of the Knesset Members" (Basic Law Jerusalem The Capital of Israel, Article 7).

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conditions for direct vs. indirect disputes of Article 6. For direct disputes, a majority of two-thirds is required, but for indirect disputes, a simple majority of the Knesset can modify Article 7 itself and can thereby also modify the non-protected Article 6. This analysis indicates that even the simplest amendment provisions become complicated and conflictual very fast.

This short institutional and political account of what was intended to be the simplest worldwide set of amendment rules indicates how these rules are most endowed with significance and can be changed to promote different actors' goals, which is the fundamental point being made throughout this book.

1.1.2 Multiple Bodies

In the Czech Republic, a constitutional amendment must be passed by a three-fifths majority in both houses of the Czech Parliament. In response to the terrorist attacks in Paris and Brussels in 2015 and 2016, the EU issued a directive in 2016 restricting the sale of semi-automatic firearms to reduce the risk of future attacks (Bank 2016). In the Czech Republic, which was slated to hold its national elections soon, the interior minister of President Miloš Zeman's cabinet proposed a constitutional reform that would provide Czech citizens the right to use firearms to protect the state against terrorism (Adamičková and Königová 2016). The proposed amendment passed the Chamber of Deputies, where Zeman enjoyed considerable support, with an overwhelming margin of victory. However, the vote in the Senate, where the center-left Social Democratic party still held a plurality of seats, missed the three-fifths threshold by seven votes, thus causing the proposed reform to fail (Williams 2018).

In response to another EU directive aimed at restricting gun ownership, another attempt was made in 2021 to enshrine the right to gun ownership in the constitution after a petition was signed by over 100,000 Czechs. Senate elections in 2018 and 2020 had weakened the Social Democrats, who now accounted for three of the eighty-one seats in the Senate rather than the twenty-five they held in 2016. As a result of a less hostile Senate, the second attempt to enshrine gun rights in the Czech constitution passed the supermajority threshold in both houses (Plevák 2021).

In the United States, where constitutional amendments must be approved by a two-thirds majority in both the House of Representatives and the Senate as well as three-quarters of the states, a

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proposed amendment to criminalize the burning of the US flag failed by one vote in the Senate after being ratified by the House (Morisey 2007).

This was the latest in a string of unsuccessful attempts to modify the constitution to prohibit flag burning. In 1989, the US Supreme Court ruled that flag burning was a constitutionally protected expression of free speech. In response, the US Congress attempted to amend the Constitution to criminalize the defacement of an American flag but was unable to achieve a supermajority of votes in the US Senate. While they did pass the Flag Protection Act, which allowed for the punishment of flag defacers, this act was struck down in the same year by the Supreme Court. Further attempts were made in 1998, 2000, 2001, 2003, and 2005, but they were unable to reach enough support from Democrats in the Senate to reach the supermajority threshold. While three-quarters of the US states would need to ratify the amendment even if it did pass the US Congress, every US state has signaled that they would ratify an anti-flag burning amendment (American Civil Liberties Union n.d.).

1.1.3 Qualified Majority

In Poland, a three-quarters majority of legislators in the lower house and a simple majority in the upper house must agree in order to amend the constitution. Since 2015, the Polish government has packed the Constitutional Court by mandating a retirement age, forcing the retirement of several judges and appointing its own partisans to the empty spots. In this way, by 2020 thirteen of the fifteen seats on the Constitutional Court had been appointed by Andrzej Duda, the far-right president of Poland (Bunikowski 2018). However, Duda's supporters in parliament have still struggled to pass constitutional amendments. For example, in 2020, members of Duda's nationalist party proposed two constitutional amendments: to extend the term of the president by two years because of the coronavirus crisis (Reuters 2020b) and to ban the adoption of children by LGBTQ couples (Reuters 2020a). While a majority of voters in the lower house voted in favor of both amendments, neither passed because they were unable to meet the required two-thirds threshold.

In South Korea, President Moon Jae-In proposed a constitutional amendment in 2018 that would replace a single five-year presidential term without reelection with two four-year terms with the possibility of reelection. The amendment would also have lowered the legal voting age from nineteen to eighteen and devolved power to local governments.

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To pass, the amendment needed a two-thirds majority, but only 114 of 288 legislators took part in the vote (Kim 2021), causing the amendment to fail.

1.1.4 *Multiple Votes in Successive Parliaments*

Several countries require an extended time period for a successful amendment, where two *successive* parliaments agree on a constitutional revision.[2] In these cases, the first parliament identifies the proposed revisions, then there is an election of a new parliament which votes for the adoption of the final text. The required majorities of the two parliaments are specified in the amendment rules. Obviously, this procedure may fail in any one of the two votes and is significantly more difficult than the simple vote required by most constitutions.

In Benin, a constitutional amendment must pass a double vote of three-quarters (consideration stage) and then four-fifths of members of parliament (MPs) in the National Assembly (the formal substantive deliberation stage, or, alternatively, a referendum). A 2017 amendment failed when it did not even reach the second stage because it missed the three-quarter requirement by three votes (Adjolohoun 2017). Because the proposed amendments would have changed about one-third of the constitution's text, Adjolohoun believes that "the 22 MPs who voted against the proposal and the one who abstained blocked the entire process for fear of opening a Pandora's Box which they believed they may lack the political ability to control." The proposal sought to extend the current five-year presidential term by one year and to reduce the number of terms from two to one, which, in Adjolohoun's words, followed from the "desire to superimpose a personal pledge [that President Talon had made during his election campaign] onto the people's will." The presidential term limit was central to the controversy since it had been a "key pillar of the national consensus edifice" (Adjolohoun 2017).

In Greece, the required majorities are significantly lower, needing only a simple majority in one parliament and a three-fifths majority in the other. However, the Greek Constitution does not specify which parliament should have each majority. This generates two possibilities: either

[2] I am *not* discussing here repeated votes which are very often prescribed in the same parliament since we are discussing identical majorities, which, even if they are not completely achieved, will be approximated.

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the first parliament will decide by simple majority in which case the second (after the election) will be required to decide by qualified majority, or the first parliament will decide by qualified majority enabling a simple majority of the second parliament to make a constitutional amendment at its will. This particular constitutional flexibility generates different strategic possibilities as a function of the anticipated electoral outcomes. If the same party is anticipated to win the election, then it will select the easier procedure. If a different party is anticipated to win, the most likely procedure will require the qualified majority to be used in the second parliament (which will make many attempted amendments fail). This is what happened (for the first time) during the 2019 election. The constitutional revision was initiated by the left-wing coalition government of the country and was completed by the right-wing majority.

This procedure resulted in the failure of many proposed amendments. For example, the proposal by the Left included a referendum by popular initiative (after the collection of 500,000 signatures) which was not included in the constitution.[3] Similarly, the separation of church and state was not included. Two significant modifications that survived the process were the separation of the election of the president of the republic from the dissolution of parliament and the reduction of qualified majorities for the selection of independent authorities. Article 32 required the dissolution of parliament, and the new election of a three-fifths qualified majority could not select a president of the republic. This provision led to the rise of the left-wing government in 2015 when the Right could not find the number of votes necessary for the election of a president of the republic. The left-wing government voted to modify Article 32 in the first parliament, thus enabling the upcoming right-wing government to modify it at will. As for the independent authorities, the four-fifths qualified majority of parliamentary support for their election was reduced to three-fifths (the significance of the numbers being that in the first case support by the main party of opposition is necessary while

[3] The coalition of SYRIZA–ANEL introduced a referendum in 2015 that indicated their opposition to the needs of economic restrictions and was advocated for by the EU due to the conditions for financial loans to the Greek government (see Tsebelis 2018b). This referendum passed but was then almost immediately abdicated as the coalition wanted to introduce the measure in the constitution. This proposal has often been made by other actors like the Greek Orthodox Church in order to support proposals such as the rejection of marriage between people of the same sex. I discuss the ambivalent role of referendums as constitutional devices later in this chapter.

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in the second the support of some minor party of the opposition may be sufficient).

These two countries' examples indicate how difficult it is to overcome the multiple-votes procedures. However, failure is not the only option. I will describe here two more alternatives in order to indicate that political elites may find ways to deviate from restrictive rules (unconstitutional though they may be).

In Belgium, constitutional amendments must be passed in two votes separated by an election. The first vote requires an absolute majority and declares that there are reasons to revise such constitutional provisions as it determines. The substance of the amendment does not have to be specified until the second vote, which requires a two-thirds majority with a quorum of two-thirds (Article 195 of the Belgian Constitution). In 1962, the Catholic-Socialist governing coalition proposed a series of constitutional reforms with the goal of helping to reduce tensions between French and Dutch Belgians, which eventually started the transformation from a decentralized unitary state to a federation. The so-called first state reform in 1970 established guarantees against minorization by implementing (1) a procedure for preventing a parliamentary majority composed mainly of members of the majority ethnic group from passing a law that was harmful to the interests of the linguistic minority; (2) a guarantee of equal representation in the government, or, rather, in the cabinet (Council of Ministers); and (3) the guarantee that certain specified future laws that affected the basic relations between the linguistic communities would have to be passed by a special concurrent majority. These guarantees were enshrined in the constitution in exchange for cultural communities (mainly concerned with person-related matters) that the Flemish demanded to promote cultural and linguistic autonomy. Also, three regions (mainly concerned with economic and place-related matters) were created (the Flemish, Walloon, and Brussels-Capital regions) as "an answer to the call for more economic autonomy of the French-speaking population" (Goossens and Hendriks 2021: 24), although their competences were less clearly defined than those of the communities.

These proposals passed the first vote in 1965, after which the parliament dissolved and elections were called in accordance with the rules of amendment. However, as a result of the election, the Catholic-Socialist coalition lost its supermajority, and the Socialists were replaced by the Liberals in the governing coalition. Because the Liberals were opposed to the constitutional reforms, the second vote did not occur. However, in

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the aftermath of the Leuven Affair of 1968, an outbreak of the language war between Flemings and Walloons prompted legislative elections. The French section of the Catholic University of Leuven, a Francophone enclave on Flemish soil, announced plans for a major expansion of its facilities in the city, resulting in a split of the university with the French departments moving across the language frontier to Louvain-la-Neuve. The parliament concurred on the sustenance of the declaration of constitutional revision, which permitted the freshly established Catholic-Socialist coalition, led by Prime Minister Eyskens, to again prioritize the revision. Since the coalition lacked the necessary two-thirds majority, Eyskens' government started negotiating with the Liberals and occasionally with the linguistic parties, which had gained voter support in the 1968 election. After a period spanning over two years which were marked by substantial parliamentary debate and rigorous consultations with various special ad hoc commissions, Prime Minister Eyskens managed to gain enough backing to institute the major reform of the Belgian state in December 1970 (Dunn 1974: 152).

Decades later, the Belgian political elites sought to circumvent these complicated procedures and reduce the potential for failure of amendments. This only happened once in Belgian history and was applicable to the legislature elected on June 13, 2010.[4] This time, a new *transitional* provision in Article 195 omitted the need to dissolve the parliament (the second stage of the original amendment procedure) for reforms regarding the autonomy of regions, child allowance rights, federal elections, bicameral system reform, the powers of the Brussels Region's capital, the use of languages in legal matters, public prosecutions, tax matters' conflict of interest regulation, and European parliament elections over the remaining course of the legislature (Venice Commission 2012). In the remaining stage, two-thirds of the members and votes in each house were still needed for what constituted the so-called sixth state

[4] "The Houses, as they were constituted following their full renewal on 13 June 2010, may however, in common consent with the King, pronounce on the revision of the following provisions, articles and groups of articles, but only to the effect as indicated hereafter: [follows a list of revisions of fifteen parts of the constitution] ... The Houses can only debate on the items mentioned in the first paragraph provided that at least two thirds of the members who make up each House are present and no change is adopted unless it is supported by at least two thirds of the votes cast. This transitional provision is not to be considered as a declaration in the sense of Article 195, second paragraph" (Venice Commission 2012: 3ff.).

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reform. According to Goossens and Cannoot (2015), "In light of the historical evolution of Belgian federalism, the sixth state reform is undoubtedly a major reform. The whole package of power transfers is extensive (ca. 20 billion euros), especially in comparison with previous state reforms. In addition, for the first time powers regarding social security were transferred to the federated entities, as the power concerning family allowances is decentralized from the federal level to the communities" (44). They conclude that "the power transfers of the sixth state reform have resulted in a paradigm shift, since the lion's share of powers – excluding social security – is now situated at the level of the federated states. The sixth state reform also thoroughly revised the Special Finance Act, which considerably increased the fiscal autonomy of the regions" (50).

In Luxembourg, a constitutional amendment also had to be passed by two successive votes (although the legislature consists of only one chamber) separated by an election. In addition, the grand duke had to sign the declarations of amendments and sanction (enact) the modifications that the Chamber of Deputies had decided. The Luxembourg political elites found another way to get around this restriction: Before the regularly scheduled dissolution of every parliament for an election, they simply stated their intention to revise the constitution, even if they did not plan on revising the constitution in the subsequent election (Gerkrath 2013). Sometimes, these declarations mentioned many articles at once. Gerkrath (2013) concludes that "virtually any new elected Chamber was also entitled to proceed to constitutional amendments" (451). Since 2003, however, the intervening elections have been removed, and constitutional reforms must now undergo two parliamentary votes, spaced at least three months apart, in order to enable a more efficient and comprehensive reform process of the constitution that had become less and less coherent, consistent, and transparent over regular and increasingly frequent amendments since 1868 and, strikingly, lacked the enumeration of a number of fundamental rights and liberties (Sauer 2021). Furthermore, in an effort to enhance direct public involvement, the 2003 revision of the constitutional amendment process introduced the option of a referendum to replace the second parliamentary vote either if at least one-quarter of the MPs (numbering sixteen) or if 25,000 voters eligible to vote in parliamentary elections, which is slightly less than one-tenth of the eligible voters, makes such a request (Sauer 2021). In addition, "the ultimate change in the revision procedure results indirectly from the reform of Article 34 by the revision act of 12 March 2009. By ending

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the power of the Grand Duke to 'sanction' acts of Parliament, this revision also removed the last prerogative of the Grand Duke in the field of constitutional revision. Now constitutional revision acts, like ordinary legislation, will simply be enacted 'within three months of the vote in the Chamber'" (Gerkrath 2013: 453).

1.1.5 Tiered Amendment Difficulty

Many countries include "eternal provisions" in their constitutions, such as Germany's Article 79.3 which specifies that "amendments to this Basic Law affecting the division of the Federation into Länder, their participation on principle in the legislative process, or the principles laid down in Articles 1 and 20 shall be inadmissible." Similarly, the Greek Constitution specifies (in Article 110.1) that "the provisions of the Constitution shall be subject to revision with the exception of those which determine the form of government as a Parliamentary Republic and those of articles 2 paragraph 1, 4 paragraphs 1, 4 and 7, 5 paragraphs 1 and 3, 13 paragraph 1, and 26."

Additionally, a constitution frequently specifies different tiers of permissibility of amendments. For example, the Chilean Constitution (Article 127) divides the articles into two different categories requiring different majorities for each one: "The proposed amendment will need to be approved in each House by the vote of three-fifths of the representatives and senators in office. If the amendment concerns chapters I, III, VIII, XI, XII, or XV, it will need, in each House, the approval of two-thirds of the representatives and senators in exercise." Similarly, the constitution of Malta (Article 66) specifies a series of subjects requiring two-thirds of the members of the house of representatives, while others require additional approval by a referendum.

1.1.6 Time Limits

The time limit in the amendment procedure of the Costa Rican Constitution is twofold and proceeds as follows. (1) The proposal to reform one or various articles must be presented to the legislative assembly in ordinary sessions, signed by at least ten deputies or by 5 percent at a minimum of the citizens registered on the electoral roll. (2) This proposal will be read three times at intervals of six days, to decide if it is admitted or not for discussion. (3) "In the affirmative case it will pass to a commission appointed by [an] absolute majority of the Assembly,

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for it to decide [dictamine] in a term of up to twenty working days" (Constitution of Costa Rica, Article 195). Obviously, having an amendment survive a vote three times instead of once makes survival more difficult, but it is not significantly more difficult since the same parliament is involved. Nevertheless, there is some challenge involved as shown in the next case, which indicates that this rule was relaxed.

In Nigeria, this process is followed:

> The end of Assembly of every legislative house breaks the cycle of the amendment process. Therefore, the Constitution amendment process cannot go beyond the fixed period stipulated for any given Assembly nor deliberations on the amendments continue at the convening of a new Assembly.
>
> Note however, that recent Rules of the House of Representatives [Order XIII, Rule 1 (11)] now allow for constitution amendment bills not concluded in a previous Assembly to be taken up by a new Assembly. This was seen in the 7th and 8th Assemblies where the latter continued and concluded work on some constitution alteration bills began by the former but vetoed by the President. This provision however goes more to the issues and does not dispense with certain procedural requirements. For instance, the bill will still have to be reintroduced and made to go through the legislative stages or readings. The benefit of the rule is that the same issues can be brought back on table. Those considered settled can be prioritized and accelerated while certain procedures like a public hearing may be dispensed with except there are new issues or provisions introduced in the bill that require further consultations.
>
> (PLAC 2014: 11)

In Guyana, where a constitutional amendment must pass within six months of originally being proposed, an amendment to the constitution that would have forbidden discrimination based on sexual orientation failed when, despite having unanimous support from Congress, the president refused to ratify the amendment after being targeted with a pressure campaign by Christian groups. Because of the president's refusal, the six-month threshold was reached without the amendment being passed, and the amendment failed (Bulkan 2004).

1.1.7 Alternative Pathways

In Colombia, a constitutional amendment can be passed either by a simple majority vote of both houses of the Colombian legislature or by a majority vote of citizens in a referendum, with the caveats that Congress must approve of the referendum and the turnout must reach

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25 percent.[5] In 2003, Colombian president Álvaro Uribe submitted a list of fifteen reforms to a popular referendum. The reforms that were initially proposed included a ban on public office for those convicted of corruption, mandatory participation of regional legislatures in the creation of the national budget, the dissolution of the existing two houses of parliament followed by the establishment of a new unicameral parliament, and the limiting of the wages of politicians to no more than twenty-five times the country's minimum wage.

Before the vote, Uribe faced two setbacks. First, in order to secure Congress' support of the referendum, he was forced to abandon the proposed unicameral reconstitution of Congress, instead settling on a 20 percent reduction in the number of legislators in each body. Second, Uribe wanted all fifteen proposals to be bundled into a single question, but the Colombian Supreme Court ruled that, according to the constitution, each proposed reform needed to be considered separately. Consequently, every voter had to read each of the fifteen proposals and vote for or against the reform.

On October 25, 2013, Colombians went to the polls to vote on the proposed changes. While all fifteen proposals received support in excess of 80 percent among those who voted, only a single proposal – a ban on holding public office for those convicted of corruption – passed the 25 percent quorum requirement laid out in the Colombian Constitution. Following this failure, Uribe submitted his amendments for approval in the Colombian Congress where he was forced to substantially water down the most controversial proposals (Breuer 2008).

In France, where a constitutional amendment may pass either in Congress or by referendum, the French people voted in a referendum in 2000 to decide whether to reduce presidential term limits from seven to five years. The referendum was a success: 73.2 percent of voters supported the proposed constitutional amendment, though only 30.2 percent of eligible voters turned out (Rogoff 2008). In 2008, France considered another constitutional amendment that would impose term limits on

[5] Specifically, the Colombian constitution states that "the constitutional reforms must be submitted to a referendum approved by Congress when referring to the rights recognized in Chapter I of Title II and to their guaranties, to the procedures of popular participation, or to Congress, if so requested, within the six months following the promulgation of the legislative act, by one third of the citizens who make up the electoral rolls. The reform shall be understood to be defeated by a negative vote of the majority of the voters as long as at least one-fourth of those on the electoral rolls participate in the balloting" (Colombian Constitution Article 376).

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French presidents and broadly restructured the relationship between the executive and legislative branches. Rather than pursue another referendum, a joint session of Congress was called, where the amendment passed the two-thirds supermajority threshold by a single vote (Rogoff 2008).

1.1.8 Referendums

Citizen Initiatives

In Switzerland, citizens can challenge any legal provision via referendum and may also initiate a process of constitutional amendment by gaining 100,000 signatures in support of a proposal. Recently, constitutional amendments that restrict migrants or the building of minarets, for instance, have been proposed and passed in this fashion (Dixon and Uhlmann 2018). In the case of the minaret ban, legal challenges against the initiative were made, but the Swiss federal court did not consider the challenges on the grounds that they did not have the right to overturn a citizen initiative.

In Spain, where citizen initiatives can also be a source of lawmaking, there are limits to the types of issues that can be decided via referendum. Spanish citizens cannot reform the constitution, tax law, or international treaties. Moreover, they may not submit an initiative that concerns matters that are regulated by constitutional law, such as fundamental rights and liberties (Cuesta-Lòpez 2012). Similarly, **in Italy**, "issues of taxation, budgets, criminal amnesty or pardons, and the ratification of international treaties cannot be put to popular vote" (Uleri 2012: 74), and **in Greece** a referendum on a legislative bill "regulating important social matters" that has been passed by Parliament can be declared if three-fifths of the Greek Parliament assent, so long as it does not concern fiscal policy (Constitution of Greece Article 44).[6]

Majority Requirements

In 1999, a set of over fifty constitutional reforms was (after much debate and many rounds of concessions) passed by the **Guatemalan** Congress and was submitted to a vote by the Guatemalan people in a referendum. The referendum failed, however, and all the hard-fought amendments

[6] The same article of the constitution states that "the President of the Republic shall by decree proclaim a referendum on crucial national matters following a resolution voted by an absolute majority of the total number of Members of Parliament, taken upon proposal of the Cabinet."

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were abandoned (Lehoucq 2002). Since the Guatemalan constitution does not impose a quorum requirement on referendums, it is worth noting that even though less than 19 percent of Guatemalan voters actually cast a vote during the referendum, if the result had gone the other way it still would have been binding and the amendments would have passed.

Quorum Requirements

This was decidedly not the case **in Moldova** in 2009, where a referendum to reduce the number of votes needed by the Moldavian Congress to elect a president from sixty-one to fifty-one failed despite receiving 88 percent support from those voting. Much like the Colombian case where most of Uribe's proposed reforms did not achieve the 25 percent quorum threshold, only 30.3 percent of Moldavian voters participated in the 2009 Moldavian referendum, falling just short of the required 33 percent (Fruhstorfer 2016). In contrast, a 2001 constitutional amendment to impose restrictions on the appointment of judges in Botswana (where referendums are required for major constitutional amendments) was ratified in a referendum with only 5 percent of the population actually participating.

In Denmark, constitutional amendment also requires assent from both the Danish Parliament and from the people in a referendum. The Danish Constitution requires that 40 percent of all voters must participate in a constitutional referendum and that a simple majority of those voters must assent to a proposed constitutional change. This 40 percent requirement is actually reduced from the 45 percent requirement that prevailed prior to 1953. In 1939, a major set of constitutional reforms in Denmark that had included reducing the voting age to twenty-one narrowly failed, with 44.5 percent of the Danish voting population participating in the referendum (Elklit 2010).

In Australia, "a double majority referendum" is required for a successful constitutional amendment. This is defined by the Australian Electoral Commission (2024): "A national majority of all formal votes cast a majority of formal votes cast in a majority of the states (i.e. at least four out of six states)." This unusual procedure is a replication of the Swiss system of amending the constitution.

Five amendment proposals were rejected at the state stage despite having a majority of the popular vote. One salient example is the Simultaneous Election Bill of 1977, which aimed to change the duration of senator terms from a fixed term to two terms of the house. The bill had broad popular support, winning 62.22 percent of votes in the

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referendum, but it was narrowly rejected, gaining a majority in only three states instead of the required four. The actual discrepancy between the majority of the population and the blocking minority can be much higher because of the pronounced population differences among states. I calculated that, as of 2023, a 9.95 percent of the population is sufficient to form the majority in the three smallest states (Western Australia, South Australia, and Tasmania, who together comprise 19.90 percent of the population) and, consequently, block an amendment even if the remainder (over 90 percent of the population) is in favor (Centre for Population 2024).

In the state of Nevada, referendums are of great importance in both pathways that the state constitution may be amended. If the legislature (senate or assembly) proposes an amendment, the pathway is threefold (as stated in Nev. Const. art. 16, § 1).[7] First, the amendments must pass in the senate and the assembly by an absolute majority. Second, they must pass it again in the next consecutive biennial session – or, in other words, after the next general election when they are possibly composed differently. Third, a majority of the electors qualified to vote for members of the legislature must approve and ratify the amendment in a referendum.[8]

If the citizens initiate the amendment, the pathway is twofold and leaves out the legislature entirely. Before that pathway starts, any such initiative must obtain the signatures of registered voters that equal at least

[7] Nev. Const. art. 16, §1: "Any amendment or amendments to this Constitution may be proposed in the Senate or Assembly; and if the same shall be agreed to by a Majority of all the members elected to each of the two houses, such proposed amendment or amendments shall be entered on their respective journals, with the Yeas and Nays taken thereon, and referred to the Legislature then next to be chosen, and shall be published for three months next preceding the time of making such choice. And if in the Legislature next chosen as aforesaid, such proposed amendment or amendments shall be agreed to by a majority of all the members elected to each house, then it shall be the duty of the Legislature to submit such proposed amendment or amendments to the people, in such manner and at such time as the Legislature shall prescribe; and if the people shall approve and ratify such amendment or amendments by a majority of the electors qualified to vote for members of the Legislature voting thereon, such amendment or amendments shall, unless precluded by subsection 2 or section 2 of article 19 of this constitution, become a part of the Constitution."

[8] For example, the 2001 legislature proposed and passed that in Nev. Const. art. 2, §1 on voting rights, the words "idiot or insane person" would be replaced by "person who has been adjudicated mentally incompetent, unless restored to legal capacity," which was agreed on and passed by the 2003 legislature and approved and ratified by the people at the 2004 general election (see 2001 Statutes of Nevada page 3469 and 2003 Statutes of Nevada page 3726).

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10 percent of the voters who voted at the last preceding general election, with at least one-fourth of those collected in each of the four petition districts, which match the congressional districts (Nevada Secretary of State n.d.). Then, two referendums at two successive general elections are required. Only if the voters approve the amendment twice can it be added to the Nevada Constitution (Nev. Const. art. 19, § 2).[9]

Referendum Agenda

This is a very sensitive issue as we will explain in Chapter 2. In some constitutions it is not allowed to introduce multiple issues in a referendum amending the constitution. We saw already that in Colombia the Supreme Court split one referendum into fifteen separate questions. In the **Constitution of Ireland** Article 46.4 it is specified, "A Bill containing a proposal or proposals for the amendment of this Constitution shall not contain any other proposal." A similar restriction exists in the Italian Constitution about referendums apart from when they involve constitutional amendments. Among the US states, there are twenty-six that provide for at least one type of statewide citizen-initiated measure (whether initiative, referendum, or both). Of those twenty-six states, sixteen have single-subject rules.

1.2 Conflicts among Constitutional Players

In India, the requirement for amending the constitution differs depending on the significance of the proposed amendment, with a simple majority of both the upper and lower houses required for basic issues and a two-thirds majority for more consequential ones (The Constitution of India, 1947). Since independence in 1947, there have been numerous conflicts between lawmakers and the Indian judiciary. Starting in 1950, the Supreme Court and the Indian government struggled over the issues of land rights and affirmative action for underprivileged classes. On the issue of land reform, the Indian government had passed legislation that would expropriate the zamindars, a class of landlords who had been given the right to tax small farmers in their jurisdictions during the British colonial period. To compensate the zamindars, the government would pay them future profits from the expropriated land rather than an

[9] For example, citizens initiated to impose term limits of twelve years on the members of assembly and senators. Article 4, § 3 and § 4 of the Nevada Constitution was amended in 1996 after the people approved and ratified it at the 1994 and 1996 general elections.

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immediate lump sum. The zamindars challenged their expropriation, and several high state courts struck down the legislation on the grounds that the compensation proposed by the government was not sufficient to make up for the violation of the zamindars' rights (VanderMay 1996, Neuborne 2003, Roy and Swamy 2022).

In response, the government amended the constitution to restrict judicial review on land-reform cases like those concerning the zamindars. Although this amendment was upheld by the Supreme Court, a subsequent challenge of inadequate compensation by the zamindars in 1952 and later in 1962 led to judicial action: in the 1952 case *State of Bihar v. Kameshwar Singh*, the Supreme Court struck down "the Bihar Land Reform Act, despite the provisions . . . removing it from judicial scrutiny, holding that a judicially enforceable just-compensation obligation survived the first amendment" (Neuborne 2003: 487), and in the 1962 case *Karimbil Kunhikoman v. State of Kerala*, the Supreme Court struck down Kerala's zamindari expropriation act. The government then *again* amended the constitution, further expanding the scope of agrarian reform acts that shielded it from judicial review.

On the issue of affirmative action, the government passed legislation in 1951 that would reserve slots in government-funded educational centers for "untouchables and other backward classes." These efforts were swiftly challenged by members of the upper-class Brahmins on the grounds that they "violated the fundamental right of equality protected by [the constitution]" (Neuborne 2003: 488). In *State of Madras v. Dorairajan,* the Supreme Court considered the Brahmin argument and agreed, striking down the government legislation. As in the land-reform cases, the government responded by amending the constitution to explicitly shield affirmative action legislation from judicial review.

A pattern had been established, where "a state would pass land-reform legislation; it would be challenged in a high court as violating a fundamental right; the challenge would be upheld, and the law declared unconstitutional; [and] there would be an amendment to the Constitution to protect the legislation" (Roy and Swamy 2022: 25). This pattern would persist for nearly two decades until 1967 when the Supreme Court considered *Golak Nath v. State of Punjab*. In response to the Punjab Land Reform Act, the zamindars argued that the "act violated articles 31, 19, and 14 [of the constitution], and that the provisions of the . . . amendments . . . purporting to shield the act from judicial review . . . were themselves unconstitutional" (Neuborne 2003: 489). In a landmark decision, the Supreme Court ruled in favor of the zamindars, holding that

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amendments to the constitutions were technically laws and, as such, were subject to judicial review in the same way that laws were. While they did not strike down the nationalization-shielding amendments, they threatened to use their new powers to strike down constitutional amendments against any new attempts by the government to undermine fundamental rights.

Following this decision, the Supreme Court proceeded to strike down other government acts, including a bank-nationalizing act, on the grounds that they had provided inadequate compensation. Following these strikes, Indira Gandhi campaigned with the promise to weaken the Supreme Court's power. She won a super-majority, with 350 seats in the lower house, and made a series of constitutional amendments to wrest the power of judicial review from the courts. These amendments were tested in *Kesavananda Bharati v. State of Kerala*, and "by a majority of ten to three, the court overruled *Golak Nath* ... [holding that] an amendment of the Constitution was constitutional law which is to be distinguished from ordinary law" (Nanda 1974). However, the victory for Gandhi was not complete: the court also ruled that "parliament's power of constitutional amendment was not unlimited and that, through judicial review, the limits were to be enforced" (Nanda 1974: 868), arguing that certain core features of the constitution such as fundamental rights could only be revised by wholesale constitutional change. In doing so, the Indian Supreme Court effectively gave itself the power to protect the "core" of the constitution.

In Israel, on July 24, 2023, the so-called reasonableness bill passed the Knesset to limit the Israeli Supreme Court's power in general. The reasonableness bill curbs judicial review over legislation by explicitly legislating against the Supreme Court's exercise of judicial review of Basic Laws and requiring a full bench of Supreme Court justices to preside over any case in which the legality of regular legislation passed by the Knesset is evaluated. Under this bill, 80 percent of the bench is required to rule for invalidation of such legislation.

The Israeli coalition government that proposed the reform consists of seven parties – Likud, United Torah Judaism, Shas, Religious Zionist Party, Otzma Yehudit, Noam, and National Unity – and is led by Benjamin Netanyahu, who is the chairman of Likud. According to McKernan (2023), "the changes are spearheaded not by the prime minister, but by his Likud party colleague Yariv Levin, the justice minister, and the Religious Zionist party lawmaker Simcha Rothman, who chairs the Knesset's law and justice committee." McKernan continues to reason

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that "Levin and Rothman have a longstanding hatred of Israel's Supreme Court, which they see as too powerful and as biased against the settler movement, Israel's ultra-religious community, and the Mizrahi population, Jewish people of Middle Eastern origin. In particular, many on the Israeli right have never forgiven the Court for decisions related to Israel's unilateral withdrawal from the Gaza Strip in 2005." In 2005, the Israeli Supreme Court had ruled the plan by then–prime minister Ariel Sharon to be constitutional, pathing the way for 9,000 settlers to be evacuated from Gaza. In a ten-to-one vote, it rejected the settlers' arguments that their human rights would be violated and held that it was ultimately a political decision by stating "their removal had been mandated legally by Parliament and 'appropriate compensation' had been ensured by law" (New York Times 2005). Leaders of the right wing contended for decades that the Supreme Court is biased against the settlement movement and acted particularly contradictory when it struck down legislation as unconstitutional, such as in 2020 when the law would have allowed for the retroactive legalization of around 4,000 Jewish homes built on occupied West Bank land privately owned by Palestinians (Halbfinger and Rasgon 2020). Therefore, the reform package had initially included an "override clause," which would have allowed the Israeli Knesset to reenact laws with a simple majority that the Supreme Court had nullified, reducing the court's ability to strike down the Knesset's laws that were deemed unconstitutional. Furthermore, it involved granting the government control over judicial appointments by changing the makeup of the Judicial Selection Committee and limiting the authority of its legal advisors by giving the ministers power to appoint and dismiss them, making them subordinate directly to the ministers rather than to the Justice Ministry's professional oversight. To the government, "these moves are a legitimate way to address a longstanding power imbalance between an overactive and unelected judiciary that selects its own members and that holds unreasonable veto power over democratically chosen representatives" (Kingsley 2023b). Prime Minister Netanyahu, although not the initiator, backed the reform for supposedly two reasons. First, as he is on trial for alleged corruption, he might personally benefit from the reform "in terms of the administration of his trial" (Goldenberg 2023). He denies the charges and has "campaigned against the justice system" since the indictment in November 2019 (Debre and Federman 2023). The second strategic consideration is that he needed the support of the far-right parties to secure the survival of the coalition and, hence, his own power. Mansoor (2023) specifically mentions the national

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security minister, Itamar Ben-Gvir, leader of Otzma Yehudit, who "gave Netanyahu what proved to be the decisive margin." The article, published in March 2023, points out that Netanyahu agreed to delay the proposal following mass protests and "can't back away from the proposed judicial reforms entirely without risking Ben-Gvir's critical political support."

To the protestors, the reform "will undermine Israel's democracy by giving absolute power to the ruling coalition and leave minorities without protection from the will of the majority" (Lieber and Boxerman 2022). The protests in March paralyzed the nation, compelling the government to discard its initial strategy of pushing through all parts of the overhaul at once, as already mentioned (see also McKernan 2023). Instead, they are now being introduced through a series of smaller bills, with the override clause having been removed as a sign of conceding to the protesters (Lieber and Amon 2023). The reasonableness bill still triggered so much controversy – not only on the streets but among the political parties in the Knesset – that all members of the opposition left the chamber when the reasonableness bill was voted. It then passed with a sixty-four to zero vote after all members of the governing coalition voted for it. While the country was waiting for the Supreme Court to decide whether to strike down the reasonableness bill and thereby decide its own fate (Kingsley 2023a), the reform was shelved like all non-security legislation in October 2023 when Netanyahu was pressured to form an emergency unity government with his main political rival Benny Gantz, leader of the center-right National Unity party, due to the outbreak of the Israel–Hamas war (Hendrix 2023). The Supreme Court struck down the provision as unconstitutional on January 1, 2024, most likely ending the controversy because the current government cannot address the issue, and it is unlikely that a future government will be able to reintroduce it.

In Hungary, where two-thirds support from the National Assembly is required for an amendment to be approved, a number of constitutional changes followed after the election of the Fidesz party in 2010 to the Hungarian Parliament with a supermajority. Fidesz came to power in the context of the economic fallout that had followed the 2008 worldwide recession. Voters rejected the Hungarian Socialist Party, which had been in power since 2002. Although the Fidesz party won only 53 percent of the vote, this translated into a supermajority of seats in Hungary's unicameral parliament (Bánkuti et al. 2015). This disproportionate result was due to the Hungarian electoral system, which assigned 386 legislative seats using a combination of single-member districts, proportional representation-style lists, and fifty-eight compensatory seats originally

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designed to make up for the disproportional allotment of single-member districts (Benoit 2001). Fidesz's supermajority allocation of seats despite only winning a bare majority of votes was a result of its high degree of support in smaller, rural regions, where votes are translated to seats more efficiently, and due to the fact that because only three parties ran in the 2010 election it benefited from a relatively large proportion of the compensatory seats (Bánkuti et al. 2015).

After laying the groundwork during their first year in government,[10] Fidesz introduced a new constitution called the Fundamental Law in 2011 and proceeded to amend it significantly several times over the next few years. In June 2012, the first amendment to the Fundamental Law elevated transitional provisions to bona fide parts of the constitution in order to shield them from judicial review, ensured that the presidential salary could only be changed via the adoption of a Cardinal Law (a law whose passage requires a two-thirds supermajority), and removed a clause in the transitional provisions weakening financial oversight in response to EU criticism. The transitional provisions were a set of amendments that had not been technically ratified between the passage of the Fundamental Law in 2011 and the first round of amendments in 2012. They included clauses that guaranteed there would be no statute of limitations on crimes committed during Hungary's communist regime, that removed the chairs of the Supreme Court, National Judicial Council, and privacy ombudsman, and that guaranteed that fines levied against Hungary by the European Commission can be collected as taxes (Boros 2013, Roznai 2022).

In October 2012, the second amendment modified the transitional provisions to make voter registration in a government-controlled database prior to an election a mandatory requirement for voting. In December 2013, in response to a claim filed to the Constitutional Court that the transitional provisions were not temporary and were in fact unconstitutional attempts to amend the constitution, the Constitutional Court struck down this amendment as well as a set of other clauses from the transitional provisions that Fidesz had tried to

[10] Preparing to create a new constitution, Fidesz repealed the four-fifths supermajority requirement for making a new constitution and revised the formal process for selecting members of the Hungarian Constitutional Court. Prior to the amendment, each party in the National Assembly had a single vote when selecting justices, regardless of the proportion of seats each party held. As a result of the amendment, the ability of minority parties to block nominations to the Supreme Court was eliminated, and the government quickly appointed two new justices to the Constitutional Court (Uitz 2015).

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elevate to Fundamental Law, such as the transitional provision that removed the statute of limitations on crimes committed during communism. This decision was made on the grounds that the transitional provisions were indeed permanent and that "their adoption exceeded the government's power under the Fundamental Law to enact transitional provisions, notwithstanding the government's clear intent to give them constitutional status" (Roznai 2022: 150).

The Fidesz government responded with the Fourth Amendment in March 2013, which sought to undermine the Constitutional Court's decision by directly incorporating the transitional provisions into the Fundamental Law itself. Critically, it removed the ability for the Constitutional Court to review constitutional amendments on substantive (rather than strictly procedural) grounds and prohibited it from referring to precedents in constitutional law from before the 2011 constitution. In addition, the amendment stipulated that political advertising during campaigns could only be broadcast over public media sources with the list of acceptable media groups to be determined by Cardinal Law, that speech which violated the "dignity of the Hungarian nation" could be criminally prosecuted, that those who received tuition grants from the government would be able to work at Hungarian companies thereafter, and that municipal governments could use the powers at their disposal to remove homeless populations from public spaces (Orange Files 2013). The effort to shield the constitution from judicial review was effective: later in the year, the Constitutional Court "rejected a challenge to various provisions of the fourth amendment ... [on the grounds] that it lack[ed] competence to conduct substantive judicial review of constitutional amendments due to explicit provisions, introduced by the Fourth Amendment, that limit[ed] its jurisdiction over constitutional amendments to formal review on procedural grounds" (Roznai 2022: 152).

In Slovakia, where a three-fifths qualified majority of legislators is needed to change the constitution, a 2014 constitutional amendment to impose restrictions on the qualifications of new and incumbent judges passed but was challenged by the Constitutional Court. If passed uncontested, the amendment would have required all new and existing judges to meet a certain degree of security clearance in order to be appointed or to retain their positions. On January 30, 2019, the court struck down the 2014 amendment on the grounds that it violated Article 1 of the Slovak Constitution, which held that the Slovak Republic was a democratic state bound by the rule of law. The court argued that it directly followed that the constitution ensured commitment to the separation of powers and the

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independence of the judiciary, which it considered to be "material core of the Constitution" (Domin 2019). By this ruling, the Slovakian Constitutional Court therefore gave itself the power to reject constitutional amendments that go against the "core of the constitution" (Ľalík 2020a).

The judges made the decision shortly before nine out of thirteen would leave, and it almost went unnoticed "because the political fight over the composition of the future Constitutional Court took center stage" (Ľalík 2020a: 328; see also Steuer and Láštic 2024: 248), who describe the period from 2018 to 2019 as a "gridlock in electing new judges." A few months later, the "Threema" scandal surfaced after the murder of the investigative journalist Ján Kuciak and his fiancée. Nineteen judges were accused of "delivering judgments on demand" (Čuroš 2023: 639), painting a picture of "a massive corruption scheme among the judiciary, law enforcement, politicians, and business members" (Čuroš 2022). As a result, "the outrageous crisis of legitimacy of the judiciary provided a perfect opportunity for the interference of the legislative and executive power into the judicial power. Such interventions had been attempted for years, but after the Threema scandal, the public embraced the idea of enacting significant changes in the judiciary" (Čuroš 2022). In this light, some view the reform that followed favorable, leading to more "efficiency and a better standard of delivering decisions" (Čuroš 2022), while others point toward the illegitimacy: "The passing of the amendment in question has made the parliament an unbound constitutional-maker that is neither in line with constitutionalism nor with democracy" (Ľalík 2020b).

The reform, curtailing the power of the judiciary, was passed in December 2020. Steuer and Láštic (2024) state that "the amendment can be seen as a parliamentary retaliation to the SCC's [Slovak Constitutional Court's] decision" (255). The amendment allowed for the examination of the origins of the property holdings of individual judges (purportedly to investigate corrupt dealings by judges), eased the process of judicial appointment to the Constitutional Court by allowing a simple majority of the Slovakian Parliament (rather than a three-fifths supermajority) to appoint a constitutional justice, provided the president the power to unilaterally appoint justices if the parliament fails to do so, and mandated a maximum retirement age of seventy-two years for judges on the Constitutional Court (Davala and Chudo 2021). In addition, and most critically, the amendment removed the ability of the court to review constitutional amendments and was rushed through Parliament, just barely passing the three-fifths threshold with 91 of 150 MPs voting in favor (Steuer and Láštic 2024).

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In 2021, the Slovakian Supreme Court made a significant ruling under the new rules, stating that a referendum initiative on a snap election was unconstitutional. "The Court found referenda analogous, both in form and function, to constitutional amendments" (Drugda 2021), thereby reclaiming some of the power it had lost through the amendment in 2020.

This absence of a mechanism for early elections became acutely salient in 2022 when President Zuzana Caputova responded to the collection of over 380,000 signatures by three opposition parties and decided to hold a referendum, seeking approval for the early termination of the National Council of the Slovak Republic's election period either through a referendum or a resolution by the National Council. Shortly after that decision, Prime Minister Heger's coalition government faced a vote of no confidence and subsequently collapsed (Associated Press 2023a).

The referendum was held on January 21, 2023, and faced challenges due to the president stating, "I perceive this referendum as a part of a political campaign of one party . . . I am therefore not going to encourage citizens to attend, nor am I going to discourage them" (Cincurova et al. 2023). Subsequently, it resulted in a low turnout and its failure (as at least 50 percent would have been needed).

In the week prior to the referendum, President Caputova had already given parliament the deadline of the end of January to amend the constitution to make a snap election possible. Only four days after the failed referendum, ninety-two members of parliament voted for the constitutional amendment that allows a snap vote if it is approved by a three-fifths majority in the 150-seat National Council of the Slovak Republic (Associated Press 2023b).

In **Ukraine**, the Constitutional Court struck down constitutional amendments as unconstitutional years after they were made. In 2004, after the Orange Revolution, a major constitutional change was made to limit the power of the president relative to the prime minister. This amendment was proposed and passed by parliamentarians supporting the pro-Russian Viktor Yanukovych, ostensibly with the goal of weakening the power of the anti-Russian president Yushchenko. In 2010, Yanukovych regained the presidency and appointed four new members to Ukraine's Constitutional Court. Subsequently, the court ruled that the 2004 amendments to weaken the presidency were unconstitutional and ordered that they be reversed, restoring the power of the president. Following the widespread Euromaidan protests in 2013, Yanukovych fled the country, new elections were held, and the newly

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elected parliament repassed the 2004 amendments to weaken the presidency (Tyushka 2014).

In all of these cases, there are conflicts between the legislature and the judiciary, and in lots of them, there is an oscillation in the results: sometimes the legislature is the winner, and in others it is the courts (India and Israel are the most prominent examples). What is not obvious is the (indirect) participation of the public because, given that the constitution does not specify who should be the ultimate decisionmaker, it is the actor that will express the opinion of the public that will claim the constituent power. The following case demonstrates what happens when the carrier of the constituent power can interfere directly. It is a conflict not between legislation and constitutional interpretation (conflict within the constitutional rules) but between interpretation and constitutional amendment.

In a landmark case in October 2006, **Ireland's** high court rejected the recognition of a lesbian couple's Canadian marriage. It ruled that the constitution did not protect the rights of same-sex couples to get married, although the constitution had never defined marriage as being between a man and a woman explicitly. Instead, "[Justice Elizabeth] Dunne took the definition of marriage contained in Ireland's Civil Registration Act 2004 which defines marriage as being between a man and a woman as an indication of the 'prevailing view' as to the definition of marriage" (Tiernan 2020: 31). The plaintiffs, Katherine Zappone and Ann Louise Gilligan, had challenged an interpretation of the Taxes Consolidation Act, which provides for a husband to be assessed on his and his wife's total income and vice versa, by the Revenue Commissioners, who had denied altering their tax returns in recognition of their marriage explicitly. They had based the interpretation on the definitions of husband and wife in the Oxford English Dictionary, and Zappone and Gilligan argued to the court that it violated their constitutional rights to equal protection (Article 40.1), privacy, and dignity (Article 40.3). Justice Dunne recognized that "it is to be hoped that the legislative changes to ameliorate these difficulties will not be long in coming" (High Court 2006). Also, she delegated the responsibility for such change to happen by saying that "ultimately, it is for the legislature to determine the extent to which such changes should be made" (High Court 2006).

In response to the ruling, lower house member Brendan Howlin tabled a Private Member's Civil Union Bill on the same day that Zappone and Gilligan lost their high court case. Even though the bill was defeated in Parliament later, the introduction of (various) civic partnership bills in

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conjunction with this court case raised public awareness about the need for legal recognition for same-sex couples (Tiernan 2020: 39). When the Civil Partnership and Certain Rights and Obligations of Cohabitants Act was finally passed in 2010, it was clear that a constitutional amendment was needed to achieve full equality in terms of marriage and not only in terms of partnership. In 2012, a constitutional convention was established due to complex government formation negotiations between the center-right Fine Gael and the center-left Labour Party over their differing reform agendas regarding the issue of same-sex marriage, among other issues. The convention's agenda "reflected the decision of the inter-party negotiators to 'park' certain matters that were in their respective election manifestos that were unlikely to be resolved easily during their febrile and intense negotiations" (Farrell et al. 2016: 122). After the convention recommended amending the constitution, the government called a referendum.

The referendum on May 22, 2015, had a remarkably high turnout. A majority of 62 percent voted to add the following sentence to the Irish Constitution: "Marriage may be contracted in accordance with law by two persons without distinction as to their sex," making Ireland the first country in world history to extend civil marriage to same-sex couples through a popular vote. Eventually, the people overruled the court and its interpretation of the constitution. However, Doyle and Walsh (2020) emphasize that the outcome of the referendum was not particularly contentious or surprising:

> The Convention has been credited with securing "an outcome consistent with liberal value accommodation" in the same-sex marriage referendum, notwithstanding the persistence of normative opposition to same-sex marriage. Since the 1970s, however, both constitutional interpretation and constitutional amendment – reflecting changes in general society – had rendered the Constitution considerably less religious and less conservative. The same-sex marriage and abortion referendums probably marked the culmination of that process with secular/progressive forces in the ascendant. But they were not a constitutional revolution.
>
> (Doyle and Walsh 2020: 464)

In addition to this case, there were eight others in Ireland where a proposed amendment was "regarded as necessary in order to reverse statements of law resulting from unpopular judicial interpretations, or because of a judicial decision making it clear that a desired course of action would be possible only following a successful referendum to amend the Constitution" (de Londras and Morgan 2013: 182). Among

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the eight proposed amendments, one was on human rights (bail), two on elections, one on abortion, and four on institutions of government. Concerning bail, Raifeartaigh (1997) states that "Ireland appears to be one of the few, perhaps the only, common law jurisdiction which rejects the likelihood of further offending as a ground for pre-trial detention. In 1966, the Irish Supreme Court emphatically rejected the suggestion that one of the grounds on which bail might be refused was the likelihood that the accused might commit further offenses; again in 1989 it unhesitatingly affirmed its earlier decision. The Court's view, as we shall see, was founded on the view that such a course of action would violate the presumption of innocence" (2). What Raifeartaigh calls "a somewhat absolutist view of the presumption of innocence" led the government to hold a referendum to change the Irish legal position (Raifeartaigh 1997: 18). The new article, approved by the people in 1996, ensures that the grounds for refusal of bail by a court may be regulated in the future by the legislature so that, under the Bail Act 1997, a court can now consider whether or not a person had committed serious crimes while on bail in the past in addition to the "extraordinary circumstances" that the ruling in 1966 had implied (Raifeartaigh 1997: 18).

Two out of these eight cases failed in the respective referendum: the one on representation of rural voters and the one on parliamentary inquiries.

1.3 How Institutions Are Modified in Order to Get the Intended Outcome

In this section, I will highlight some examples from US state constitutions because they have provisions that involve referendums which, as will be explained in the next chapter, are very flexible instruments for changing the rules. The examples in this section demonstrate that modifying how easy it is to use referendums affects the facility of constitutional amendments.

The Michigan Constitution from 1850 included the provision that the voters must decide whether a constitutional convention is called automatically every sixteen years. Furthermore, the provision required that a majority of votes that are cast in the election – not just a majority of those voting on the question of the convention call – must approve all convention calls rather than only those that occur automatically. Only in 1866, pursuant to the sixteen-year requirement, and in 1906, when it was placed on the ballot by legislative action, did the voters approve the calling of a constitutional convention. In many instances, the question

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failed despite the majority of those voting on the question giving their approval ("CRC special report" 2010a). Five referendums failed between 1926 and 1961, and, especially during and after World War II, "a general dissatisfaction with the document created a growing desire to revise the constitution" ("CRC special report" 2010a: 2). Therefore, instead of a general constitutional revision, eighteen proposed amendments were adopted in the decade beginning in 1951, while only three were rejected ("CRC special report" 2010b). The Citizens Research Council of Michigan summarized the developments in this era as follows: "Along with 51 previous amendments, these new provisions gave the Constitution the appearance of a patchwork quilt of trivia and excessive detail, which provided for far too many executive branch agencies, excessive earmarking of taxes, and a system of legislative representation skewed toward rural interests" ("CRC special report" 2010b: 4).

As a consequence, the "long struggle for constitutional revision" (Cramton 1964: 8), amplified by the fiscal crisis in 1959, stimulated renewed efforts by a number of interest groups that had previously supported the campaigns (Sturm 1963). In January 1960, the Michigan Junior Chamber of Commerce and the Michigan League of Women Voters proposed a constitutional amendment to ease the calling of a constitutional convention. The so-called Gateway Amendment was approved by the voters later in 1960 and paved the way for a successful convention call in 1961. The referendum on April 3, 1961, did not require the majority of electors anymore, and therefore a favorable plurality on the convention question was sufficient. Michigan voters approved the proposition by a margin of only 23,421 votes (Sturm 1963). The Citizens Research Council of Michigan emphasized that "if the former constitutional requirement of a majority of those participating in the election had applied, the proposal would have failed" ("CRC special report" 2010a).

To summarize, changing the rules in 1960 was critical in allowing a convention referendum to pass in 1961 after it had been blocked on various occasions and only stepwise amendments had been possible.

In Ohio and other states, lawmakers were recently trying to achieve the opposite: They were pushing for a rule change that would make it harder for citizens to initiate and implement constitutional amendments successfully. The rule change, sought by the Republican supermajority, was specifically targeted at a citizen-led effort to put a constitutional amendment on the ballot that would prohibit banning abortion before fetal viability (Zernike and Wines 2023). The amendment that the

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lawmakers advanced had already passed the senate and the house. It went before voters in a special election in August 2023 and thus would have taken effect before the amendment on abortion rights advanced by citizens was on the ballot in November 2023.

First, the addition of new requirements to get proposed amendments on the ballot would have immediately hampered the citizens' effort: according to the New York Times, "proponents would have to collect signatures from at least 5 percent of the residents in all 88 counties in the state, up from the current 44" (Zernike and Wines 2023: para. 29). Additionally, they would not have been allowed to collect additional signatures to make up for those that authorities disqualified, which as of now can be done for one week (the so-called curing period) (Zernike and Wines 2023). Second, their ballot initiative would have required a 60 percent threshold once it passed the higher hurdles to appear on the ballot, rather than the current 50 percent. The Republican measure to raise this threshold, however, required support from only 50 percent of voters to pass. Furthermore, Chris Melody Fields Figueredo, executive director of the Ballot Initiative Strategy Center, which works to support progressive ballot measures, expresses suspicion in the New York Times that the new threshold was chosen strategically based on the vote for abortion rights in other red and purple states (Zernike and Wines 2023). Specifically, in Michigan, Kentucky, and Kansas the vote was between 52 and 59 percent.

However, 57 percent of the Ohio voters resoundingly rejected the amendment of the amendment rule (Ingles and Kasler 2023). Subsequently, abortion rights were enshrined into the state's constitution in the November referendum by 57 percent (so not the 60 percent that would have been necessary under the new rules), although the approval has prompted another institutional conflict over the amendment's implementation. How and when the impacts of the new constitutional protections for abortion access and other reproductive rights are felt therefore "remains unclear" (Smyth 2023b).

Similar measures have been taken in **North Dakota** in response to issues other than the abortion rights movement: "North Dakota lawmakers in recent years have grumbled about certain constitutional initiatives voters have approved, including measures for a state Ethics Commission in 2018 and for term limits on the governor and state lawmakers last year" (Dura 2023). Consequentially, the North Dakota legislature approved a bill in 2023 that makes it more challenging for constitutional initiatives to qualify for the ballot and be adopted. Voters

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will be asked on the 2024 ballot to approve or reject the constitutional amendment, which would (1) establish a single-subject rule for initiatives (both statutory and constitutional), (2) increase the signature requirement for constitutional amendment initiatives from 4 percent of the resident population to 5 percent of the resident population of the state, and (3) require proposed constitutional initiatives that have qualified for the ballot to win approval in both the next primary and the next general elections (Mitchell 2023).

In Arkansas, Republican lawmakers chose another route rather than amending the constitution: After voters had soundly rejected a constitutional amendment in 2022, which was proposed by the legislature to stiffen the requirements to get a measure on the ballot (increasing the required vote to approve ballot initiatives to 60 percent and applying to measures placed on the ballot via petition or by the legislature), the legislature simply passed new requirements as state law. They also aimed to increase the hurdles but targeted hurdles other than the ones that had just been rejected, picking up on a rejected amendment from 2020. Governor Huckabee Sanders signed the law in March 2023, whereby the number of counties where a minimum number of signatures from registered voters must be submitted was raised from fifteen to fifty (Smyth 2023a). The minimum is defined as "not less than one-half of the designated percentage of the electors" (Vrbin 2023), with the percentage being set at ten for proposed constitutional amendments (Smyth 2023a).

Conclusions

The goal of this chapter is to impress upon the reader two points: first, the diversity of constitutional amendments, and second, the significance of them. Section 1.1 deals with this diversity and shows how many different simple rules are used (different actors are assigned the role of a veto player, different decision-making rules are selected, intermediate elections are required, referendums may be added in the mix, or time or other constraints are imposed; then sometimes these rules are combined, and other times they are presented as alternatives). All such cases are presented in Section 1.1, with the goal to underline the diversity and complications of constitutional amendment rules.

Sections 1.2 and 1.3 focus on the significance of these rules by presenting how these rules become the objects of political conflict or the targets of modification for political reasons, making constitutional change easier or more difficult to achieve. These two sections

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demonstrate that the policy preferences of different actors become the source of induced institutional preferences: The actors understand that the best way to promote their policy preferences is to modify in a specific way the rules of the game (that is, alter the constitution). The conclusion of these two sections is to persuade the reader that these amendment rules matter a lot – a conclusion that may be trivial for some readers but has been disputed in the literature.

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