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THE STRUCTURE OF CONSTITUTIONAL AMENDMENT RULES

Richard Albert[*]

INTRODUCTION

Formal constitutional amendment rules are the gatekeepers to the constitutional text. They detail the procedures for changing the written constitution,[1] specify what is subject to or immune from formal amendment,[2] promote deliberation about constitutional meaning,[3] distinguish the constitutional text from ordinary law,[4] and may also be designed to express constitutional values.[5] Formal amendment rules are especially useful for channeling popular will into institutional dialogue[6] and checking informal constitutional amendments.[7] By their nature, formal amendment rules reflect both faith and distrust in political actors: they simultaneously

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1. Rosalind Dixon & Richard Holden, *Constitutional Amendment Rules: The Denominator Problem*, *in* COMPARATIVE CONSTITUTIONAL DESIGN 195, 195 (Tom Ginsburg ed., 2012).

2. Jon Elster, *Constitutionalism in Eastern Europe: An Introduction*, 58 U. CHI. L. REV. 447, 471 (1991).

3. Raymond Ku, *Consensus of the Governed: The Legitimacy of Constitutional Change*, 64 FORDHAM L. REV. 535, 571 (1995).

4. ANDRÁS SAJÓ, LIMITING GOVERNMENT: AN INTRODUCTION TO CONSTITUTIONALISM 39–40 (1999).

5. Richard Albert, *The Expressive Function of Constitutional Amendment Rules*, 59 MCGILL L.J. 225, 236 (2013).

6. Walter Dellinger, *The Legitimacy of Constitutional Change: Rethinking the Amendment Process*, 97 HARV. L. REV. 386, 431 (1983).

7. Rosalind Dixon, *Constitutional Amendment Rules: A Comparative Perspective*, *in* COMPARATIVE CONSTITUTIONAL LAW 96, 97 (Tom Ginsburg & Rosalind Dixon eds., 2011).

authorize political actors to improve the constitution[8] while limiting how and when political actors may do so.[9] Given the many essential functions formal amendment rules serve, we would expect constitutions to entrench them, and indeed most of them do.[10]

Yet the structure of formal amendment rules has received little scholarly attention. Scholars have devoted considerably more attention to informal amendment,[11] which we can define as "the alteration of constitutional meaning in the absence of textual change."[12] Though constitutions may today change less frequently via formal rather than informal amendment, constitutional designers must nonetheless understand the formal amendment options available to them in order to structure the formal amendment rules they entrench in the constitutions they design. It is therefore surprising that constitutional designers have few academic resources to explain how to design the rules governing formal amendment, which John Burgess called in 1890 "the most important part of a constitution,"[13] and which Akhil Amar has more recently described as holding "unsurpassed importance, for these rules define the conditions under which all other constitutional norms may be legally displaced."[14]

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8. Brannon P. Denning & John R. Vile, *The Relevance of Constitutional Amendments: A Response to David Strauss*, 77 TUL. L. REV. 247, 275 (2002).

9. Donald J. Boudreaux & A.C. Pritchard, *Rewriting the Constitution: An Economic Analysis of the Constitutional Amendment Process*, 62 FORDHAM L. REV. 111, 123–24 (1993).

10. Bjørn Erik Rasch & Roger D. Congleton, *Amendment Procedures and Constitutional Stability*, *in* DEMOCRATIC CONSTITUTIONAL DESIGN AND PUBLIC POLICY 319, 325 (Roger D. Congleton & Birgitta Swedenborg eds., 2006).

11. *See, e.g.*, BRUCE ACKERMAN, WE THE PEOPLE: FOUNDATIONS 266–94 (1991) (developing the theory of "constitutional moments"); BRUCE ACKERMAN, WE THE PEOPLE: TRANSFORMATIONS 383–420 (1998) (developing the same theory); JEREMY WEBBER, REIMAGINING CANADA: LANGUAGE, CULTURE, COMMUNITY, AND THE CANADIAN CONSTITUTION 260–305 (1994) (discussing informal amendment in Canada); Brannon P. Denning, *Means to Amend: Theories of Constitutional Change*, 65 TENN. L. REV. 155, 180–209 (1997) (surveying theories of informal amendment); Rosalind Dixon, *Partial Constitutional Amendments*, 13 U. PA. J. CONST. L. 643, 664–80 (2011) (developing the concept of "partial constitutional amendment"); Peter Oliver, *Canada, Quebec, and Constitutional Amendment*, 49 U. TORONTO L.J. 519, 526–31 (1999); David A. Strauss, *The Irrelevance of Constitutional Amendments*, 114 HARV. L. REV. 1457, 1469–86 (2001). *See generally* RESPONDING TO IMPERFECTION: THE THEORY AND PRACTICE OF CONSTITUTIONAL AMENDMENT (Sanford Levinson ed., 1995) (compiling essays on constitutional change).

12. Heather K. Gerken, *The Hydraulics of Constitutional Reform: A Skeptical Response to* Our Undemocratic Constitution, 55 DRAKE L. REV. 925, 929 (2007).

13. JOHN BURGESS, I POLITICAL SCIENCE AND COMPARATIVE CONSTITUTIONAL LAW 137 (1890).

14. Akhil Reed Amar, *The Consent of the Governed: Constitutional Amendment Outside Article V*, 94 COLUM. L. REV. 457, 461 (1994).

Scholars have developed criteria to classify formal amendment rules. Their classifications help constitutional designers compare formal amendment rules across nations. Yet these classifications are either over-inclusive, under-inclusive, or both. As I will demonstrate, some classify formal amendment rules according only to voting thresholds, thereby failing to account for nonvoting criteria that often govern formal constitutional change. Others classify formal amendment rules according to both voting thresholds and nonvoting criteria, but they fail to appreciate the larger structures around which formal amendment rules are built. Still others classify constitutions whose textual democratic commitments serve only to cloak nondemocratic practices. These classifications may be interesting, but they are largely unhelpful to democratic constitutional designers. Although sham constitutions entrench formal amendment rules, their entrenched rules do not actually bind political actors, nor do citizens accept them as accurate and legitimate reflections of how power is actually exercised and constrained.[15] Insofar as democratic constitutional design should reflect democratic practices in fact, formal amendment classifications are useful only where they exclude sham constitutions.

In this Article, I construct a new classification of formal amendment rules based on my analysis of formal amendment rules in the world's highest-performing democratic countries. I identify the world's leading democracies from the annual Democracy Index published by the *Economist Intelligence Unit*.[16] The 2012 Democracy Index "provides a snapshot of the state of democracy worldwide for 165 independent states and two territories—this

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15. Giovanni Sartori, *Constitutionalism: A Preliminary Discussion*, 56 AM. POL. SCI. REV. 853, 861–62 (1962).

16. THE ECONOMIST INTELLIGENCE UNIT, DEMOCRACY INDEX 2012: DEMOCRACY AT A STANDSTILL (2013), *available at* http://www.eiu.com/public/topical_report.aspx?campaignid=DemocracyIndex12 (last visited Apr. 25, 2014). I have found the *Economist Intelligence Unit*'s Democracy Index more informative and comprehensive than Freedom House's own index, which, though perhaps more commonly used in studies of democracy, contains fewer democratic indicators. Specifically, the Freedom House index reports a country's freedom status (free, partly free, or not free) and its score on a scale of one to seven on political rights and civil liberties. *See* FREEDOM HOUSE, FREEDOM IN THE WORLD 2013: DEMOCRATIC BREAKTHROUGHS IN THE BALANCE (2013), *available at* http://www.freedomhouse.org/sites/default/files/FIW%202013%20Booklet.pdf (last visited Apr. 25, 2014). In contrast, the *Economist Intelligence Unit*'s Democracy Index classifies countries in one of four categories (full democracies, flawed democracies, hybrid regimes, and authoritarian regimes), ranks countries with an overall score on a descending scale, and also quantifies a country's performance relative to other countries on five democratic indicators (electoral process and pluralism, functioning of government, political participation, political culture, and civil liberties). *See* THE ECONOMIST INTELLIGENCE UNIT, *supra*.

covers almost the entire population of the world and the vast majority of the world's states (micro states are excluded)."[17] The 2012 Democracy Index allocates to each country a score on five measures of democracy—electoral process and pluralism, civil liberties, the functioning of government, political participation, and political culture—and assigns a total score and overall rank for every country included in the study. Each country is also classified under one of four types: full democracies, flawed democracies, hybrid regimes, or authoritarian regimes. I examine the constitutions of countries classified as either full or flawed democracies with overall scores above 7.5 out of ten—thirty-six countries in total—to construct this new classification of formal amendment rules.[18] My

17. THE ECONOMIST INTELLIGENCE UNIT, *supra* note 16, at 1.

18. The Democracy Index defines full democracies as

> [c]ountries in which not only basic political freedoms and civil liberties are respected, but these will also tend to be underpinned by a political culture conducive to the flourishing of democracy. The functioning of government is satisfactory. Media are independent and diverse. There is an effective system of checks and balances. The judiciary is independent and judicial decisions are enforced. There are only limited problems in the functioning of democracies.

Id. at 28. Flawed democracies "also have free and fair elections and even if there are problems (such as infringements on media freedom), basic civil liberties will be respected. However, there are significant weaknesses in other aspects of democracy, including problems in governance, an underdeveloped political culture and low levels of political participation." *Id.* I exclude hybrid regimes where

> [e]lections have substantial irregularities that often prevent them from being both free and fair. Government pressure on opposition parties and candidates may be common. Serious weaknesses are more prevalent than in flawed democracies—in political culture, functioning of government and political participation. Corruption tends to be widespread and the rule of law is weak. Civil society is weak. Typically there is harassment of and pressure on journalists, and the judiciary is not independent.

Id. I also exclude authoritarian regimes:

> In these states state political pluralism is absent or heavily circumscribed. Many countries in this category are outright dictatorships. Some formal institutions of democracy may exist, but these have little substance. Elections, if they do occur, are not free and fair. There is disregard for abuses and infringements of civil liberties. Media are typically state-owned or controlled by groups connected to the ruling regime. There is repression of criticism of the government and pervasive censorship. There is no independent judiciary.

Id. Given that my study examines *formal* amendment rules, I exclude full and flawed democracies with unwritten constitutions or constitutions without one or more master texts (like Israel and the United Kingdom), but I include democracies whose constitutions include one or more comprehensive constitutional acts (for instance, Canada and New Zealand) and where formal amendment occurs via constitutional act or fundamental law (for example, Austria, the Czech Republic, and Denmark).

analysis considers only current, not historical or superseded, democratic constitutions.

The purpose of this Article is twofold. My main purpose is to probe the structure and uses of formal amendment rules in constitutional democracies. I deconstruct the architecture of formal amendment rules in constitutional democracies, as well as the ways political actors deploy those rules. This Article endeavors to offer constitutional designers in both democratic and democratizing states a comprehensive roadmap to build or refine their own formal amendment rules.[19] My second purpose is to generate an agenda for further research into the structure of formal amendment. I identify patterns, similarities, and distinctions in order to generate renewed interest in the study of formal amendment from perspectives in constitutional design, law, history, and theory. This Article is therefore both an inquiry into formal amendment and an invitation to further research.

In Part I, I begin by explaining why existing formal amendment classifications are useful but lacking. In Part II, I create a new classification to respond to the weaknesses of existing ones. I posit that formal amendment rules are conceptually structured in three tiers: foundations, frameworks, and specifications. I suggest that formal amendment rules are anchored either explicitly or implicitly in the foundational distinction between constitutional amendment and revision. I also demonstrate that they operate pursuant to one of six amendment frameworks: comprehensive single-track, comprehensive multi-track, restricted single-track, restricted multi-track, exceptional single-track, or exceptional multi-track. I then show that formal amendment rules moreover consist of distinguishable but combinable specifications that supplement their foundations and frameworks: voting thresholds and quorum requirements, content restrictions, temporal requirements, electoral preconditions, and defense mechanisms.

Part III then illustrates how constitutional designers may use this three-tiered classification of formal amendment rules to achieve such objectives as managing federalism, expressing constitutional values, enhancing or diminishing the judicial role, and pursuing democratic outcomes related to governance, constitutional endurance, and amendment difficulty. I conclude with suggestions for future research into the design of formal amendment rules.

19. More cynically, constitutional autocrats could exploit the structure of formal amendment rules in constitutional democracies to clothe their regime in the legitimacy of entrenched amendment rules. *See* KARL LOEWENSTEIN, POLITICAL POWER AND THE GOVERNMENTAL PROCESS 136 (2d ed. 1965) ("So deeply implanted is the conviction that a sovereign state must possess a written constitution that even modern autocracies feel compelled to pay tribute to the democratic legitimacy inherent in the written constitution.").

I. AMENDMENT CLASSIFICATIONS

Existing formal amendment classifications have proven to be useful for limited purposes. Some focus principally on the voting thresholds that distinguish one constitution's formal amendment rules from another. These classifications are helpful in understanding how constitutions incorporate majoritarian or supermajoritarian procedures in formal amendment.[20] Other classifications are attentive to both voting thresholds and nonvoting criteria in formal amendment rules, and accordingly illustrate how both may be used in combination to design formal amendment rules.[21] Still others classify formal amendment rules in tandem with methods of informal amendment in an effort to demonstrate the relationship between the emergence and frequency of informal amendment and the flexibility or rigidity of formal amendment rules.[22] Yet all three types of existing formal amendment classifications are incomplete. None serves as a comprehensive guide for constitutional designers to understand how formal amendment rules are structured or to operationalize that structure in designing their own rules of formal amendment.

A. Voting Thresholds

Formal amendment rules may be classified according to the quantum of agreement needed to alter the constitutional text. All formal amendment rules in some way incorporate ordinary or extraordinary voting thresholds by representative assemblies or citizens. Arend Lijphart has classified formal amendment rules according to voting thresholds in thirty-six countries identified as democracies by Freedom House.[23] Lijphart identifies four categories of voting thresholds in his classification: approval by ordinary majority, two-thirds majority, less than two-thirds majority but more than an ordinary majority, and more than two-thirds majority.[24] Lijphart finds that a plurality of the countries in his sample—fifteen of the thirty-six countries—entrench formal amendment rules requiring a two-thirds majority or its equivalent.[25] He finds that the next most popular are approval by supermajority greater than two-thirds and by supermajority greater than an ordinary majority but lower than two-thirds,[26] and that the least

20. *See infra* Subpart I.A.
21. *See infra* Subpart I.B.
22. *See infra* Subpart I.C.
23. AREND LIJPHART, PATTERNS OF DEMOCRACY 47–48 (2d ed. 2010).
24. *Id.* at 207. In an addendum in the new edition of his study, Lijphart notes that fourteen countries use referenda as an absolute requirement of, or an optional alternative to, formal amendment rules. *Id.* at 219.
25. *Id.* at 208.
26. *Id.*

common voting threshold for formal amendment is approval by ordinary majority.[27]

Lijphart's classification is helpful to constitutional designers for three primary reasons. First, it orders three dozen constitutions whose formal amendment rules vary in many ways. Second, it demonstrates how voting thresholds contribute to a constitution's flexibility and rigidity.[28] Lijphart contrasts how authorizing regular majorities to formally amend the constitution leads to constitutional flexibility, whereas limiting formal amendment to extraordinary majorities fosters constitutional rigidity.[29] Third, Lijphart also connects constitutional malleability with the strength of judicial review. He posits that "judicial review can work effectively only if it is backed up by constitutional rigidity and vice versa,"[30] meaning that a judicial ruling is more likely to be durable where the rules of formal amendment are difficult. He also uses his classification to suggest that "completely flexible constitutions and the absence of judicial review permit unrestricted majority rule."[31] His classification is instructive.

Nevertheless, Lijphart's classification cannot serve as a complete guide for constitutional designers planning to design their own formal amendment rules. It does not account for the complexity of formal amendment rules, and its generality misses important distinctions even within the various voting thresholds according to which he classifies formal amendment rules. For example, Lijphart's classification does not consider limits to formal amendment rules such as unamendable constitutional provisions or periods of time during which the formal amendment rules are suspended—namely in emergencies or during the formal amendment process itself. Constitutional designers cannot fully understand how to structure formal amendment rules without appreciating how these and other specifications fit within the amendment process.

Moreover, Lijphart acknowledges that his classification does not reflect nuances within particular voting thresholds. Specifically, Lijphart concedes that his classification does not account for different rules of formal amendment in the same constitution.[32] Lijphart has a two-part solution for this problem: "first, when alternative methods can be used, the least constraining methods should be counted,"[33] and "second, when different rules apply to different parts of constitutions, the rule pertaining to amendments

27. *Id.*
28. *Id.* at 206–11.
29. *Id.* at 204.
30. *Id.* at 219.
31. *Id.*
32. *Id.* at 209.
33. *Id.*

of the most basic articles of the constitution should be counted."[34] Lijphart's classification therefore does not classify the multiple routes of formal amendment entrenched in a single constitution, nor does it classify the different formal amendment rules that apply to different sections of a constitution. Yet alternative methods of amendment and exclusive or specially assigned amendment rules are fundamental distinctions among formal amendment rules that must be reflected in any classification if the purpose of the classification is to serve as a complete guide for constitutional designers in designing formal amendment rules of their own. Lijphart's second solution—to apply the amendment rule for "the most basic articles"—compounds the problem with either subjectivity or error. Sometimes formal amendment rules entrench alternative, exclusive, or specially assigned amendment rules. That Lijphart does not classify these rules is problematic for identifying what he refers to as "the most basic articles" of the constitutions in his classification.

Edward Schneier has developed a similar classification based on voting thresholds.[35] Schneier classifies 101 constitutions into five categories and a total of nineteen subcategories. His five main categories represent the voting thresholds pursuant to which the legislature may initiate a formal amendment: simple majority, sixty percent, sixty-five percent, two-thirds, and seventy-five percent.[36] Schneier divides each of these five categories into one of six subcategories that represent the methods and requirements for ratification (for instance, no further action, executive approval, or referendum).[37] His classification, which is presented in a useful table, therefore allows us quickly to see that formal amendment in Argentina, for example, requires a legislative vote by a two-thirds majority with no further action, or that Russia requires a legislative vote of sixty percent followed by a constitutional convention.[38]

Schneier's objective is both to summarize how constitutions may be formally amended and to identify patterns in formal amendment. His classification only partly achieves its objectives. Schneier concedes that his classification is limited because it "glosses over important nuances" in formal amendment rules.[39] Although the classification does summarize methods of formal amendment, it is not complete. As Schneier acknowledges, his classification does not reflect the full range of formal amendment methods: "many constitutions provide alternative methods including, most

34. *Id.*
35. EDWARD SCHNEIER, CRAFTING CONSTITUTIONAL DEMOCRACIES: THE POLITICS OF INSTITUTIONAL DESIGN 222–25 (2006).
36. *Id.* at 224–25.
37. *Id.*
38. *Id.*
39. *Id.* at 223.

frequently, referendums. This table reflects what I believe to be common practice of the method most frequently used in each country."[40] This raises a second limitation to Schneier's classification: it is time bound. That one method of formal amendment may today be common practice does not mean that it will remain common practice. Infrequently used methods may become more frequently used, just as more frequently used methods may lapse into disuse.[41] Relatedly, the implication of excluding infrequently used methods of formal amendment is to exclude certain formal amendment methods from his classification.

The consequence of abstracting from specific rules in search of larger patterns is sometimes to elide over important details. Schneier's classification is vulnerable to this criticism. For example, Schneier classifies the United States under the two-thirds category with ratification by three-quarters of states.[42] But this classification does not reflect Article V's prohibition on formal amendments to the Equal Suffrage Clause without the consent of the affected state.[43] Similarly, Schneier classifies Canada and South Africa under the simple majority vote and seventy-five percent categories, respectively, and under the subcategories of approval by provincial legislatures or constitutional convention and approval by majority of provinces, respectively.[44] Yet this classification does not reflect the escalating structure of both Canada and South Africa's respective formal amendment rules, whose intricate design distinguishes it from many other constitutions.[45] In addition, Schneier includes sham constitutions in his classification.[46] Although sham constitutions entrench formal amendment rules, those rules do not actually bind political actors, nor do citizens accept them as accurate

40. *Id.* at 225.

41. I have elsewhere explored whether constitutional provisions may expire as a result of nonuse. *See* Richard Albert, *Constitutional Amendment by Constitutional Desuetude*, 62 AM. J. COMP. L. (forthcoming 2014) (developing the theory that written constitutions may be informally amended by desuetude); Richard Albert, *Constitutional Disuse or Desuetude: The Case of Article V*, 94 B.U. L. REV. 1029 (2014) (inquiring whether Article V has fallen into disuse or desuetude as a result of its unsuccessful uses over the past generation).

42. SCHNEIER*, supra* note 35, at 225.

43. U.S. CONST. art. V.

44. SCHNEIER, *supra* note 35, at 224–25.

45. *See infra* Subpart II.B.

46. Schneier includes countries such as Iran, Syria, Eritrea, Pakistan, and Sudan in his classification. *See* SCHNEIER, *supra* note 35, at 224–25. Some of the countries in Schneier's study qualify as "competitive authoritarian regimes" where "formal democratic institutions are widely viewed as the principal means of obtaining and exercising political authority," but "[i]ncumbents violate those rules so often and to such an extent, however, that the regime fails to meet conventional minimum standards for democracy." Steven Levitsky & Lucan A. Way, *Elections Without Democracy: The Rise of Competitive Authoritarianism*, 13 J. DEMOCRACY 51, 52 (2002).

and legitimate reflections of how power is actually exercised and constrained.[47]

Schneier's classification nevertheless identifies useful patterns in formal amendment. Schneier finds that most formal amendment procedures require a confirmatory vote, do not involve the executive branch, and establish a modal legislative vote of two-thirds.[48] But he concludes that "the most interesting pattern" from his analysis "is that there are few discernible patterns."[49] Schneier observes that "[c]ommonwealth countries excepted, the rules seem neither more nor less restrictive in parliamentary as opposed to presidential systems, in older as against newer democracies, or by regions of the world."[50] That Schneier finds few deployable patterns of formal amendment design weakens the usefulness of his classification for constitutional designers seeking to understand how to structure their own rules of formal amendment.

B. Voting Thresholds and Nonvoting Criteria

Formal amendment rules may also be classified under a combination of voting thresholds and nonvoting criteria. These classifications are more instructive to constitutional designers than those that classify formal amendment rules according only to voting thresholds because they offer a fuller view of amendment rules and illustrate the interrelations between voting thresholds and nonvoting criteria. In his classification of formal amendment rules, Jon Elster identifies what he calls six "main hurdles" to formal amendment: absolute entrenchment, supermajority approval, higher quorum requirements, delays, subnational ratification, and referenda.[51] These six categories represent both voting thresholds, which include supermajority approval, higher quorum requirements, subnational ratification and referenda, as well as nonvoting criteria that include absolute entrenchment and delays. Elster's classification therefore differs from Lijphart and Schneier's respective classifications, neither of which uses a nonvoting criterion as a principal category in its classification of formal amendment rules.

Elster constructs his classification to demonstrate the features that make constitutions more difficult to change than ordinary laws.[52] Each of the six categories he identifies serves the function, either by design or effect, of controlling the pace of constitutional

47. David S. Law & Mila Versteeg, *Sham Constitutions*, 101 CALIF. L. REV. 863, 880 (2013).
48. SCHNEIER, *supra* note 35, at 223.
49. *Id.*
50. *Id.*
51. JON ELSTER, ULYSSES UNBOUND: STUDIES IN RATIONALITY, PRECOMMITMENT, AND CONSTRAINTS 101 (2000).
52. *Id.* at 100–01.

change. For instance, some constitutions absolutely entrench rights or structures to prohibit formal amendment.[53] Similarly, both supermajority approval and higher quorum requirements complicate formal amendment, although unlike absolute entrenchment they do not make it impossible.[54] Inserting delays in the process of formal amendment—for example, by requiring successive votes or imposing time limitations—likewise makes constitutions more difficult to formally amend than ordinary laws, as does requiring either subnational or referendal ratification.[55]

A similar effort to classify formal amendment rules is Jan-Erik Lane's six-part classification.[56] Five of Lane's six criteria overlap with Elster's criteria, the only exception being Lane's confirmatory votes in the place of Elster's higher quorum requirements.[57] Lane's classification shows that the frequency of formal amendment is indirectly related to the constitutionally entrenched mechanisms favoring constitutional inertia.[58] The more specific the rules of formal amendment and the more numerous the amendment mechanisms entrenched in the text, the greater the likelihood of constitutional inertia, argues Lane.[59] These mechanisms are the criteria according to which Lane classifies formal amendment rules: unamendable rules, referenda, delays, qualified majorities, subnational ratification, and confirmatory votes.[60]

In addition, Donald Lutz has classified formal amendment rules in his larger effort to measure amendment difficulty in thirty-two countries.[61] Lutz identifies four general formal amendment strategies around which constitutional designers structure their formal amendment rules. The first, *legislative supremacy*, reflects "unbridled dominance of the legislature by one legislative vote sufficient to amend the constitution."[62] The second, which he calls *intervening election*, requires the national legislature to vote to approve a formal amendment in two separate sessions divided by an election.[63] The third, *legislative complexity*, is "usually characterized by multiple paths for the amending process, which

53. *Id.* at 102.
54. *Id.*
55. *Id.* at 103.
56. JAN-ERIK LANE, CONSTITUTIONS AND POLITICAL THEORY 41 (2d ed. 2011).
57. *Compare id.*, *with* ELSTER, *supra* note 51, at 102.
58. LANE, *supra* note 56.
59. *Id.*
60. *Id.*
61. DONALD S. LUTZ, PRINCIPLES OF CONSTITUTIONAL DESIGN 170 (2006). Lutz compares national constitutions with state constitutions, but I hesitate to compare them insofar as subnational constitutions are associated with weaker government structures and rights as well as weaker formal amendment rules. *See* Tom Ginsburg & Eric A. Posner, *Subconstitutionalism*, 62 STAN. L. REV. 1583, 1601 (2010).
62. LUTZ*, supra* note 61, at 174.
63. *Id.* at 175.

features the possibility of a referendum as a kind of threat to bypass the legislature."[64] The fourth amendment strategy is *required referendum*, which is used in constitutional states that institutionalize a referendum as a method of formal amendment.[65]

Constitutional designers will find Elster's, Lane's, and Lutz's classifications useful. Elster explains with examples how those six categories may be combined to construct formal amendment rules.[66] He also advises designers that supermajority approval and delays are the most important categories for constitutional precommitment.[67] Lane's classification is a particularly useful resource for constitutional designers because it demonstrates how countries use multiple amendment mechanisms in many different combinations for different purposes, namely to protect minorities or to single out certain laws as special.[68] Lutz's classification evaluates formal amendment rules with an interest in understanding what contributes to amendment ease and difficulty, how to balance a written constitution's flexibility and stability, and the extent to which one amendment strategy affects the amendment rate.[69] Each of these classifications is a valuable resource for the design of formal amendment rules.

But all three classifications remain incomplete. Although they identify both voting thresholds and nonvoting criteria, they do not identify the larger structures around which formal amendment rules are built. Voting thresholds and nonvoting criteria are only part of the architecture of formal amendment rules insofar as they operate within deeper amendment foundations and frameworks that arise prior to the constraining effect that voting thresholds and nonvoting criteria exert. Formal amendment rules are therefore anchored in underlying foundations and frameworks that Elster, Lane, and Lutz do not identify, and which would be helpful for constitutional designers to understand before designing their formal amendment rules. My objective in this Article is to illustrate and explain how formal amendment rules are structured, both in the ways that Elster, Lane, and Lutz identify and in those that they do not.

C. Conceptual Categories

Scholars have also ventured beyond the formal rules of constitutional amendment to posit broader conceptual categories of constitutional change. Xenophon Contiades and Alkemen Fotiadou have developed a comprehensive conceptual classification of constitutional amendment comprising five models of constitutional

64. *Id.* at 176.
65. *Id.* at 364.
66. ELSTER, *supra* note 51, at 103.
67. *Id.* at 104.
68. *See* LANE, *supra* note 56, at 41–43.
69. LUTZ, *supra* note 61, at 176–77.

change: elastic, evolutionary, pragmatic, distrust, and direct-democratic.[70] These models are descriptive, neither normative nor mutually exclusive, and reflect the basic features of amendment in constitutional regimes for the purpose of comparing their functional advantages and limitations.[71] As models, they are particularly useful in illustrating the interrelation between formal and informal amendment.

Contiades and Fotiadou describe the elastic model of constitutional change as "operating under an unentrenched constitution, which may be altered through the normal lawmaking process, having no procedural limits and no eternity clauses."[72] Anchored in parliamentary supremacy, the elastic model makes the legislative branch all powerful because "no obstacles to revision exist other than self-restraint flowing from legal culture, tradition, and political accountability."[73] The United Kingdom's unwritten constitution is the paradigm of the elastic model.[74] In contrast, the evolutionary model is characterized by a strong judiciary, a high incidence of informal change, and rigid formal amendment rules.[75] Under this model, the difficulty of formal amendment prompts and legitimates informal methods of amendment ranging from constitutional revolutions to incremental alterations: "Dynamic interpretation lies at the heart of that model, where constitutional change is meticulously construed through legal reasoning as befits judicial justification. Judge-made change may not be attributed exclusively to the judge; political elites or the people might be the driving force behind judicial constitutional evolution."[76] Canada and the United States are two leading examples of this model.[77]

Constitutional regimes under the pragmatic model generally resort to formal amendment for constitutional change. Contiades and Fotiadou explain that "[t]he pragmatic model allows constitutional change to take place smoothly, with efficiency of formal change being the most striking feature of the way the system works."[78] Formal amendment rules are not usually difficult under this model. But even if they are stringent, the consensual political culture facilitates necessary formal amendments: "The amending formula may be demanding, designed to secure constitutional stability; nevertheless, constant change is feasible due to a

70. Xenophon Contiades & Alkmene Fotiadou, *Models of Constitutional Change*, *in* ENGINEERING CONSTITUTIONAL CHANGE: A COMPARATIVE PERSPECTIVE ON EUROPE, CANADA AND THE USA 417, 440–57 (Xenophon Contiades ed., 2013).

71. *Id.* at 441.

72. *Id.*

73. *Id.*

74. *Id.* at 442.

75. *Id.* at 442–43.

76. *Id.* at 443.

77. *Id.*

78. *Id.* at 445.

consensual constitutional ethos."[79] Whereas the evolutionary model relies less on formal amendment than judicial interpretation to keep the constitution current, the pragmatic model relies less on the judiciary than formal amendment: "A strong judiciary is a feature of this model; nevertheless, there is no need for constitutional review to operate as a substitute for formal amendment."[80] In other words, "[J]udicial interpretation plays a complementary role and is not the primary vehicle of change,"[81] conclude Contiades and Fotiadou. Germany illustrates this model.[82]

The distrust and direct-democratic models of constitutional change are opposites. The distrust model incorporates unamendable constitutional provisions, complicated formal amendment rules, and elite ratification into its procedures for constitutional change: "Demanding and complex amending formulas, political elite-driven change, and difficulty in reaching compromises on constitutional issues are the basic ingredients of the distrust model."[83] When entrenched within a polarized political culture, the distrust model exhibits conflict—and ultimately dysfunction—manifested by the near impossibility of formal amendment.[84] Contiades and Fotiadou ascribe this model to Belgium, Greece, Portugal, Spain, and the Netherlands.[85] The direct-democratic model differs in several ways: it grants citizens the power both to initiate and to have the last word on constitutional change; it makes constitutional referenda mandatory; it eschews un-amendability; and it privileges popular participation over elite decision making.[86] As Contiades and Fotiadou explain, "The design and qualities of referendums are of great importance, while the role of political elites and courts is influenced by the fact that the ultimate amending power lies with the people."[87] Switzerland is the leading example of this model.[88]

Contiades and Fotiadou are not alone in developing a classification of constitutional change. Carlo Fusaro and Dawn Oliver have advanced a theory of constitutional change that embraces both formal and informal amendment.[89] They categorize the drivers of constitutional change (the people, the people and the courts, legislative assemblies, the courts, governments and their

79. *Id.* at 446.
80. *Id.*
81. *Id.*
82. *Id.* at 446–47.
83. *Id.* at 450.
84. *Id.* at 451–52.
85. *Id.* at 451–54.
86. *Id.* at 454.
87. *Id.*
88. *Id.* at 455.
89. *See* Carlo Fusaro & Dawn Oliver, *Towards a Theory of Constitutional Change*, *in* HOW CONSTITUTIONS CHANGE: A COMPARATIVE STUDY 405, 405–33 (Dawn Oliver & Carlo Fusaro eds., 2011).

leaders, and supranational institutions[90]), several legitimizing theories of constitutional change (sovereignty, parliamentary sovereignty, the constituting and constituted powers, representative versus direct democracy, *grundnorm* setting, and majoritarian and counter-majoritarian theories[91]), as well as the legal doctrines according to which we justify or approach constitutional change (positivism and neo-constitutionalism[92]). Their classification cuts across formal and informal amendment and provides useful abstractions about constitutional change. Yet they do not focus on the actual design of formal amendment rules.[93]

I have also developed elsewhere a classification of constitutional amendment accounting for both formal and informal methods of constitutional change. Drawing from written democratic constitutions, I posited three models of constitutional change: the textual model, the political model, and the substantive model.[94] I classified Australia, Canada, and Switzerland as examples of the textual model,[95] which holds that "the constitutional text enshrines the necessary and sufficient conditions for amending the constitution."[96] The political model, represented by the United States,[97] recognizes that "amendments may spring from expressions of popular will that manifest themselves in dialogic exchanges among the political branches and the citizenry" and that amendments therefore "do not abide by the constitutionally enshrined procedures for amending the constitution."[98] The substantive model, in contrast, "chooses instead to elevate constitutional substance over political process, in so doing contemplating the possibility of invalidating constitutional amendments for departing from the spirit of the constitutional text—even if those amendments satisfy the textual requirements for constitutional entrenchment."[99] I referred to Germany, India, and South Africa as substantivist regimes.[100]

90. *Id.* at 414–16.
91. *Id.* at 416–21.
92. *Id.* at 421–23.
93. Fusaro and Oliver do, however, discuss some important details of formal amendment in an earlier chapter that is valuable and interesting, yet even this chapter does not explain how formal amendment rules are structured. *See* Dawn Oliver & Carlo Fusaro, *Changing Constitutions: Comparative Analysis*, *in* HOW CONSTITUTIONS CHANGE: A COMPARATIVE STUDY, *supra* note 89, at 381, 391–97.
94. Richard Albert, *Nonconstitutional Amendments*, 22 CAN. J. L. & JURISPRUDENCE 5, 12–31 (2009).
95. *Id.* at 47.
96. *Id.* at 12.
97. *Id.* at 16.
98. *Id.* at 12.
99. *Id.* at 12–13.
100. *Id.* at 21.

My analysis stressed that these categories "are neither exhaustive nor mutually exclusive, by which I mean not only that constitutional states may exhibit practices indicative of a fourth or *n*th constitutional amendment model but also that one constitutional state may exhibit amendment practices aligned with more than one model."[101] The classification was designed to serve a narrow purpose: to identify "sufficiently distinguishable" models in order "to strike instructive contrasts that may help illuminate the competing theories of sovereignty that underpin the amendment practices of constitutional states."[102] In retrospect, I would revise my classification, but not in material ways that would undermine my two conclusions: first, that formal amendment rules "either conceal much about the actual practice of constitutional amendment or simply do not accurately reflect the political norms that shape and inform the practice of constitutional amendment,"[103] and second, that "the theory and practice of constitutionalism is at once rooted in constitutional texts, public institutions, judicial interpretation, political practice, extratextual customs, and citizens themselves."[104] Nevertheless, my classification gave insufficient attention to the design of formal amendment rules. Contiades and Fotiadou's classification exhibits the same weakness as Fusaro and Oliver's own, and neither their classifications nor mine can serve as a complete guide for constitutional designers tasked with designing formal amendment rules.

II. THE THREE TIERS OF FORMAL AMENDMENT RULES

Existing classifications do not offer directions for the design of formal amendment rules. We can facilitate this design task only by explicating the actual structure of formal amendment rules. In this Article, I construct a new classification intended to guide constitutional designers through the process of constructing formal amendment rules. I demonstrate that formal amendment rules in democratic constitutions are structured around three tiers, with options within each of these tiers: one of two fundamental foundations, one of six operational frameworks, and a combination of supplementary specifications. I analyze formal amendment rules in the world's highest-performing constitutional democracies as measured by the 2012 Democracy Index.[105] I focus only on full or flawed democracies earning scores above 7.5 out of ten, and I exclude democratic regimes without a master-text written constitution. However, I include democratic regimes with strong

101. *Id.* at 12.
102. *Id.*
103. *Id.* at 47.
104. *Id.*
105. THE ECONOMIST INTELLIGENCE UNIT, *supra* note 16.

traditions of written and unwritten constitutionalism, and I also include democratic regimes where the constitution consists of constitutional statutes. I also include democratic regimes where formal amendment occurs via constitutional act or fundamental law. These criteria yield a study sample of thirty-six countries ranked in the 2012 Democracy Index's top forty.

TABLE 1: STUDY SAMPLE FROM THE 2012 DEMOCRACY INDEX (WITH COUNTRY RANKING)

1	2	3	4
Norway	Sweden	Iceland	Denmark
5	6	7	8
New Zealand	Australia	Switzerland	Canada
9	10	11	12
Finland	Netherlands	Luxembourg	Austria
13	14	15	17
Ireland	Germany	Malta	Czech Republic
18	18	20	21
Uruguay	Mauritius	South Korea	United States
22	23	24	25
Costa Rica	Japan	Belgium	Spain
26	26	28	28
Cape Verde	Portugal	France	Slovenia
30	31	32	33
Botswana	South Africa	Italy	Greece
34	35	36	38
Estonia	Taiwan	Chile	India

A. *The Foundations of Formal Amendment*

Formal amendment rules are anchored in the foundational distinction between amendment and revision. The distinction holds that amendment alters the constitution within the existing framework of government while revision amounts to a fundamental change that departs from the presuppositions of the constitution and may even reshape its framework.[106] As Thomas Cooley observed in the late nineteenth century, "[An amendment m]ust be in harmony with the thing amended, so far at least as concerns its general spirit and purpose. It must not be something so entirely incongruous that, instead of amending or reforming it, it overthrows or revolutionizes

106. WALTER F. MURPHY, CONSTITUTIONAL DEMOCRACY: CREATING AND MAINTAINING A JUST POLITICAL ORDER 498 n.4 (2007); Miriam Galston, *Theocracy in America: Should Core First Amendment Values Be Permanent?*, 37 HASTINGS CONST. L.Q. 65, 92–93 (2009); Jason Mazzone, *Unamendments*, 90 IOWA L. REV. 1747, 1751 (2005). This seems consistent with the etymological root of the word "amend," which derives from the Latin verb *emendare*, meaning "to free from fault" or "to put right." *See* BRYAN A. GARNER, MODERN AMERICAN USAGE 41 (3d ed. 2009).

it."[107] More recently, John Rawls has defined an amendment as "adjust[ing] basic constitutional values to changing political and social circumstances"[108] and "adapt[ing] basic institutions in order to remove weaknesses that come to light in subsequent constitutional practice."[109]

1. Formal Amendment and Constitutional Revision

Some democratic constitutions use the term "revision" but do not entrench the conceptual distinction between amendment and revision pursuant to which different procedures apply to amending or revising the constitution.[110] These constitutions use the term "revision" to mean "amendment."[111] Other democratic constitutions may be read as acknowledging or suggesting a distinction between amendment and revision but do not specify different procedures for each process.[112] Still other democratic constitutions make explicit the conceptual distinction between amendment and revision and accordingly entrench procedures for amendment that differ from those that must be used for revision.[113] These constitutions illustrate one of the two foundations in the design of formal amendment rules: constitutions that entrench rules for both amendment and revision. Finally, some constitutions adopt a middle position between entrenching and leaving unstated the distinction between amendment and revision: they insist that formal

107. Thomas M. Cooley, *The Power to Amend the Federal Constitution*, 2 MICH. L.J. 109, 118 (1893).

108. JOHN RAWLS, POLITICAL LIBERALISM 238 (2d ed. 2005).

109. *Id.* at 239.

110. *See* 1975 SYNTAGMA [SYN.] [CONSTITUTION] 2, art. 110 (Greece); CONSTITUTION OF LUXEMBOURG, art. 114; CONSTITUIÇÃO DA REPÚBLICA PORTUGUESA, arts. 286–89.

111. Some constitutions use the term "reform" instead of "amendment" or "revision." For example, the Chilean Constitution refers to the "reform of the Constitution." CONSTITUCIÓN POLÍTICA DE LA REPÚBLICA DE CHILE [C.P.] arts. 127–29. Where constitutions use "reform" without distinguishing it from another type of alteration, I interpret it to refer to "amendment." The analysis would differ if, for example, the constitutional text distinguished between "partial reform" and "general reform," in which case the former would mean "amendment" and the latter would mean "revision." Textual inquiry is useful to distinguish among different formal amendment designs, but it is useful, perhaps necessary, to look beyond the text into constitutional practice and interpretation in order to understand the domestic significance of these various terms.

112. *See* CONSTITUIÇÃO DA REPÚBLICA DE CABO VERDE, art. 309, para. 1; CONSTITUCIÓN DE 1967, art. 331 (Uru.).

113. *See* BUNDES-VERFASSUNGSGESETZ [B-VG] [CONSTITUTION] BGBl No. 1/1920, as last amended by Bundesverfassungsgesetz [BVG] BGBl I No. 2/1983, art. 44, ¶ 2 (Austria); CONSTITUCIÓN POLÍTICA DE LA REPÚBLICA DE COSTA RICA, arts. 195–96; CONSTITUCIÓN ESPAÑOLA [C.E.], B.O.E. nn.166–68, Dec. 29, 1978 (Spain); BUNDESVERFASSUNG [BV] [CONSTITUTION] Apr. 18, 1999, SR 101, arts. 192–95 (Switz.).

amendments conform to substantive standards but do not specify separate procedures for adopting a formal change that violates those substantive standards.

TABLE 2: AMENDMENT AND REVISION IN DEMOCRATIC CONSTITUTIONS

Constitution suggests both amendment and revision, but *does not* entrench the distinction.	Cape Verde Uruguay
Constitution expressly recognizes both amendment and revision, and *does* entrench the distinction.	Austria Costa Rica Spain Switzerland
Constitution establishes substantive standard that formal amendment must respect but does not specify consequence of adopting amendment in violation of those standards.	Czech Republic Norway

For example, the Swiss Constitution entrenches the conceptual distinction between amendment and revision. It distinguishes between "total" and "partial" revision, the former referring to revision and the latter to amendment: "The Federal Constitution may at any time be subjected to a total or a partial revision."[114] Total revision "may be proposed by the People or by one of the Chambers, or may be decreed by the Federal Parliament"[115] but "[t]he mandatory provisions of international law may not be violated."[116] In contrast, partial revision "may be requested by the People, or be decreed by the Federal Parliament,"[117] but "[a] partial revision must respect the principle of the unity of subject matter; it may not violate the mandatory provisions of international law."[118] The Swiss Constitution establishes a further restriction on partial revision: "A popular initiative for partial revision must, moreover, respect the principle of the unity of form."[119] Therefore whereas international law is the only textual restriction on total revision, the Constitution constrains partial revision in more ways—according to subject matter, unity of form, and international law—consistent

114. BUNDESVERFASSUNG [BV] Apr. 18, 1999, SR 101, art. 192, para. 1 (Switz.).
115. *Id.* at art. 193, para. 1.
116. *Id.* at art. 193, para. 4.
117. *Id.* at art. 194, para. 1.
118. *Id.* at art. 194, para. 2.
119. *Id.* at art. 194, para. 3.

with the use of amendment for only narrow, not sweeping, changes.[120]

Similarly, the Costa Rican Constitution distinguishes between a "partial amendment" and a "general amendment." The Constitution specifies that "the Legislative Assembly may partially amend this Constitution complying strictly with the following provisions," going on to list eight requirements for effecting a partial amendment, including who may initiate a partial amendment and the requisite voting thresholds, as well as quorum requirements and time limits.[121] The Constitution also outlines a special procedure for making a general amendment that does more than merely fine tune the text, which states: "A general amendment of this Constitution can only be made by a Constituent Assembly called for the purpose. A law calling such Assembly shall be passed by a vote of no less than two thirds of the total membership of the Legislative Assembly and does not require the approval of the Executive Branch."[122] That the Constitution sets strict requirements for partial amendment is consistent with the limited uses of amendment, as opposed to the more transformative changes possible with revision, which may be authorized only by an extraordinary body or procedure—namely a Constituent Assembly in Costa Rica or the people in Switzerland.

2. Formal Amendment and Implicit Limitations

But most democratic constitutions—thirty out of the thirty-six in this study—leave unstated the distinction between amendment and revision.[123] These constitutions neither recognize nor imply

120. For helpful context to the international law restriction in the Swiss Constitution, see Yaniv Roznai, *The Theory and Practice of "Supra-Constitutional" Limits on Constitutional Amendments*, 62 INT'L & COMP. L.Q. 557, 591 (2013).

121. CONSTITUCIÓN POLÍTICA DE LA REPÚBLICA DE COSTA RICA, art. 195.

122. *Id.* at art. 196.

123. *See* U.S. CONST. art. V; AUSTRALIAN CONSTITUTION s 128; 1994 CONST. art. 195 (Belg.); CONSTITUTION OF BOTSWANA § 89; Constitution Act, 1982, *being* Schedule B to the Canada Act, 1982, s. 38–48 (U.K.); CONSTITUIÇÃO DA REPÚBLICA DE CABO VERDE, arts. 309–12, 314; CONSTITUCIÓN POLÍTICA DE LA REPÚBLICA DE CHILE [C.P.] arts. 127–29; GRUNDLOVEN [GRL] [CONSTITUTION] Lov nr. 88 (Den.); PÕHISEADUS [CONSTITUTION], ss 161–68 (Est.); SUOMEN PERUSTALSKI [CONSTITUTION], 6 luku 73 (Fin.); 1958 CONST. art. 89 (Fr.); GRUNDGESETZ FÜR DIE BUNDESREPUBLIK DEUTSCHLAND [GRUNDGESETZ] [GG] [BASIC LAW], May 23, 1949, BGBl. VII, art. 79 (Ger.); 1975 SYNTAGMA [SYN.] 2, art. 110 (Greece); STJÓRNARSKRÁ LÝÐVELDISINS ÍSLANDS [CONSTITUTION], art. 79 (Ice.); INDIA CONST. art. 368; IR. CONST., 1937, art. 46; Art. 138 Costituzione [Cost.] [Constitution] (It.); NIHONKOKU KENPŌ [KENPŌ] [CONSTITUTION], art. 96 (Japan); CONSTITUTION OF LUXEMBOURG, art. 114; KOSTITUZZJONI TA' MALTA [CONSTITUTION], art. 66; MAURITIUS CONST., art. 47; Grondwet voor het Koninkrijk der Nederlanden [GW.] [CONSTITUTION] arts. 137–42 (Neth.); Constitution Act, 1986, pt. 3 s 15 (N.Z.); CONSTITUIÇÃO DA REPÚBLICA PORTUGUESA, arts. 285–86; USTAVA REPUBLIKE SLOVENIJE [CONSTITUTION] arts. 168–71 (Slovn.); S. AFR. CONST., 1996, sec. 74; DAEHANMINKUK HUNBEOB

that amendment and revision entail different consequences and outcomes. The standard democratic design instead defines formal alteration exclusively with regard to amendment. Yet it does not follow from the non-entrenchment of the distinction between amendment and revision that the distinction does not exist or that its non-entrenchment will foreclose its emergence from other sources. For example, the natural right of revolution is not usually entrenched in constitutions,[124] yet it remains an implicit restriction against which formal amendment rules and constitutions themselves are defenseless.[125] I will later show why we should not likewise presume that the distinction between amendment and revision does not exist where it is not entrenched.[126]

TABLE 3: UNSTATED DISTINCTION BETWEEN AMENDMENT AND REVISION IN DEMOCRATIC CONSTITUTIONS

Australia	Belgium	Botswana	Canada	Cape Verde
Chile	Denmark	Estonia	Finland	France
Germany	Greece	Iceland	India	Ireland
Italy	Japan	Luxembourg	Malta	Mauritius
Netherlands	New Zealand	Portugal	Slovenia	South Africa
South Korea	Sweden	Taiwan	Uruguay	United States

There are risks to leaving implicit what is subject to amendment and revision. Disagreement is bound to occur regarding which constitutional changes work a fundamental redesign to the constitution and which are less fundamental. As Laurence Tribe has written in the context of the U.S. Constitution,

[HUNBEOB] [CONSTITUTION] art. 98 (S. Kor.); REGERINGSFORMEN [RF] [CONSTITUTION] 8, arts. 14–16 (Swed.); MINGUO XIANFA [CONSTITUTION] art. 174 (1947) (Taiwan); CONSTITUCIÓN DE 1967, art. 331 (Uru.).

124. Roughly twenty percent of the world's constitutions entrench the right of revolution in some form. *See* Tom Ginsburg et al., *When to Overthrow Your Government: The Right to Resist in the World's Constitutions*, 60 UCLA L. REV. 1184, 1217–18 (2013). But note that the Mexican Constitution contemplates restricting this right by establishing a formal constitutional rule against revolution. *See* Constitución Política de los Estados Mexicanos [C.P.], *as amended*, Diario Oficial de la Federación [DO], 5 de Febrero de 1917, art. 135 (Mex.).

125. JOHN LOCKE, TWO TREATISES OF GOVERNMENT: THE SECOND TREATISE OF CIVIL GOVERNMENT 246–47 (Thomas I. Cook ed., Hafner Publ'g Co. 1947) (1690).

126. *See infra* Subpart III.C.

> Not only is the list of fundamental constitutional norms open to debate, but the very identity of the Constitution—the body of textual and historical materials from which the norms are to be extracted and by which their application is to be guided—is itself a matter that cannot be objectively deduced or passively discerned in a viewpoint-free way.[127]

Melissa Schwartzberg echoes this point, observing that "scholars dispute what constitutes these substantive limits, which suggests the broader contestability of these sorts of claims[,]"[128] and concluding that "[e]fforts at restricting the boundaries of constitutional amendment are bound to be challengeable, and reasonable people are likely to disagree about what constitutes an unalterable principle."[129] The challenge for constitutional designers is therefore to find the right balance between giving clarity to their successors and accommodating the future contestability of constitutional identity.[130]

Some constitutions adopt a middle position between entrenching different procedures for amendment and revision and leaving the distinction unstated. These constitutions insist that formal amendments must conform to certain substantive standards, but they do not state the consequences of adopting a formal

127. Laurence H. Tribe, *A Constitution We Are Amending: In Defense of a Restrained Judicial Role*, 97 HARV. L. REV. 433, 440 (1983). More recently, however, Professor Tribe has acknowledged that

> it may well be that *some* properly adopted formal amendments could themselves be deemed "unconstitutional" because of their radical departure from premises too deeply embedded to be repudiated without a full-blown revolution. Thus, for instance, an amendment repealing the Article IV guarantee of a "republican" form of government and simultaneously making membership in Congress a matter of heredity, rather than of election by "the People," might well be deemed void regardless of its process of adoption, as might an amendment that repudiates the rule of law or abandons the indissoluble character of the Union.

LAURENCE H. TRIBE, THE INVISIBLE CONSTITUTION 33–34 (2008).

128. MELISSA SCHWARTZBERG, DEMOCRACY AND LEGAL CHANGE 148 (2007).

129. *Id.*

130. This challenge for constitutional designers also touches upon subject-matter restrictions. *See infra* Subpart II.C.2. Where constitutional designers designate a particular provision as unamendable, political actors could nevertheless use the regular procedures of formal amendment to amend that nominally unamendable provision. This could work an implicit constitutional revision. Analogously, where constitutional designers do not designate a particular provision as unamendable, yet that provision is or becomes central to the regime's political culture, one could argue that such a change would likewise work an implicit constitutional revision. Akhil Amar has suggested that using Article V to repeal the First Amendment would have this effect. *See* Akhil Reed Amar, *Philadelphia Revisited: Amending the Constitution Outside Article V*, 55 U. CHI. L. REV. 1043, 1044–45 n.1 (1988). John Rawls has taken a similar view of the First Amendment, which he views as having been "validated by long historical practice." RAWLS, *supra* note 108, at 239.

amendment that violates those standards, and they also do not entrench a separate procedure for revision. This suggests three points: formal amendment cannot be the vehicle to adopt a provision in violation of those standards; formal alteration of those standards would amount to something more than an amendment; and those standards may be violated, but only by revision, which would result in adopting an altogether new constitution.

For instance, the Norwegian Constitution entrenches formal amendment rules but insists that an amendment "must never, however, contradict the principles embodied in this Constitution, but solely relate to modifications of particular provisions which do not alter the spirit of the Constitution."[131] The Constitution insists that formal amendments cannot violate this substantive standard, but it does not state a procedure for adopting formal alterations that do. It leaves implicit the power of political actors to revise the Constitution in contravention of this standard. Were political actors to "alter the spirit of the Constitution," the result would be something more than an amendment, and indeed could not be achieved through the formal amendment process.[132] The only alternative appears to be the adoption of a new constitution.

Similarly, the Czech Republic's Constitution entrenches the middle position: it neither specifies different alteration procedures for amendment and revision nor does it leave the distinction unstated. It instead suggests that the regular formal amendment process is insufficient to formalize changes that will work something more than an amendment to the constitution. Its text states that "the substantive requisites of the democratic, law-abiding State may not be amended,"[133] and "interpretation of legal rules may not be used as authorization to eliminate or imperil the foundations of the democratic State."[134] It is possible to imagine an alteration that would conform to these standards of democracy. But where an alteration would violate those standards, it would be properly described as a revision, not an amendment. Neither the Czech nor the Norwegian Constitutions specify what the revision process entails, but we can infer that their constitutional designers intended those changes to occur only in a constitutional redesign.

131. GRUNNLOVEN [GRL.] [CONSTITUTION] § 112 (Nor.). This absolute prohibition on amendments violating the spirit of the Constitution does not grant interpretive authority to courts; it is directed to the national legislature, which holds controlling authority in interpreting the Constitution. *See* Yaniv Roznai, *Unconstitutional Constitutional Amendments—The Migration and Success of a Constitutional Idea*, 61 AM. J. COMP. L. 657, 670 n.91 (2013).

132. GRUNNLOVEN [GRL.] § 112 (Nor.).

133. Ústavní zákon č. 1/1993 Sb., Ústava České Republiky [Constitution of the Czech Republic], art. 9, para. 2.

134. *Id.* at art. 9, para. 3.

B. The Frameworks of Formal Amendment

Written democratic constitutions generally embed one of six formal amendment frameworks into their formal amendment foundations. The frameworks of formal amendment vary according to the number of procedures available for formally amending the constitution and the range of the constitutional provisions open to formal amendment by those procedures. The first important observation about formal amendment frameworks is that formal amendment rules may entrench either one or more procedures for formally amending the constitution. I divide these procedures into two categories: single-track, for formal amendment rules entrenching only one procedure for formal amendment; and multi-track, for formal amendment rules entrenching more than one procedure for formal amendment. Formal amendment procedures may differ with respect to the institutions authorized to initiate a formal amendment, to amend an amendment proposal, and to ratify an amendment.[135]

The second important observation about formal amendment frameworks is that formal amendment rules may also authorize the use of all, some, or one of these procedures of formal amendment to amend all, some, or one of the provisions entrenched in the constitution. I divide the range of constitutional provisions open to formal amendment into three categories: comprehensive, under which all amendable provisions are susceptible to amendment by all available procedures for formal amendment; restricted, pursuant to which each amendable provision is made amendable by a designated procedure for formal amendment; and exceptional, which creates one amendment procedure of general application and a second procedure exclusively for one constitutional provision or a set of related provisions. These criteria generate six possible combinations demonstrable in a 2x3 matrix.

135. For purposes of my classification, I do not distinguish the power to initiate an amendment within the same branch of government (for instance as between the two houses of the bicameral national legislature) but I do distinguish the power to initiate an amendment among branches of the national government (for instance as between the president and the legislature) and between national and subnational government institutions (for instance as between the national and subnational legislatures).

TABLE 4: FORMAL AMENDMENT FRAMEWORKS IN CONSTITUTIONAL DEMOCRACIES

	Single-Track	**Multi-Track**
Comprehensive	Comprehensive Single-Track (Germany)	Comprehensive Multi-Track (France)
Restricted	Restricted Single-Track (South Africa)	Restricted Multi-Track (Canada)
Exceptional	Exceptional Single-Track (Australia)	Exceptional Multi-Track (United States)

C. Formal Amendment Procedures (Single- or Multi-Track), the Scope of Their Use (Comprehensive, Restricted, or Exceptional), and Representative Democratic Constitutions

Below, I describe these six formal amendment frameworks with reference to currently-in-force democratic constitutions. I also categorize each of the thirty-six democratic constitutions in this study. To summarize, thirteen adopt the comprehensive multi-track framework (Costa Rica, Finland, France, Greece, Italy, Luxembourg, Netherlands, Slovenia, South Korea, Sweden, Switzerland, Taiwan, Uruguay), ten adopt the comprehensive single-track framework (Belgium, Cape Verde, Czech Republic, Denmark, Germany, Ireland, Japan, New Zealand, Norway, Portugal), five adopt the restricted single-track framework (Botswana, India, Malta, Mauritius, South Africa), four adopt the restricted multi-track framework (Canada, Chile, Estonia, Spain), three adopt the exceptional single-track framework (Australia, Austria, Iceland), and one adopts the exceptional multi-track framework (United States).

TABLE 5: AMENDMENT FRAMEWORKS IN DEMOCRATIC CONSTITUTIONS

Framework	Countries	
Comprehensive Multi-Track Amendment Framework	Costa Rica France Italy Netherlands South Korea Switzerland Uruguay	Finland Greece Luxembourg Slovenia Sweden Taiwan
Comprehensive Single-Track Amendment Framework	Belgium Czech Republic Germany Japan Norway	Cape Verde Denmark Ireland New Zealand Portugal
Restricted Single-Track Amendment Framework	Botswana India Malta Mauritius South Africa	
Restricted Multi-Track Amendment Framework	Canada Chile Estonia Spain	
Exceptional Single-Track Amendment Framework	Australia Austria Iceland	
Exceptional Multi-Track Amendment Framework	United States	

1. *Comprehensive Single-Track Amendment*

TABLE 6: COMPREHENSIVE SINGLE-TRACK FRAMEWORK IN DEMOCRATIC CONSTITUTIONS

Belgium	Cape Verde	Czech Republic	Denmark	Germany
Ireland	Japan	New Zealand	Norway	Portugal

Of the thirty-six democratic constitutions, ten entrench the comprehensive single-track framework.[136] This framework has the virtue of clarity: there exists only one formal amendment procedure (it is single-track) and it applies to all amendable constitutional provisions (it is comprehensive). The German Basic Law illustrates the paradigmatic example of the comprehensive single-track framework. The German Basic Law's text allows amendments "only by a law expressly amending or supplementing its text"[137] and specifies that there is only one way to make a formal amendment: "Any such law shall be carried by two thirds of the Members of the Bundestag and two thirds of the votes of the Bundesrat."[138] The rule is therefore clear: to formally amend the German Basic Law, two-thirds of both houses of the national legislature must approve the amendment.[139] Japan likewise follows the comprehensive single-track framework.[140] To formally amend the Constitution, the bicameral national legislature must initiate the amendment process with a two-thirds vote, the proposal must be ratified in a referendum by a majority vote, and the Emperor must then promulgate the amendment.[141] This single-track framework is comprehensive insofar as it applies to all amendable provisions.

136. *See* 1994 CONST. art. 195 (Belg.); CONSTITUIÇÃO DA REPÚBLICA DE CABO VERDE, arts. 309–12, 314; Ústavní zákon č. 1/1993 Sb., Ústava České Republiky [Constitution of the Czech Republic], art. 39, para. 4; GRUNDLOVEN [GRL] Lov nr. 88 (Den.); GRUNDGESETZ FÜR DIE BUNDESREPUBLIK DEUTSCHLAND [GRUNDGESETZ] [GG] [BASIC LAW], May 23, 1949, BGBl. VII, art. 79 (Ger.); IR. CONST., 1937, art. 46; NIHONKOKU KENPŌ [KENPŌ], art. 96 (Japan); Constitution Act, 1986, pt. 3 s 15 (N.Z.); GRUNNLOVEN [GRL.] § 112 (Nor.); CONSTITUIÇÃO DA REPÚBLICA PORTUGUESA, arts. 285–86.

137. GRUNDGESETZ FÜR DIE BUNDESREPUBLIK DEUTSCHLAND [GRUNDGESETZ] [GG] [BASIC LAW], May 23, 1949, BGBl. VII, art. 79 (Ger.).

138. *Id.* at art. 79, para. 2.

139. *Id.*

140. NIHONKOKU KENPŌ [KENPŌ], art. 96 (Japan).

141. *Id.*

2. Comprehensive Multi-Track Amendment

TABLE 7: COMPREHENSIVE MULTI-TRACK FRAMEWORK IN DEMOCRATIC CONSTITUTIONS

Costa Rica	Finland	France	Greece	Italy
Luxembourg	Netherlands	Slovenia	South Korea	Sweden
Switzerland	Taiwan	Uruguay		

The comprehensive multi-track framework differs from its single-track counterpart only insofar as it offers political actors more than one procedure to make a formal amendment to the constitution. I include in this framework all alternative amendment procedures, whether they are genuine alternatives or whether they authorize alternative routes in the event of an amendment failure under another route. Under the comprehensive multi-track framework, political actors may deploy any of the available formal amendment procedures to make a formal amendment to any amendable provision in the constitutional text. All formal amendment procedures are equally useable, and any may be used to amend any amendable constitutional provision. Thirteen of the thirty-six democracies in this study have adopted the comprehensive multi-track framework of formal amendment.[142]

The French Constitution is a prominent example. Amendments may be initiated by either the President or members of the national legislature.[143] An amendment proposal may take the form of a governmental or private member's bill,[144] the former initiated by a member of the cabinet and the latter by a noncabinet parliamentarian. Both houses of the national legislature must then approve the amendment proposal, which must subsequently be ratified in a national referendum.[145]

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142. *See* CONSTITUCIÓN POLÍTICA DE LA REPÚBLICA DE COSTA RICA, arts. 195–96; SUOMEN PERUSTALSKI, 6 luku 73 (Fin.); 1958 CONST. art. 90 (Fr.); 1975 SYNTAGMA [SYN.] 2, art. 110 (Greece); Art. 138 Costituzione [Cost.] (It.); CONSTITUTION OF LUXEMBOURG, art. 114; Grondwet voor het Koninkrijk der Nederlanden [GW.] arts. 137–42 (Neth.); USTAVA REPUBLIKE SLOVENIJE, arts. 168–71 (Slovn.); DAEHANMINKUK HUNBEOB [HUNBEOB] art. 98 (S. Kor.); REGERINGSFORMEN [RF] 8, arts. 14–16 (Swed.); BUNDESVERFASSUNG [BV] Apr. 18, 1999, SR 101, arts. 192–95 (Switz.); MINGUO XIANFA art. 174 (1947) (Taiwan); CONSTITUCIÓN DE 1967, art. 331 (Uru.).

143. 1958 CONST. art. 90 (Fr.).

144. *Id.*

145. *Id.* But not all amendment proposals must be ratified by referendum. The French Constitution authorizes the President to unilaterally bypass the referendum requirement for governmental amendment bills; in those cases, the

This framework is multi-track because it creates multiple ways to formally amend the constitution. Under the comprehensive multi-track framework, political actors have the choice of at least two paths to propose and/or ratify a formal amendment. Recall, in contrast, that a constitution entrenching the comprehensive single-track framework (for instance, the German Basic Law) gives political actors no such choice because the comprehensive single-track framework offers only one procedure to formally amend the constitution. Yet the comprehensive multi- and single-track frameworks share the feature of general applicability. Just as the single amendment procedure within the comprehensive single-track framework may be used to amend all amendable constitutional provisions, the multiple amendment procedures within the comprehensive multi-track framework may likewise be used to amend all amendable constitutional provisions. The multiple amendment procedures within the multi-track frameworks are therefore equal insofar as they are equally deployable to amend any of the amendable constitutional provisions entrenched in the written constitution.[146]

The Italian Constitution similarly exhibits the comprehensive multi-track framework.[147] Formal amendments must be proposed and adopted in the bicameral national legislature and approved by an absolute majority of each house in two consecutive votes held within three months.[148] If the houses approve the amendment proposal by a supermajority of two-thirds, the amendment becomes effective.[149] But if the amendment proposal fails to secure supermajority approval in both houses, it may be subject to the additional step of a referendum. The proposal must be ratified in a national referendum if such a request is made by one-fifth of one of the two houses, 500,000 voters, or five of the autonomous regional councils.[150] The formal amendment rules require the amendment proposal to win majority support in the referendum to become effective.[151] Like the formal amendment procedures in the French Constitution, these procedures provide more than one way to

President must submit the approved governmental amendment bill to Parliament convened in Congress, where it must be ratified by a three-fifths majority. *Id.*

146. But the 1962 amendment authorizing the direct election of the President by national vote was adopted in apparent violation of the French Constitution's formal amendment rules. *See* Martin A. Rogoff, *Fifty Years of Constitutional Evolution in France: The 2008 Amendments and Beyond*, JUS POLITICUM, No. 6, 2011, at 1, 13 (Fr.), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1793210.

147. Art. 138 Costituzione [Cost.] (It.).

148. *Id.*

149. *Id.*

150. *Id.*

151. *Id.*

formally amend the constitution, and they may each be used to formally amend any of the amendable constitutional provisions.

3. Restricted Single-Track Amendment

TABLE 8: RESTRICTED SINGLE-TRACK FRAMEWORK IN DEMOCRATIC CONSTITUTIONS

Botswana	India	Malta	Mauritius	South Africa

In contrast, the restricted single-track framework creates more than one amendment procedure but expressly designates which of these amendment procedures must be used to formally amend specific provisions of the constitution. Although it consists of more than one formal amendment procedure, it is restricted because each amendment procedure is deployable only for specifically enumerated provisions of the constitution. It is single track only insofar as it provides a single procedure for amending specifically enumerated constitutional provisions. The restricted single-track framework is distinguishable from the comprehensive single-track framework according to the number of amendment procedures it entrenches: the comprehensive single-track framework provides only one amendment procedure to formally amend all amendable constitutional provisions, whereas the restricted single-track framework creates more than one formal amendment procedure to amend designated provisions. The difference between the restricted single-track framework and the comprehensive multi-track framework turns on how their various amendment procedures may be deployed. Under the restricted single-track framework, the various amendment procedures are expressly keyed to specific constitutional provisions. In contrast, the comprehensive multi-track framework contemplates the use of any of the multiple amendment procedures to formally amend any amendable constitutional provision.

Five democratic constitutions entrench the restricted single-track framework.[152] Unlike the multiple amendment procedures under the French Constitution's comprehensive multi-track framework, the multiple amendment procedures under the South African Constitution's restricted single-track framework cannot be used to amend all constitutional provisions. The Constitution creates three amendment procedures, each of which is linked to different classes of provisions.[153] The lowest amendment threshold

152. *See* CONSTITUTION OF BOTSWANA § 89; INDIA CONST. art. 368; KOSTITUZZJONI TA' MALTA, art. 66; MAURITIUS CONST., art. 47; S. AFR. CONST., 1996, sec. 74.

153. S. AFR. CONST., 1996, sec. 74.

requires two-thirds approval in the National Assembly.[154] It is the Constitution's general amending formula and may be used to formally amend all provisions not specially assigned to a higher amendment threshold. The intermediate amendment threshold requires two-thirds approval in both the National Assembly and the National Council of Provinces.[155] This procedure must be used to formally amend the Bill of Rights, as well as any amendment that concerns the National Council of Provinces, modifies provincial rights or prerogatives, or changes a constitutional provision relating specifically to a provincial matter.[156] The most exacting formal amendment requirements require approval by three-quarters and two-thirds, respectively, in the National Assembly and the National Council of Provinces.[157] This amendment threshold governs amendments to the Constitution's statement of constitutional values as well as to the highest amendment threshold itself.[158]

We can perceive in the South African Constitution the two defining characteristics of the restricted single-track framework of formal amendment—multiplicity and rigidity. First, the restricted single-track framework entrenches more than one procedure to amend the constitution. But unlike the comprehensive multi-track framework, whose multiple procedures may be used to amend any of the constitution's amendable constitutional provisions, the restricted single-track framework's multiple procedures may not be used to freely amend all of the constitution's amendable provisions. Second, we must note the rigidity of the framework. Its multiple amendment procedures are designated for specific constitutional provisions. Where, for instance, a constitution entrenching the restricted single-track framework creates three amendment procedures, each of the three procedures is expressly connected to a particular class of constitutional provisions and those provisions alone.

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154. S. AFR. CONST., 1996, sec. 74, para. 3.

155. *Id.* at sec. 74, para. 2.

156. *Id.* at sec. 74, paras. 2–3.

157. *Id.* at sec. 74, paras. 1–2.

158. *Id.* at sec. 74, para. 1. The Constitution's statement of constitutional values proclaims that

> [t]he Republic of South Africa is one, sovereign, democratic state founded on the following values: (a) Human dignity, the achievement of equality and the advancement of human rights and freedoms. (b) Non-racialism and non-sexism. (c) Supremacy of the constitution and the rule of law. (d) Universal adult suffrage, a national common voters roll, regular elections and a multi-party system of democratic government, to ensure accountability, responsiveness and openness.

Id. at sec. 1.

4. Restricted Multi-Track Amendment

TABLE 9: RESTRICTED MULTI-TRACK FRAMEWORK IN DEMOCRATIC CONSTITUTIONS

Canada	Chile	Estonia	Spain

Of the thirty-six democratic constitutions in this study, four entrench the restricted multi-track framework.[159] This framework combines the restrictions of specifically designated amendment procedures with multiple procedures for amending those specific provisions. Whereas the restricted single-track framework creates only one formal amendment procedure for amending specifically enumerated constitutional provisions, the restricted multi-track framework provides more than one procedure for amending those specifically enumerated provisions.

The Canadian Constitution provides an illustration. Its text entrenches five amendment procedures.[160] First, the method of provincial unilateral amendment authorizes a provincial legislature to formally amend its provincial constitution by passing a law in the normal course of the legislative process.[161] This procedure may be initiated only in the subnational legislature concerned. Second, under the method of unilateral federal amendment, Parliament may pass a simple law to amend the Constitution.[162] Either house of Parliament may initiate the amendment.

Each of the following three procedures may be initiated by either house of the national legislature or a subnational legislature.[163] First, under the method of parliamentary amendment with the approval of the affected provincial legislature, both houses of Parliament are required to adopt a resolution by majority vote followed by a majority vote of the legislature whose subnational unit is affected by the amendment.[164] Second, under the general amending formula, both houses of Parliament are required to adopt a resolution by majority vote followed by resolutions from two-thirds of provincial legislatures whose aggregate population represents at least fifty percent of the national

159. *See* Constitution Act, 1982, *being* Schedule B to the Canada Act, 1982, s. 38–48 (U.K.); CONSTITUCIÓN POLÍTICA DE LA REPÚBLICA DE CHILE [C.P.] arts. 127–29; PÕHISEADUS, ss 161–68 (Est.); CONSTITUCIÓN ESPAÑOLA [C.E.], B.O.E. nn.166–68, Dec. 29, 1978 (Spain).

160. *See generally*, Constitution Act, 1982, *being* Schedule B to the Canada Act, 1982, s. 38–48 (U.K.).

161. *Id.* at. s. 45 ("Subject to section 41, the legislature of each province may exclusively make laws amending the constitution of the province.").

162. *Id.* at s. 44.

163. *See id.* at s. 46.

164. *Id.* at s. 43.

population.[165] Finally, under the method of unanimity, both houses of Parliament are required to adopt a resolution by majority vote followed by majority resolutions from each of the provincial legislatures.[166] These are the five distinguishable formal amendment procedures under the Canadian Constitution.[167]

Each of Canada's five formal amendment procedures is specially designated for amending specific constitutional provisions. The first method—unilateral provincial amendment—applies to all provincial matters except those specifically assigned to higher amendment thresholds.[168] Canadian political actors may use the method of unilateral federal amendment to make formal amendments to the federal executive government or to either of the two houses of Parliament.[169] They may use the third mode of amendment—Parliament and the affected province—to alter provincial boundaries or to change the use of English or French within a province.[170] The fourth mode of amendment—Parliament and a supermajority of provinces—is the Constitution's default amendment procedure and must be used to make a formal amendment to such provisions, including provincial representation in the House of Commons and the Senate, the powers of the Senate and the way Senators are selected, and the creation of new provinces.[171] The fifth mode of amendment—unanimous consent—must be used to make formal amendments to provisions like the monarchy, the composition of the Supreme Court of Canada, and the procedures for amending the Constitution.[172] The subject-matter restrictions associated with these five amendment procedures combined with the multiplicity of initiators show why the Canadian Constitution is an example of the restricted multi-track framework.

The Spanish Constitution also demonstrates the restricted multi-track framework. The government, either house of the national legislature, or the legislatures of the country's autonomous communities may initiate a formal amendment proposal.[173] The default formal amendment rule then requires each house of the legislature to approve the proposal by a three-fifths vote.[174] Alternatively, where both houses are unable to approve the

165. *Id.* at s. 38, para. 1. Territorial population does not appear to count toward national population. *See id.* at s. 38, para. 2.

166. *Id.* at s. 41

167. The Canadian Constitution also authorizes provinces to dissent from, and thereby avoid being bound by, certain formal amendments, as well as to opt out from others. *See id.* at s. 38, paras. 2–4, s. 40.

168. *Id.* at s. 41.

169. *Id.* at s. 44.

170. *Id.* at s. 43.

171. *Id.* at s. 42, para. 1(f).

172. *Id.* at s. 41.

173. CONSTITUCIÓN ESPAÑOLA [C.E.], B.O.E. n. 87, Dec. 29, 1978 (Spain).

174. *Id.* at B.O.E. n. 167, para. 1.

amendment proposal by the required two-thirds threshold, the amendment may pass with simple majority approval in the Senate and two-thirds approval in the Congress.[175] The formal amendment process also includes an optional final step: a referendum, if requested by one-tenth of the members of either house within fifteen days of approval in the national legislature.[176] For formal amendments to the Crown, the Constitution's fundamental principles and its entrenchment of rights and liberties, the power to initiate an amendment similarly rests with the government, either house of the national legislature, or the legislatures of the autonomous communities. Ratification requires a different procedure: two-thirds approval in each house of the national legislature, followed by the new elections for the national legislature and two-thirds approval from each of the newly constituted chambers, followed by ratification by referendum.[177]

5. Exceptional Single-Track Amendment

TABLE 10: EXCEPTIONAL SINGLE-TRACK FRAMEWORK IN DEMOCRATIC CONSTITUTIONS

Australia	Austria	Iceland

The exceptional single-track and exceptional multi-track frameworks are similar to the restricted single-track and multi-track frameworks, respectively. Both exceptional frameworks differ from the restricted frameworks only insofar as each of the exceptional frameworks entrenches only two amendment procedures: one default amendment procedure that applies generally to all amendable constitutional provisions, and one special amendment procedure that applies exclusively to a single constitutional provision or a set of related provisions. Under both exceptional frameworks, the special amendment procedure incorporates the first procedure within it. Amending the specially entrenched provision or set of related provisions therefore requires the successful completion of one of the available amendment procedures for making a formal amendment and an additional procedure that is not otherwise required for amending other constitutional provisions. This additional procedure is what is most significant about the exceptional frameworks of formal amendment—it is reserved exceptionally for only one constitutional provision or one set of related provisions.

175. *Id.* at B.O.E. n. 167, para. 2.
176. *Id.* at B.O.E. n. 167, para. 3.
177. *Id.* at B.O.E. n. 168.

Of the thirty-six constitutions in this study, only three entrench the single-track exceptional framework.[178] A useful example of this exceptional single-track framework is the Icelandic Constitution.[179] The constitutional text provides a general amendment formula,[180] under which amendment proposals must be introduced in the unicameral national legislature. If the legislature adopts the proposal, the legislature must then be dissolved for new legislative selections. Once it is newly reconstituted, the legislature must then once again adopt the amendment proposal unchanged, and the President must subsequently confirm the amendment.[181] This formal amendment procedure applies to all amendable constitutional provisions except the following: "The Evangelical Lutheran Church shall be the State Church in Iceland and, as such, it shall be supported and protected by the State."[182] Any formal amendment to this provision requires an additional step: a national referendum.[183] This exceptional procedure for amendments related to the establishment of the Evangelical Lutheran Church illustrates the exceptional dimension of Iceland's formal amendment procedures. Exclusivity is an important design feature with useful applications, as I will show in the pages below.[184]

6. Exceptional Multi-Track Amendment

TABLE 11: EXCEPTIONAL MULTI-TRACK FRAMEWORK IN DEMOCRATIC CONSTITUTIONS

United States

Only one democratic constitution entrenches the exceptional multi-track framework: the U.S. Constitution. The text establishes four ways to amend the Constitution: (1) proposal by two-thirds of each house of the national legislature and ratification by three-quarters of the subnational legislatures; (2) proposal by two-thirds of each house of the national legislature and ratification by three-quarters of subnational conventions; (3) petition by two-thirds of the

178. AUSTRALIAN CONSTITUTION s 128; BUNDES-VERFASSUNGSGESETZ [B-VG] BGBl No. 1/1920, as last amended by Bundesverfassungsgesetz [BVG] BGBl I No. 2/1983, arts. 34–35, 44, ¶ 2 (Austria); STJÓRNARSKRÁ LÝÐVELDISINS ÍSLANDS, art. 79 (Ice.).

179. Residents of Iceland have recently voted in a national referendum in favor of rewriting their Constitution in light of the 2008 banking crisis. *See* Robert Robertsson, *Voters in Iceland Back New Constitution, More Resource Control*, REUTERS (Oct. 21, 2012, 10:20 AM), http://www.reuters.com/article/2012/10/21/iceland-referendum-idUSL5E8LK1TE20121021.

180. STJÓRNARSKRÁ LÝÐVELDISINS ÍSLANDS, art. 79 (Ice.).

181. *Id.*

182. *Id.* at art. 62.

183. *Id.* at art. 79.

184. *See infra* Subpart III.A.

subnational legislatures for a convention to propose one or more constitutional amendments, and ratification by three-quarters of the subnational legislatures; and (4) petition by two-thirds of the subnational legislatures for a convention to propose one or more constitutional amendments, and ratification by three-quarters of subnational conventions.[185] Any of these four formal procedures may be used to amend any provision in the U.S. Constitution except the Equal State Suffrage Clause, which requires that each state hold equal voting power in the Senate.[186]

The rule for amending the Equal State Suffrage Clause illustrates why the U.S. Constitution exhibits the exceptional multi-track framework of formal amendment. In order to amend the Equal State Suffrage Clause provision, the Constitution requires adherence to one of these four formal procedures in addition to the consent of the state or states whose voting power is affected by that amendment.[187] The additional step of securing state consent is required only if political actors also successfully complete one of the four formal procedures.[188] If they fail in that attempt, securing state consent alone will not result in a formal amendment. Both steps are necessary for amending the Equal State Suffrage Clause: successfully completing one of the four formal amendment procedures and securing state consent. This higher amendment threshold applies exceptionally to the Equal State Suffrage Clause.

D. The Specifications of Formal Amendment

Formal amendment rules are therefore anchored in one of two foundations and structured around one of six frameworks. Yet these foundations and frameworks are neither self-executing nor do they provide the entire blueprint to formal amendment. They must be supplemented by specifications that set into motion their operation. These formal specifications are written into the text of the constitution and are expressly designed as operational restrictions on the formal amendment process that political actors must navigate to formally amend the constitution. Of the several types of formal specifications, five of them appear with relative frequency in written constitutions: voting thresholds and quorum requirements,

185. U.S. CONST. art. V.

186. *Id.* ("Provided . . . that no State, without its Consent, shall be deprived of its equal Suffrage in the Senate.").

187. It is theoretically possible that the affected state could express its consent along with other states at the three-quarters ratification stage. This would obviate the need for a separate step to obtain the affected state's consent.

188. U.S. CONST. art. V. The Equal Suffrage Clause may be read as requiring the unanimous consent of the states. *See* Sanford Levinson, *Designing an Amendment Process*, *in* CONSTITUTIONAL CULTURE AND DEMOCRATIC RULE 271, 284 (John Ferejohn et al. eds., 2001).

subject-matter restrictions, temporal requirements, electoral preconditions, and defense mechanisms.

1. Voting Thresholds and Quorum Requirements

All formal amendment rules entrench thresholds specifying the quantum of agreement needed to use any of their procedures. Constitutional designers have wide latitude to tailor these thresholds to the appropriate specifications in their jurisdictions; each of the six frameworks of formal amendment therefore entrenches various voting thresholds. We find examples of simple or supermajority voting thresholds in the comprehensive single-track,[189] comprehensive multi-track,[190] restricted single-track,[191] restricted multi-track,[192] exceptional single-track,[193] and exceptional multi-track frameworks.[194] We also find voting thresholds requiring at least two of the following in comprehensive, restricted and exceptional frameworks: supermajority vote, a combination of national and subnational approval, and referendum.[195]

Constitutional designers have also specified quorum requirements that political actors must meet to validly deploy formal amendment rules. Where political actors do not achieve these quorum requirements, the formal amendment rules are effectively rendered inoperative. In Denmark, for example, the Constitution requires a referendum to ratify an amendment proposal approved by the national legislature.[196] In order to validly

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189. *See* IR. CONST., 1937, art. 46, para. 2 (requiring a referendum); Constitution Act, 1986, pt. 3 s 15 (N.Z.) (requiring a majority vote in national legislature); GRUNNLOVEN [GRL.] § 112 (Nor.) (requiring a supermajority vote in the national legislature).

190. *See* SUOMEN PERUSTALSKI, 6 luku 73 (Fin.) (authorizing amendment by a combination of simple and supermajority vote, or extraordinary supermajority vote); BUNDESVERFASSUNG [BV] Apr. 18, 1999, SR 101, arts. 192–95 (Switz.) (authorizing referendum).

191. *See* INDIA CONST. art. 368 (authorizing amendment by a combination of simple majority and supermajority vote).

192. *See* CONSTITUCIÓN POLÍTICA DE LA REPÚBLICA DE CHILE [C.P.] arts. 127–29 (authorizing amendment by supermajority vote in the national legislature).

193. *See* AUSTRALIAN CONSTITUTION s 128 (requiring simple majority vote in the national legislature and in subnational states).

194. *See* U.S. CONST. art. V (requiring supermajority approval in the national legislature and subnational states).

195. *See* AUSTRALIAN CONSTITUTION s 128 (requiring a combination of referendum and national/subnational approval under exceptional single-track framework); Constitution Act, 1982, *being* Schedule B to the Canada Act, 1982, s. 38–48 (U.K.) (requiring supermajority and national/subnational approval under the restricted multi-track framework); NIHONKOKU KENPŌ [Kenpō], art. 96 (Japan) (requiring supermajority vote and referendum under a comprehensive single-track framework); MAURITIUS CONST., art. 47, para. 3 (requiring referendum and extraordinary supermajority in the legislature under a restricted single-track framework).

196. GRUNDLOVEN [GRL] Lov nr. 88 (Den.).

ratify the amendment proposal, at least forty percent of the electorate must participate, and of those a simple majority must vote in favor.[197] Under South Korea's referendum requirement, a simple majority of eligible voters must approve a proposed amendment.[198] The Canadian Constitution entrenches a variation on the conventional quorum requirement: its general amending formula requires approval from a simple majority in both houses of the national legislature, as well as simple majority approval from at least two-thirds of subnational legislatures whose population represents at least half of the entire provincial population according to the latest census.[199] Constitutional designers therefore have many options to design quorum requirements.[200]

2. Subject-Matter Restrictions

Democratic constitutions generally entrench two types of provisions: the first are susceptible to the formal amendment procedures entrenched in the text; the second are absolutely immune to them. These unamendable provisions establish explicit restrictions on the subject matter of formal amendments. Subject-matter restrictions may preclude formal amendments to secularism,[201] republicanism,[202] or democracy.[203] In addition, they may prohibit formal amendments that suppress or diminish fundamental rights and freedoms,[204] create a single-party state,[205]

197. *Id.* The final step calls for Royal Assent. *Id.*

198. DAEHANMINKUK HUNBEOB [HUNBEOB] art. 130, para. 2 (S. Kor.).

199. Constitution Act, 1982, *being* Schedule B to the Canada Act, 1982, c. 38, para. 1 (U.K.).

200. Constitutional designers should be attentive to the choice of electoral procedures as these may have an impact on the representativeness of formal amendments. Where a regime authorizes formal amendments by constitutional act or fundamental law and the legislature is constituted by a first-past-the-post system, the legislative majority may in fact represent only a popular minority. This is relevant to the popular legitimacy of formal amendments. On this point, see David Landau, *Abusive Constitutionalism*, 47 U.C. DAVIS L. REV. 189, 208–16 (2013).

201. *See* CONSTITUIÇÃO DA REPÚBLICA PORTUGUESA, art. 288, cl. c.

202. *See* CONSTITUIÇÃO DA REPÚBLICA DE CABO VERDE, art. 313, para. 1, cl. b; 1958 CONST. art. 89 (Fr.); Art. 139 Costituzione [Cost.] (It.); CONSTITUIÇÃO DA REPÚBLICA PORTUGUESA, art. 288, cl. b.

203. *See* GRUNDGESETZ FÜR DIE BUNDESREPUBLIK DEUTSCHLAND [GRUNDGESETZ] [GG] [BASIC LAW], May 23, 1949, BGBl. VII, art. 79, para. 3 (Ger.); *id.* at BGBl II, art. 20, para. 1.

204. *See* CONSTITUIÇÃO DA REPÚBLICA DE CABO VERDE, art. 313, para. 2; GRUNDGESETZ FÜR DIE BUNDESREPUBLIK DEUTSCHLAND [GRUNDGESETZ] [GG] [BASIC LAW], May 23, 1949, BGBl. VII, art. 79, para. 3 (Ger.); *id.* at BGBl. I, art. 1; CONSTITUIÇÃO DA REPÚBLICA PORTUGUESA, art. 288, cl. d.

205. *See* CONSTITUIÇÃO DA REPÚBLICA DE CABO VERDE, art. 313, para. 1, cl. g; CONSTITUIÇÃO DA REPÚBLICA PORTUGUESA, art. 288, cl. i.

redraw national borders,[206] or violate the separation of powers.[207] Other subject-matter restrictions disallow formal amendments that violate federalism[208] or international law.[209]

Yet subject-matter restrictions often fail to actually protect a provision. First, no degree of constitutional entrenchment can withstand revolution.[210] Constitutional designers cannot escape this risk; all constitutions are vulnerable to this nonconstitutional form of change. Constitutional designers can, however, avoid the faulty constitutional design that undermines their effort to entrench a subject-matter restriction. Consider the French Constitution, which entrenches a subject-matter restriction on republicanism.[211] This subject-matter restriction originated in 1884, when Jules Ferry, an opponent of monarchy and proponent of republicanism,[212] proposed to entrench the following provision: "The Republic form of the Government cannot be made the subject of a proposed revision. Members of families that have reigned in France are ineligible to the presidency of the Republic."[213] Today, under the French Constitution, "the Republican form of government shall not be the object of any amendment."[214]

The design of this subject-matter restriction illustrates the second reason why its entrenchment fails to protect it: the text absolutely entrenches republicanism, but it does not absolutely entrench itself against formal amendment. Constitutional reformers in France could therefore lawfully deploy the comprehensive multi-track framework to circumvent the subject-matter restriction on amendments to republicanism by amending the entrenching provision. This design flaw is fatal to the effort to establish a subject-matter restriction. Rewriting the French

206. *See* CONSTITUIÇÃO DA REPÚBLICA DE CABO VERDE, art. 313, para. 1, cl. a; 1958 CONST. art. 89 (Fr.).

207. *See* 1975 SYNTAGMA [SYN.] 2, art. 110, para. 1 (1975) (Greece); CONSTITUIÇÃO DA REPÚBLICA PORTUGUESA, art. 288, cl. j.

208. *See* GRUNDGESETZ FÜR DIE BUNDESREPUBLIK DEUTSCHLAND [GRUNDGESETZ] [GG] [BASIC LAW], May 23, 1949, BGBl. VII, art. 79, para. 3 (Ger.)

209. *See* BUNDESVERFASSUNG [BV] Apr. 18, 1999, SR 101, art. 194, para. 2 (Switz.)

210. JEFFREY GOLDSWORTHY, PARLIAMENTARY SOVEREIGNTY: CONTEMPORARY DEBATES 70 (2010). Relatedly, subject-matter restrictions also fail in the face of wholesale constitutional replacement that may be democratic in form though not in fact. *See* Landau, *supra* note 200, at 237–41.

211. 1958 CONST. art. 89 (Fr.).

212. *See* Nathalie Droin, *Retour sur la loi constitutionnelle de 1884: contribution à une histoire de la limitation du pouvoir constituent derive*, 80 REVUE FRANÇAISE DE DROIT CONSTITUTIONNEL 725, 740 (2009) (Fr.).

213. *Law Partially Revising the Constitutional Laws, Aug. 14, 1884*, *in* CONSTITUTIONAL AND ORGANIC LAWS OF FRANCE 168, 168 (Charles F.A. Currier ed. & trans. 1893).

214. 1958 CONST. art. 89 (Fr.).

Constitution's entrenching clause in light of this exposed design flaw would yield a provision that had been minimally, textually revised yet substantively transformed, stating henceforth that "neither this clause nor the Republican form of government shall be the object of any amendment." Constitutional designers may therefore entrench both the subject-matter restriction as well as the entrenching provision at little additional political cost.

3. Temporal Limitations

Formal amendment specifications also limit formal amendments with respect to the timing of the various steps comprising the amendment process. We can identify two general types of these temporal limitations: *deliberation requirements*, of which there are two kinds (deliberation ceilings and deliberation floors)[215] and *safe harbor provisions*.[216] Temporal limitations of both varieties are commonly entrenched in written constitutions.[217]

TABLE 12: TEMPORAL LIMITATIONS IN DEMOCRATIC CONSTITUTIONS

Deliberation Requirements	Australia Chile Costa Rica Italy Luxembourg South Korea Sweden
Safe Harbor Provisions	Cape Verde Estonia Greece Uruguay

215. *See, e.g.*, CONSTITUCIÓN POLÍTICA DE LA REPÚBLICA DE COSTA RICA, art. 195, para. 3; DAEHANMINKUK HUNBEOB [HUNBEOB] art. 129 (S. Kor.).

216. *See, e.g.*, CONSTITUIÇÃO DA REPÚBLICA DE CABO VERDE, art. 309, para. 1; PÕHISEADUS, s 168 (Est.).

217. Democratic constitutions commonly entrench deliberation requirements. *See* AUSTRALIAN CONSTITUTION s 128; CONSTITUCIÓN POLÍTICA DE LA REPÚBLICA DE CHILE [C.P.] art. 129; CONSTITUCIÓN POLÍTICA DE LA REPÚBLICA DE COSTA RICA, art. 195; Art. 138 Costituzione [Cost.] (It.); CONSTITUTION OF LUXEMBOURG, art. 114; DAEHANMINKUK HUNBEOB [HUNBEOB] arts. 129–30 (S. Kor.); REGERINGSFORMEN [RF] 8, art. 14 (Swed.). Safe harbors are also commonly entrenched. *See, e.g.*, CONSTITUIÇÃO DA REPÚBLICA DE CABO VERDE, art. 309, para. 1; PÕHISEADUS, s 168 (Est.); 1975 SYNTAGMA [SYN.] 2, art. 110, para. 6 (Greece); CONSTITUCIÓN DE 1967, art. 331, cl. c (Uru.).

The Costa Rican Constitution provides an instructive example of a deliberation ceiling.[218] The Constitution requires a special commission to render advice on the proposed amendment within no more than twenty working days.[219] This is the upper limit for the commission to deliberate on the matter before the proposal proceeds through other steps.

Conversely, the South Korean Constitution offers an example of a deliberation floor.[220] A deliberation floor establishes a minimum period for deliberating on a proposal prior to a binding vote or action on the proposal.[221] In order to formally amend the South Korean Constitution, the President must make an amendment proposal public for at least twenty days: "Proposed amendments to the Constitution shall be put before the public by the President for twenty days or more."[222] Deliberation floors are the corollary of deliberation ceilings. But rather than establishing an upper time limit for deliberating on an amendment proposal, deliberation floors require either political actors, the public, or both, to consider an amendment proposal for a minimum period of time.

Formal amendment rules are also sometimes temporally limited by a safe harbor. Whereas deliberation requirements compel political actors to consider the merits and demerits of an amendment proposal over the course of a defined period of time, safe harbors do the opposite: they prohibit political actors from making amendment proposals for a defined period of time. Safe harbors might, for example, foreclose political actors from reintroducing a defeated amendment proposal until the passage of a defined period. The Estonian Constitution adopts this model.[223] Alternatively, safe harbors might ban amendment proposals for a fixed number of years beginning immediately upon the ratification of a new constitution. The Cape Verdean Constitution illustrates this safe harbor.[224] Safe harbors might also prohibit subsequent formal amendments within a defined period of time after the successful formal amendment of

218. CONSTITUCIÓN POLÍTICA DE LA REPÚBLICA DE COSTA RICA, art. 195, para. 3.

219. *Id.*

220. DAEHANMINKUK HUNBEOB [HUNBEOB] art. 129 (S. Kor.).

221. *See, e.g.*, *id.* ("Proposed amendments to the Constitution shall be put before the public by the President for twenty days or more.").

222. *Id.*

223. PÕHISEADUS, s 168 (Est.) (stating that an amendment to the Constitution regarding the same issue shall not be initiated within one year after the rejection of a corresponding bill by a referendum or by the *Riigikogu*).

224. CONSTITUIÇÃO DA REPÚBLICA DE CABO VERDE, art. 309, para. 1 (creating a five-year safe harbor).

the constitution. The Greek and Portuguese Constitutions entrench this type of safe harbor.[225]

Temporal limitations appear to serve the interest of constitutional peace. Deliberation ceilings give notice to political actors that the window for deliberating upon a formal amendment will not remain open indefinitely. They circumscribe amendment debates within a finite period of time during which political actors are compelled to proceed apace to consider the merits and raise any possible demerits about the proposal before time elapses. Were there no time limit within which to act, it would be possible to imagine the amendment debate enduring for years—perhaps even decades.[226] Relatedly, deliberation floors frustrate political actors endeavoring to rush the formal amendment process. By requiring a minimum period of deliberation, deliberation floors reserve time to consider the amendment proposal. Safe harbors serve the same purpose, though from a different angle. Entrenching a safe harbor to a new constitution allows the document to take root and avoid the disruption that formal constitutional amendment entails. Likewise, a safe harbor on reintroducing a failed amendment requires political actors to redirect their attention elsewhere, thereby giving both themselves and the constitution a respite. Constitutional designers should consider whether and when their own constitutional states might benefit from entrenching temporal limitations in the formal amendment process.[227]

4. Electoral Preconditions

Constitutions also impose electoral preconditions upon formal amendment rules, often requiring successive votes separated by an election. For instance, some prohibit the same voting body from both proposing and ratifying formal amendments without an intervening national election to reconstitute the body between both votes.[228] For instance, the Norwegian Constitution requires the

225. 1975 SYNTAGMA [SYN.] 2, art. 110, para. 6 (Greece) (establishing a five-year safe harbor); CONSTITUIÇÃO DA REPÚBLICA PORTUGUESA, art. 284, para. 1 (same).

226. This is precisely what has transpired in the United States. The Twenty-Seventh Amendment was originally proposed in 1789, but it was not ratified until two centuries later in 1992. *See* Res. 3, 1st Cong. (1789) (proposing amendment); 57 Fed. Reg. 21187 (May 18, 1992) (certifying amendment).

227. For a comprehensive analysis of the use of temporal limitations in constitutional design, see generally Ozan O. Varol, *Temporary Constitutions*, 102 CALIF. L REV. 409 (2014) (investigating how constitutional designers do and should consider time in designing constitutions).

228. *See* 1994 CONST. art. 195 (Belg.); GRUNDLOVEN [GRL] Lov nr. 88 (Den.); 1975 SYNTAGMA [SYN.] 2, art. 110, para. 3 (Greece); STJÓRNARSKRÁ LÝÐVELDISINS ÍSLANDS, art. 79 (Ice.); Grondwet voor het Koninkrijk der Nederlanden [GW.] art. 137 (Neth.). Some constitutions establish this rule with exceptions. *See, e.g.*,

unicameral national legislature to propose a formal amendment, but the proposal can only be approved by a newly elected legislature following a general election.[229] The South Korean Constitution illustrates a variation on this restriction. It establishes an electoral precondition designed to frustrate the entrenchment of a formal amendment from which an incumbent president would profit: "Amendments to the Constitution for the extension of the term of office of the President or for a change allowing for the reelection of the President shall not be effective for the President in office at the time of the proposal for such amendments to the Constitution."[230] These electoral preconditions seem intended to prevent self-dealing that would either benefit incumbent political actors or disadvantage their adversaries.

5. Defense Mechanisms

Constitutional designers have also entrenched defense mechanisms within formal amendment rules. Whereas voting thresholds, quorum requirements, subject-matter restrictions, temporal limitations, and electoral conditions constrain how formal amendment rules are used, defense mechanisms disable the formal amendment process altogether. Spurred by fears that the amendment process could be hijacked by foreign or nefarious influences, rushed in the face of a national emergency, or compromised during times of war or instability, these defense mechanisms remove the power of formal amendment from political actors. It is not unusual for constitutional designers to disable the formal amendment process during a national emergency, martial law, or a state of siege or war.[231] For example, the Spanish Constitution orders that "the process of constitutional amendment may not be initiated in time of war or under any of the states contemplated in Article 116,"[232] which includes "alarm, emergency and siege (martial law)."[233] The Estonian Constitution declares that "amendment of the Constitution shall not be initiated, nor shall the Constitution be amended, during a state of emergency or a state of war."[234]

Constitutions may also disable the formal amendment process during periods of regency or succession. When the monarch is absent or unable to serve, constitutions prohibit formal

PÕHISEADUS, s 165 (Est.); SUOMEN PERUSTALSKI, 6 luku 73 (Fin.); REGERINGSFORMEN [RF] 8, art. 16 (Swed.).

229. *See* GRUNNLOVEN [GRL.] § 112 (Nor.).

230. DAEHANMINKUK HUNBEOB [HUNBEOB] art. 128, para. 2 (S. Kor.).

231. *See* 1994 CONST. art. 196 (Belg.); CONSTITUIÇÃO DA REPÚBLICA DE CABO VERDE, art. 315; CONSTITUIÇÃO DA REPÚBLICA PORTUGUESA, art. 289.

232. CONSTITUCIÓN ESPAÑOLA [C.E.], B.O.E. n. 169, Dec. 29, 1978 (Spain).

233. *Id*. at B.O.E. n. 116.

234. PÕHISEADUS, s 161 (Est.).

amendments,[235] perhaps out of fear that the regent named as steward would seek to advantage himself via constitutional amendment during the monarch's absence. For instance, in Luxembourg, the Constitution declares that "during a regency, no change can be made to the Constitution concerning the constitutional prerogatives of the Grand Duke, his status as well as the order of succession."[236] The Belgian Constitution imposes a similar prohibition: "During a regency, no change can be made in the Constitution with respect to the constitutional powers of the King and Articles 85 to 88, 91 to 95, 106 and 197 of the Constitution."[237] Borrowing from these monarchical design strategies, constitutional designers could impose analogous prohibitions in republican forms of government during periods of interim government or when a vacancy exists in a high office (such as the presidency). Constitutional designers could likewise disable formal amendment rules within a defined period of time prior to an election. This would help guard against illegitimate, though perhaps not illegal, efforts to exploit formal amendment rules to shape the result in change-of-control contests.

III. DESIGNING FORMAL AMENDMENT RULES

Formal amendment rules are therefore structured in three tiers. At their base, they are anchored in one of two underlying foundations. The first entrenches a distinction between formal amendment and constitutional revision. The second makes no distinction between amendment and revision but, as I will show below,[238] is susceptible to judicially imposed restrictions that mirror the distinction between amendment and revision. The second tier in the structure of formal amendment rules is one of six amendment frameworks: comprehensive, restricted, or exceptional single track; or comprehensive, restricted, or exceptional multi-track. Formal amendment rules also consist of supplementary specifications—for instance, voting thresholds, quorum requirements, content restrictions, temporal requirements, electoral preconditions, and defense mechanisms—that may be used in combination to complete the structure of formal amendment.

This three-tiered classification of the foundations, frameworks, and specifications of formal amendment rules helps identify and understand formal amendment design possibilities, and it is useful as a guide for constitutional designers to achieve their objectives. Where, for instance, constitutional designers wish to entrench

235. *See* 1994 CONST. art. 197 (Belg.); CONSTITUTION OF LUXEMBOURG, art. 115.

236. CONSTITUTION OF LUXEMBOURG, art. 115.

237. 1994 CONST. art. 197 (Belg.).

238. *See infra* Subpart III.C.

special protections for a given constitutional provision or a family of related provisions, they may choose to textually entrench subject-matter restrictions against formal amendment[239] and they may likewise specially entrench that provision or family of related provisions through one of the restricted or exceptional amendment frameworks.[240] Likewise where, for example, constitutional designers wish to keep the formal amendment process uncomplicated, transparent, and subject to little misinterpretation, they may entrench the comprehensive single-track amendment framework.[241] In this final Part, I explore and demonstrate how constitutional designers may use this new classification to reinforce federalism, express constitutional values, enhance or diminish the judicial role, and pursue democratic outcomes relating to governance, constitutional endurance, and amendment ease or difficulty. I reiterate here what I stated at the outset of this study: the purpose of this Article is to re-enliven the study of formal amendment rules by demonstrating its possibilities in constitutional design.

A. *Federalism Safeguards*

The longest surviving written constitution—the U.S. Constitution—entrenches federalism safeguards in its formal amendment rules using the exceptional multi-track framework. The Equal Suffrage Clause,[242] described above,[243] may be formally amended only where political actors satisfy one of the Constitution's four amendment procedures and also secure the consent of the state whose equal suffrage in the Senate is diminished.[244] No other provision requires this form of particularized consent. We know from the records of the Philadelphia Convention of 1787 that the Clause was a necessary bargain between large and small states.[245] Without the protection conferred to small states by the requirement that a state consent to any diminution of its voting power in the Senate, small states would not have ratified the Constitution.[246] As

239. *See supra* Subpart II.C.2.

240. *See supra* Subparts II.B.3–6.

241. *See supra* Subpart II.B.1.

242. U.S. CONST. art. V ("Provided . . . that no State, without its Consent, shall be deprived of its equal Suffrage in the Senate.").

243. *See supra* Subpart II.A.

244. U.S. CONST. art. V.

245. 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 629–31 (Max Farrand ed., 1911).

246. Equal suffrage in the Senate was nonnegotiable for the smaller states. 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 196, 201 (Max Farrand ed., 1911). James Madison recollected that the Clause "was probably insisted on by the States particularly attached to that equality." THE FEDERALIST No. 43, at 296 (James Madison) (Jacob E. Cooke ed., 1961).

Douglas Smith explains, the Clause was a "constitutional essential."[247]

The two exceptional amendment frameworks—single track and multi-track—share two properties that distinguish them from other frameworks: first, they create two tiers of amendment thresholds; and second, the higher threshold applies exclusively to one constitutional provision or one set of related constitutional provisions, whereas the lower threshold applies to all other constitutional provisions. The higher threshold is cumulative insofar as it incorporates the lower threshold within itself. These are two *design* features of the exceptional amendment frameworks. They can also be distinguished on the basis of how the frameworks are actually used: constitutional designers have entrenched them predominantly to safeguard federalism.

The federalism-reinforcing function of the exceptional frameworks is evident in two other democratic constitutions with one of these frameworks, namely the Australian and Austrian Constitutions.[248] To formally amend the Australian Constitution, each house of the bicameral national legislature must adopt a proposal by a simple majority.[249] Between two and six months thereafter, the amendment proposal must be presented to all Australian voters in a national referendum.[250] If a nationwide majority of voters representing majorities in a majority of states approve the proposal,[251] it proceeds to the final step—assent by the Governor-General.[252] But the Australian Constitution's formal amendment rules entrench an additional requirement for formal amendments that change the balance of powers between the national and subnational states. Where the formal amendment affects the powers, boundaries, or representation of a state, the amendment must also be ratified by a majority of voters in that

247. Douglas G. Smith, *An Analysis of Two Federal Structures: The Articles of Confederation and the Constitution*, 34 SAN DIEGO L. REV. 249, 322 (1997).

248. Of the four democratic constitutions entrenching the single-track or multi-track exceptional framework of formal amendment—Australia, Austria, Iceland, and the United States—only Iceland uses the exceptional framework to grant special protection to a constitutional provision that is not expressly related to federalism. *See* STJÓRNARSKRÁ LÝÐVELDISINS ÍSLANDS, arts. 62, 79 (Ice.) (applying the exceptional amendment framework to the established church).

249. AUSTRALIAN CONSTITUTION s 128.

250. *Id.*

251. *Id.*

252. *Id.* The office of Governor-General is partly ceremonial, constitutional, mystical, and practical. For more on the evolution of the office in Australia, see generally Greg Craven, *The Developing Role of the Governor-General: The Goldenness of Silence*, 32 FED. L. REV. 281 (2004) (Austl.) (illustrating the many functions of the Governor-General).

affected state.[253] This is similar to the structure of the Equal Suffrage Clause in the U.S. Constitution.[254]

The exceptional framework also applies in Austria. The Austrian bicameral national legislature consists of the nationally, popularly elected National Council, and the Federal Council, whose members are chosen proportionately by population by the subnational legislatures.[255] The Federal Council is therefore where subnational interests are more directly represented. Consistent with the exceptional framework, the Austrian Federal Constitutional Law establishes a formal amendment threshold for a special class of provisions and another for all other provisions. The general amendment rule requires approval by two-thirds supermajority vote of a quorum of only one-half in the National Council in order to pass a constitutional law or provision.[256] But for constitutional laws or provisions that restrict the powers and prerogatives of subnational states, the Federal Constitutional Law also requires a quorum of one-half in the Federal Council and two-thirds approval in the Federal Council.[257] The Federal Constitutional Law also protects the design, election rules, and eligibility requirements for the Federal Council with a formal amendment rule not unlike the Equal Suffrage Clause in Article V of the U.S. Constitution. In order to amend the design, election rules, or eligibility requirements for the Federal Council, political actors must also secure the consent of a majority of members in the Federal Council representing at least four of the nine subnational states.[258]

253. AUSTRALIAN CONSTITUTION s 128 ("No alteration diminishing the proportionate representation of any State in either House of the Parliament, or the minimum number of representatives of a State in the House of Representatives, or increasing, diminishing, or otherwise altering the limits of the State, or in any manner affecting the provisions of the Constitution in relation thereto, shall become law unless the majority of the electors voting in that State approve the proposed law.").

254. The South African Constitution also protects subnational entities by ensuring that if a formal amendment "concerns only a specific province or provinces, the National Council of Provinces may not pass the Bill or the relevant part unless it has been approved by the legislature or legislatures of the province or provinces concerned." S. AFR. CONST., 1996, sec. 74, para. 8.

255. *See* BUNDES-VERFASSUNGSGESETZ [B-VG] BGBl No. 1/1920, as last amended by Bundesverfassungsgesetz [BVG] BGBl I No. 2/1983, arts. 26, 34–35 (Austria).

256. *Id.* at art. 44, ¶ 1.

257. *Id.* at art. 44, ¶ 2.

258. *Id.* at art. 35, ¶ 4.

TABLE 13: FEDERALISM REINFORCEMENT IN AMENDMENT DESIGN IN DEMOCRATIC CONSTITUTIONS

Exceptional Single-Track Framework	Australia Austria
Exceptional Multi-Track Framework	United States

Constitutional designers must often be particularly attentive to the vertical separation of powers between national and subnational governments. They can learn from these examples of the exceptional framework of formal amendment inasmuch as Australia, Austria, and the United States have been successful to moderately successful in their management of federalism. Although the strength of federal relations in these constitutional states has not hinged exclusively (nor even primarily) on the design of formal amendment rules, the extent to which formal amendment rules give voice and representation to subnational states within the larger federal structure is a consideration that constitutional designers should not discount, particularly at the early stages of constitution design where the design of constitutional rules are as important for the aspiration or intent they reflect as the binding effect they ultimately have. Granting to subnational states veto power over formal amendments that affect the distribution and scope of subnational powers serves both as a signal of good faith in contentious constitutional design and a useful check on national government as federalism evolves under the new constitution.

B. Constitutional Values

Constitutional designers commonly express constitutional values in the preamble. For instance, Japan's postwar Constitution expresses its commitment to peace and nonaggression in its preamble: "We, the Japanese people, desire peace for all time and are deeply conscious of the high ideals controlling human relationship, and we have determined to preserve our security and existence, trusting in the justice and faith of the peace-loving peoples of the world."[259] The preamble moreover declares that the Constitution is founded in the "universal principle" of popular sovereignty: "Government is a sacred trust of the people, the

259. NIHONKOKU KENPŌ [KENPŌ], pmbl. (Japan).

authority for which is derived from the people, the powers of which are exercised by the representatives of the people, and the benefits of which are enjoyed by the people. This is a universal principle of mankind upon which this Constitution is founded."[260] The current Japanese prime minister has recently undertaken controversial efforts to amend the Constitution, including the preamble, to reflect what he argues are Japan's modern constitutional values.[261]

Constitutional designers also express constitutional values elsewhere. For example, the non-preambular text of the Finnish Constitution declares that it will "guarantee the inviolability of human dignity and the freedoms and rights of the individual and promote justice in society," and adds, "Finland participates in international co-operation for the protection of peace and human rights and for the development of society."[262] Similarly, the South African Constitution declares outside the preamble that the state is founded on the values of human dignity, equality, human rights and freedoms, non-racialism, non-sexism, constitutional supremacy, the rule of law, universal adult suffrage, voter registration, regular elections, accountability, responsiveness, transparence, and multi-party democratic government.[263] Spain also entrenches a statement of constitutional values in the non-preambular text of its constitution: "Spain is hereby established as a social and democratic State, subject to the rule of law, which advocates freedom, justice, equality and political pluralism as highest values of its legal system."[264]

This new classification of formal amendment rules suggests that constitutional designers may express constitutional values in a third site: formal amendment rules themselves.[265] Constitutional designers may deploy special forms of entrenchment in their design

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260. *Id.*

261. *See* Tobias Harris, *Shinzo Abe's Constitutional Quest*, WALL ST. J. (May 16, 2013, 1:02 PM), http://online.wsj.com/article /SB10001424127887323582904578486642338035044.html; Yuka Hayashi, *Japan Leader Charts Path for Military's Rise*, WALL ST. J. (Apr. 24, 2013, 6:10 PM), http://online.wsj.com/article /SB10001424127887323551004578438253084917008.html; Yuka Hayashi, *New Headwinds for Constitution Campaign*, WALL ST. J. BLOG (May 24, 2013, 4:22 PM), http://blogs.wsj.com/japanrealtime/2013/05/24/new-headwinds-for-constitution-campaign; Tokujin Matsudaira, *New Developments on Japan's Proposed Constitutional Amendment Process*, INT'L J. CONST. L. BLOG (Apr. 23, 2013), http://www.iconnectblog.com/2013/04/new-developments-on-japans-proposed-constitutional-amendment-process/.

262. SUOMEN PERUSTALSKI, 1 luku 1 (Fin.).

263. *See* S. AFR. CONST., 1996, sec. 1.

264. CONSTITUCIÓN ESPAÑOLA [C.E.], B.O.E. n. 1, Dec. 29, 1978 (Spain).

265. I have theorized and illustrated how formal amendment rules may be used to express constitutional values. *See generally* Albert, *supra* note 5 (arguing that constitutional designers may express constitutional values in their design of formal amendment rules).

of formal amendment rules to identify what matters more or most in a constitutional text. By incorporating special forms of entrenchment into their design of certain constitutional provisions, constitutional designers can thereby signal their importance. There are obvious and less obvious ways to assign special forms of entrenchment and to prioritize constitutional provisions in order to express constitutional values. The more obvious ways include assigning heightened protection to a constitutional provision within the restricted frameworks of formal amendment, making a constitutional provision absolutely unamendable using subject-matter restrictions, or using both in combination. The less obvious ways include entrenching the distinction between amendment and revision, or combining temporal limitations with electoral conditions.

Consider the restricted multi-track framework entrenched in the Canadian Constitution. As the degree of procedural difficulty increases from the first to the fifth amendment procedure, the importance of the subject matter of the amendment procedures likewise increases. Whereas provincial unilateral amendment may amend a provincial constitution,[266] and parliamentary amendment may be used to amend a constitutional provision dealing exclusively with the House of Commons,[267] the Canadian Constitution requires something more—the consent of Parliament and the affected province—to amend provincial boundaries.[268] Similarly, the Constitution requires a higher threshold—the approval of Parliament and a supermajority of provinces—to amend provincial representation in the Senate.[269] The Constitution reserves the highest quantum of agreement—unanimous consent—for changes to what its drafters regarded as the most important constitutional provisions, namely Canada's association with the monarchy.[270]

What appears to underpin this framework is a hierarchy of constitutional importance. This rigid escalating framework channels political actors toward fixed routes for formal amendment. These routes range from difficult to even more difficult to nearly impossible. As the degree of procedural difficulty rises under this restricted amendment framework, the subject matter of the provisions assigned to these increasing amendment thresholds likewise rises in importance, at least in Canada.[271] Constitutional

266. Constitution Act, 1982, *being* Schedule B to the Canada Act, 1982, s. 45 (U.K.).
267. *Id.* at s. 44.
268. *Id.* at s. 43.
269. *Id.* at s. 42.
270. *Id.* at s. 41.
271. *See* PETER W. HOGG, I CONSTITUTIONAL LAW OF CANADA 85 (5th ed. 2007 & Supp. 2010); Stephen A. Scott, *Pussycat, Pussycat or Patriation and New Constitutional Amendment Processes*, 20 U. W. ONT. L. REV. 247, 303–04 (1982);

designers may therefore confer special or lesser status on constitutional provisions by assigning varying degrees of formal amendment difficulty and thereby establishing a constitutional hierarchy in their design of formal amendment rules.

Constitutional designers may alternatively express constitutional values by entrenching subject-matter restrictions. Notwithstanding the naivety of a constitutional design that relies on the force of mere words to protect the constitutional text from amendment or replacement,[272] subject-matter restrictions nonetheless reflect the considered judgment of constitutional designers to set apart some provision or provisions of the constitution. Whether this special entrenchment is spurred by a political bargain, Ulyssian self-constraint, or the expression of constitutional values, the predicate is the same: to designate a constitutional provision as special—as the German Basic Law does—by absolutely entrenching the concept of human dignity.[273] Constitutional designers may therefore specially entrench, and thereby express, constitutional values with subject-matter restrictions. They may also combine one of the restricted frameworks with subject-matter restrictions, constructing a constitutional hierarchy with escalating thresholds of amendment difficulty that culminate with amendment impossibility.

The distinction between amendment and revision may similarly be exploited to express constitutional values. By differentiating one class of provisions subject exclusively to revision from another class subject more freely to amendment, constitutional designers may designate the former as not only more important, but also more fundamental to the constitutional regime than the latter. For instance, the Spanish Constitution establishes different voting thresholds and amendment procedures for constitutional changes, variously defined as amendments or revisions, with the revisionary changes requiring substantially more difficult procedures.[274] Constitutional designers may adopt this distinction, make provisions they deem more fundamental subject to revisionary change, and thereby signal their relative importance.

Constitutional designers may also express constitutional values using temporal limitations and electoral preconditions. For instance, constitutional designers may impose deliberation

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Walter Dellinger, *The Amending Process in Canada and the United States: A Comparative Perspective*, 45 LAW & CONTEMP. PROBS. 283, 300 (1982).

272. Melissa Schwartzberg, *Should Progressive Constitutionalism Embrace Popular Constitutionalism?*, 72 OHIO ST. L.J. 1295, 1308 n.55 (2011).

273. The German Basic Law holds that "human dignity shall be inviolable," GRUNDGESETZ FÜR DIE BUNDESREPUBLIK DEUTSCHLAND [GRUNDGESETZ] [GG] [BASIC LAW], May 23, 1949, BGBl. I, art. 1, para. 1 (Ger.), and expressly designates it as unamendable. *See id.* at BGBl. VII, art. 79, para. 3.

274. CONSTITUCIÓN ESPAÑOLA [C.E.], B.O.E. n. 168, Dec. 29, 1978 (Spain).

requirements for certain constitutional provisions and not others; this is a less absolutist strategy than entrenching subject-matter restrictions yet it conveys a similar message about the specialness of a constitutional provision or a set of provisions. Constitutional designers may also choose to impose safe harbors around a constitutional provision or a set of provisions, even though safe harbors commonly apply only to entire constitutions. Finally, subjecting a constitutional provision or provisions to electoral preconditions—for instance, requiring two successive national legislative votes separated by national legislative elections—can highlight constitutional importance. The same is true of combining temporal requirements with electoral conditions, such as imposing a safe harbor around a provision and requiring two successive referenda separated by a reasonable number of years in order to amend that provision.

C. The Judicial Role

Formal amendment in the United States and India demonstrates the difficulty of predicting when democratic courts will take an active role in managing the formal amendment process.[275] Neither written constitution entrenches the distinction between amendment and revision, but courts in each country have taken different approaches on whether the formal amendment process is bound by unwritten norms on amendability. In the United States, the rules of formal amendment do not restrict what may be amended using the normal processes of amendment.[276] The Supreme Court has rejected claims that constitutional amendments may be unconstitutional[277] but has agreed that the ratification of a formal amendment must be reasonably contemporaneous with its proposal in order to be constitutional.[278] The Court has, however, disclaimed responsibility for determining contemporaneousness, ceding this duty to Congress under the political question doctrine.[279]

Yet in India the nonentrenchment of the distinction between amendment and revision has not precluded its emergence. The

275. Judicial review of constitutional amendments may be procedural or substantive. For a leading analysis on this distinction as well as the difficulty of identifying the line separating procedure from substance, see generally KEMAL GÖZLER, JUDICIAL REVIEW OF CONSTITUTIONAL AMENDMENTS: A COMPARATIVE STUDY (2008) (inquiring into the practice and theory of judicial review of formal amendments around the world).

276. *See* U.S. CONST. art. V. But the slave-traded and census-based taxation were made unamendable until the year 1808. *See id.* Likewise, the composition of the Senate is made subject to a special consent requirement. *See id.*

277. *See* Leser v. Garnett, 258 U.S. 130, 136 (1922) (upholding Nineteenth Amendment); Nat'l Prohibition Cases, 253 U.S. 350, 386 (1920) (upholding Eighteenth Amendment).

278. Dillon v. Gloss, 256 U.S. 368, 375 (1921).

279. Coleman v. Miller, 307 U.S. 433, 454–55 (1939).

Indian Supreme Court has developed the distinction by limiting the national legislature's power to amend the Constitution, even though the constitutional text imposes no such substantive limits on the formal amendment power.[280] In creating what is known as the basic structure doctrine, the Supreme Court wrote that "[t]he true position is that every provision of the Constitution can be amended provided in the result the basic foundation and structure of the Constitution remains the same."[281] Neither constitutional supremacy, republicanism, democracy, secularism, the separation of powers, nor federalism can be "destroyed" by an amendment, insisted the Court, suggesting that those foundational features of Indian constitutionalism can be changed only with a new constitution.[282] Constitutional designers should therefore not presume that the non-entrenchment of the distinction will necessarily lead to either its rejection, as in the United States, or its judicial creation, as in India.

But there are ways to exclude the judiciary from matters involving formal amendment. Constitutional designers intent on diminishing the judicial role may learn from the Netherlands, where formal amendment occurs through the legislative process with the proposal and ratification of a law deemed constitutional.[283] Unlike constitutional states where courts are granted by delegation or acquiescence the power of judicial review and would therefore possess the power to review the constitutionality of such laws, the Netherlands forecloses this power from Dutch courts. The Dutch Constitution prohibits courts from exercising the power of judicial review: "The constitutionality of Acts of Parliament and treaties shall not be reviewed by the courts."[284] Dutch courts have interpreted this provision broadly to prohibit them from reviewing the constitutionality of laws against both written laws and unwritten principles of natural law.[285]

Constitutional designers intent on enhancing the judicial role may purposely introduce ambiguity in their design of formal amendment rules.[286] The two restricted amendment frameworks

280. *See* INDIA CONST. art. 368.

281. Kesavananda Bharati v. State of Kerala, (1973) 4 S.C.C. 225, 366 (India).

282. *Id.*

283. *See* Grondwet voor het Koninkrijk der Nederlanden [GW.] art. 137–42 (Neth.).

284. *Id.* at art. 120.

285. Gerhard van der Schyff, *Constitutional Review by the Judiciary in the Netherlands: A Bridge Too Far?*, 11 GERMAN L.J. 275, 277–78 (2010).

286. This applies in primarily common-law regimes where the judiciary either asserts or is granted the authority of constitutional control. But courts are not always endowed with, nor do they always assert, this power; it may belong to other bodies, for instance legislatures or the constitution-making body.

appear from experience to be the most vulnerable to interpretive ambiguity. By design, the restricted amendment frameworks create more than one formal amendment procedure, and each is deployable only for specifically enumerated constitutional provisions of the constitution. Constitutional designers can exploit this restricted framework by defining only in broad terms which constitutional provisions are formally amendable by specific amendment procedures, thereby leaving future political actors to resolve which amendment procedure they must follow to formally amend specific constitutional provisions. Though it was unlikely designed with this intention in mind, the Canadian Constitution's restricted multi-track framework has created confusion about which of its five formal amendment procedures applies to formally amending the long-standing practice of prime ministerial Senate appointments.[287] This is a matter of current constitutional controversy; the Government of Canada recently requested an advisory opinion from the Supreme Court to clarify these and related questions.[288]

D. Democratic Outcomes

Constitutional designers may also use this classification to measure how the choice of formal amendment rules maps onto democratic outcomes in constitutional states. The relationship between formal amendment design and democratic governance, constitutional endurance, and amendment difficulty is of particular interest to constitutional designers insofar as their design of formal amendment rules is informed both by the suitability of a particular foundation, framework, or specification for their own constitutional

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287. Part of the debate concerns which part of the formal amendment rules will be engaged by the proposed changes to Senatorial appointments. Under the Constitution's formal amendment rules, amendments to "the method of selecting Senators" must pass the default amendment threshold, requiring approval from both houses of the national legislature and from two-thirds of the subnational legislatures whose aggregate population represents at least half of the population of all provinces combined. *See* Constitution Act, 1982, *being* Schedule B to the Canada Act, 1982, s. 42 (U.K.). However, the Constitution's formal amendment rules also state that "subject to sections 41 and 42, Parliament may exclusively make laws amending the Constitution of Canada in relation to the executive government of Canada or the Senate and House of Commons." *See id.* at s. 44. The changes proposed are tracked historically and available on the Canada of Parliament's website. *LEGIS*info, PARLIAMENT CAN., http://www.parl.gc.ca/LegisInfo/BillDetails.aspx?Language=E&Mode=1&billId=5093616&View=3 (last visited Apr. 25, 2014).

288. The questions referred to the Supreme Court of Canada are archived by the Privy Council Office. *See PC Number: 2013-0070*, PRIVY COUNCIL OFF. (Feb. 1, 2013), http://www.pco-bcp.gc.ca/oic-ddc.asp?lang=eng&Page=secretariats&txtOICID=2013-0070&txtFromDate=&txtToDate=&txtPrecis=&txtDepartment=&txtAct=&txtChapterNo=&txtChapterYear=&txtBillNo=&rdoComingIntoForce=&DoSearch=Search+%2F+List&viewattach=27293&blnDisplayFlg=1. The Court's advisory opinion was released on April 25, 2014. *See* Reference re Senate Reform, [2014] S.C.R. 32 (Can.).

regime, and also by demonstrable correlative or causational evidence that liberal democracies are more likely to adopt a particular framework or combination of formal amendment rules.

Among the thirty-six highest-performing constitutional democracies, the most-to-least common amendment frameworks are comprehensive multi-track (13), comprehensive single track (10), restricted single track (5), restricted multi-track (4), exceptional single track (3) and exceptional multi-track (1).

TABLE 14: MOST-TO-LEAST COMMON AMENDMENT FRAMEWORKS IN DEMOCRATIC CONSTITUTIONS
(WITH DEMOCRACY INDEX RANKING)

Framework	Countries	
Comprehensive Multi-Track Amendment Framework	Costa Rica (22) France (28) Italy (32) Netherlands (10) South Korea (20) Switzerland (7) Uruguay (18)	Finland (9) Greece (33) Luxembourg (11) Slovenia (28) Sweden (2) Taiwan (35)
Comprehensive Single-Track Amendment Framework	Belgium (24) Czech Republic (17) Germany (14) Japan (23) Norway (1)	Cape Verde (26) Denmark (4) Ireland (13) New Zealand (5) Portugal (26)
Restricted Single-Track Amendment Framework	Botswana (30) India (38) Malta (15) Mauritius (18) South Africa (31)	
Restricted Multi-Track Amendment Framework	Canada (8) Chile (36) Estonia (34) Spain (25)	
Exceptional Single-Track Amendment Framework	Australia (6) Austria (12) Iceland (3)	

Exceptional Multi-Track Amendment Framework	United States (21)

Using the Democracy Index and this distribution of amendment frameworks, we can draw three additional conclusions. First, the two comprehensive amendment frameworks account for twenty-three of the thirty-six amendment frameworks in the world's top constitutional democracies.[289] Second, three of the top five constitutional democracies entrench the comprehensive single-track framework.[290] Third, the United States is alone among democracies in entrenching the exceptional multi-track framework, thus further confirming the exceptionalism that scholars have attributed to the U.S. Constitution.[291]

The Democracy Index arrives at its overall ranking by measuring subsidiary indicators of democracy, including electoral procedures and pluralism, the functioning of government, and

289. Thirteen constitutions entrench the comprehensive multi-track framework. *See* CONSTITUCIÓN POLÍTICA DE LA REPÚBLICA DE COSTA RICA, arts. 195–96; SUOMEN PERUSTALSKI, 6 luku 73 (Fin.); 1958 CONST. art. 89 (Fr.); 1975 SYNTAGMA [SYN.] 2, art. 110 (Greece); Art. 138 Costituzione [Cost.] (It.); CONSTITUTION OF LUXEMBOURG, art. 114; Grondwet voor het Koninkrijk der Nederlanden [GW.] arts. 137–42 (Neth.); USTAVA REPUBLIKE SLOVENIJE, arts. 168–71 (Slovn.); DAEHANMINKUK HUNBEOB [HUNBEOB] art. 98 (S. Kor.); REGERINGSFORMEN [RF] 8, arts. 14–16 (Swed.); BUNDESVERFASSUNG [BV] Apr. 18, 1999, SR 101, arts. 192–95 (Switz.); MINGUO XIANFA art. 174 (1947) (Taiwan); CONSTITUCIÓN DE 1967, art. 331 (Uru.). Ten constitutions entrench the comprehensive single-track framework. *See* 1994 CONST. art. 195 (Belg.); CONSTITUIÇÃO DA REPÚBLICA DE CABO VERDE, arts. 309–12, 314; Ústavní zákon č. 1/1993 Sb., Ústava České Republiky [Constitution of the Czech Republic], art. 9, para. 4; GRUNDLOVEN [GRL] Lov nr. 88 (Den.); GRUNDGESETZ FÜR DIE BUNDESREPUBLIK DEUTSCHLAND [GRUNDGESETZ] [GG] [BASIC LAW], May 23, 1949, BGBl. VII, art. 79 (Ger.); IR. CONST., 1937, art. 46; NIHONKOKU KENPŌ [KENPŌ], art. 96 (Japan); Constitution Act, 1986, pt. 3 s 15 (N.Z.); GRUNNLOVEN [GRL.] § 112 (Nor.); CONSTITUIÇÃO DA REPÚBLICA PORTUGUESA, arts. 285–86.

290. *See* GRUNDLOVEN [GRL] Lov nr. 88 (Den.) (fourth); Constitution Act, 1986, pt. 3 s 15 (N.Z.) (fifth); GRUNNLOVEN [GRL.] § 112 (Nor.) (first).

291. *See, e.g.*, BRUCE ACKERMAN, BEFORE THE NEXT ATTACK: PRESERVING CIVIL LIBERTIES IN AN AGE OF TERRORISM 122–23 (2006); SEYMOUR MARTIN LIPSET, AMERICAN EXCEPTIONALISM: A DOUBLE-EDGED SWORD 20–23 (1996); Lorraine E. Weinrib, *The Postwar Paradigm and American Exceptionalism*, *in* THE MIGRATION OF CONSTITUTIONAL IDEAS 84, 85–86 (Sujit Choudhry ed., 2006); G. Brinton Lucas, *Structural Exceptionalism and Comparative Constitutional Law*, 96 VA. L. REV. 1965, 1998 (2010); Miguel Schor, *Judicial Review and American Constitutional Exceptionalism*, 46 OSGOODE HALL L.J. 535, 536–38 (2008); Carol S. Steiker, *Capital Punishment and American Exceptionalism*, 81 OR. L. REV. 97, 97–99 (2002).

political participation.[292] Eight of the thirty-six countries earn perfect scores for electoral procedures and pluralism; of these, six entrench one of the two comprehensive amendment frameworks.[293] Of the bottom eight scores for electoral procedures and pluralism, four are held by countries entrenching the restricted single-track framework.[294] Six of the top twelve scores for functioning of government belong to countries entrenching the comprehensive multi-track framework.[295] Moreover, six of the nine restricted frameworks rank in the bottom ten for political participation,[296] and the other three rank seventh, twelfth and twentieth, respectively.[297] These are noteworthy, but more country-specific research is needed to determine whether, and if so why, these relationships are more than correlative.

Constitutional designers may likewise have an interest in whether one of the frameworks is associated with constitutional mortality or endurance.[298] The recent work of Zachary Elkins, Tom Ginsburg, and James Melton suggests that the rate of formal amendment, and by implication the formal amendment procedures themselves, bears some measurable relationship to the life

292. THE ECONOMIST INTELLIGENCE UNIT, *supra* note 16.

293. *See* GRUNDLOVEN [GRL] Lov nr. 88 (Den.); SUOMEN PERUSTALSKI, 6 luku 73 (Fin.); CONSTITUTION OF LUXEMBOURG, art. 114; Constitution Act, 1986, pt. 3 s 15 (N.Z.); GRUNNLOVEN [GRL.] § 112 (Nor.); CONSTITUCIÓN DE 1967, art. 331 (Uru.).

294. *See* CONSTITUTION OF BOTSWANA § 89; KOSTITUZZJONI TA' MALTA, art. 66; MAURITIUS CONST., art. 47; S. AFR. CONST., 1996, sec. 74.

295. *See* SUOMEN PERUSTALSKI, 6 luku 73 (Fin.); CONSTITUTION OF LUXEMBOURG, art. 114; Grondwet voor het Koninkrijk der Nederlanden [GW.] arts. 137–42 (Neth.); REGERINGSFORMEN [RF] 8, arts. 14–16 (Swed.); BUNDESVERFASSUNG [BV] Apr. 18, 1999, SR 101, arts. 192–95 (Switz.); CONSTITUCIÓN DE 1967, art. 331 (Uru.).

296. *See* CONSTITUCIÓN POLÍTICA DE LA REPÚBLICA DE CHILE [C.P.] arts. 127–29; PÕHISEADUS, ss 161–68 (Est.); INDIA CONST. art. 368; KOSTITUZZJONI TA' MALTA, art. 66; MAURITIUS CONST., art. 47; CONSTITUCIÓN ESPAÑOLA [C.E.], B.O.E. n. 166–68, Dec. 29, 1978 (Spain).

297. *See* CONSTITUTION OF BOTSWANA § 89 (twentieth); Constitution Act, 1982, *being* Schedule B to the Canada Act, 1982, s. 38–48 (U.K.) (seventh); S. AFR. CONST., 1996, sec. 74 (twelfth).

298. Constitutional endurance is not a democratic outcome in the sense that all long-enduring constitutions are democratic or that all democratic constitutions are long enduring. For example, constitutional endurance may be the result of an authoritarian regime's resistance to constitutional change. However, in a functioning constitution in a liberal democracy, constitutional endurance is likely to reflect respect for civil liberties, democratic political culture, few barriers to political participation, fair electoral procedures, and properly functioning government. It is of course also possible for constitutional revision—which leads to constitutional mortality for the superseded constitution—to occur in regimes where these five democratic indicators are high.

expectancy of a constitution.[299] They conclude that constitutional endurance is generally associated with low amendment thresholds, though they stress that it is not always clear which type of amendment threshold is easier than another: "For example, it is difficult to evaluate 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."[300] Future research could build on their work by exploring whether states with high constitutional mortality rates have ultimately found constitutional stability by switching from one framework to another, or by adopting particular specifications.

We can draw three observations from currently-in-force constitutions. First, three of the five oldest constitutions entrench one of the two exceptional frameworks: Australia (single-track), Austria (single-track) and the United States (multi-track).[301] Second, in the twenty years immediately following the Second World War, eight then-new and still-in-force constitutions entrenched a comprehensive amendment framework: five entrenched the multi-track framework[302] and three entrenched the single-track framework.[303] Three also entrenched the restricted single-track framework.[304] Third, in the aftermath of the Cold War, six out of the nine still-in-force constitutions have entrenched one of the two comprehensive amendment frameworks: three single-track and[305] three multi-track,[306] along with one each under the restricted single-

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299. ZACHARY ELKINS ET AL., THE ENDURANCE OF NATIONAL CONSTITUTIONS 99–100 (2009).

300. *Id.* at 100.

301. *See* U.S. CONST. art. V; AUSTRALIAN CONSTITUTION s 128; BUNDES-VERFASSUNGSGESETZ [B-VG] BGBl No. 1/1920, as last amended by Bundesverfassungsgesetz [BVG] BGBl I No. 2/1983, arts. 34-35, 44 (Austria);. The 1868 Luxembourgian Constitution and the 1814 Norwegian Constitution entrench the comprehensive multi-track and single-track framework, respectively. *See* CONSTITUTION OF LUXEMBOURG, art. 114; GRUNNLOVEN [GRL.] § 112 (Nor.).

302. *See* CONSTITUCIÓN POLÍTICA DE LA REPÚBLICA DE COSTA RICA, arts. 195–96; 1958 CONST. art. 89 (Fr.); Costituzione [Cost.] (It.); DAEHANMINKUK HUNBEOB [HUNBEOB] art. 98 (S. Kor.); MINGUO XIANFA art. 174 (1947) (Taiwan).

303. *See* GRUNDLOVEN [GRL] Lov nr. 88 (Den.); GRUNDGESETZ FÜR DIE BUNDESREPUBLIK DEUTSCHLAND [GRUNDGESETZ] [GG] [BASIC LAW], May 23, 1949, BGBl. VII, art. 79 (Ger.); NIHONKOKU KENPŌ [KENPŌ], art. 96 (Japan).

304. *See* INDIA CONST. art. 368; KOSTITUZZJONI TA' MALTA, art. 66; MAURITIUS CONST., art. 47.

305. *See* 1994 CONST. art. 195 (Belg.); CONSTITUIÇÃO DA REPÚBLICA DE CABO VERDE, arts. 309–12, 314; Ústavní zákon č. 1/1993 Sb., Ústava České Republiky [Constitution of the Czech Republic], art. 9, para. 4.

306. *See* SUOMEN PERUSTALSKI, 6 luku 73 (Fin.); USTAVA REPUBLIKE SLOVENIJE, arts. 168–71 (Slovn.); BUNDESVERFASSUNG [BV] Apr. 18, 1999, SR 101, arts. 192–95 (Switz.).

track,[307] restricted multi-track,[308] and exceptional single-track frameworks.[309]

It may also interest constitutional designers to evaluate the relationship between constitutional endurance and the entrenchment of temporal limitations like deliberation requirements or safe harbors.[310] One could reasonably hypothesize that deliberation ceilings and safe harbors both foster constitutional endurance. Insofar as deliberation ceilings confine constitutional amendment debates to a predetermined amount of time, the hypothesis would be that the constitution avoids being seen as a catalyst or obstruction to the adoption or rejection of a particular amendment. And insofar as safe harbors prohibit constitutional amendment or revision within a given period of time after the coming-into-force of a new constitution or constitutional provision, the related hypothesis would be that safe harbors give the constitution a chance to survive through its first years in force—perhaps the most important years for achieving popular legitimacy. Further empirical research on these questions could help illuminate whether deliberation ceilings and safe harbors actually do serve the interest of constitutional endurance.

As constitutional designers structure their rules of formal amendment, they may likewise wish to inquire whether any of the formal amendment frameworks is associated with unusual ease or difficulty of formal amendment. The choice of which framework to adopt will turn on whether constitutional designers wish to privilege flexibility or stability, or more likely some measure of both. Donald Lutz has computed and compiled data on the difficulty of formal amendment in thirty-two constitutional states.[311] Lutz's valuable data ranks the easiest and hardest formal amendment processes among the pool of studied constitutions. His data on amendment difficulty are not presented in terms of formal amendment frameworks. One could therefore build on Lutz's important study of amendment difficulty by further investigating how the data map onto the formal amendment frameworks and their related amendment specifications.

307. *See* S. AFR. CONST., 1996, sec. 74.
308. *See* PÕHISEADUS, ss 161–68 (Est.).
309. *See* STJÓRNARSKRÁ LÝÐVELDISINS ÍSLANDS, art. 62, 79 (Ice.).
310. *See supra* Subpart II.C.3.
311. LUTZ, *supra* note 61.

TABLE 15: AMENDMENT DIFFICULTY AND AMENDMENT FRAMEWORKS (WITH LUTZ INDEX OF DIFFICULTY)

Lutz Ranking of Amendment Difficulty (In Descending Order)[312]	Constitutional Amendment Framework
United States (5.10)	Exceptional Multi-Track
Australia (4.65)	Exceptional Single-Track
Costa Rica (4.10)	Comprehensive Multi-Track
Spain (3.60)	Restricted Multi-Track
Italy (3.40)	Comprehensive Multi-Track
Norway (3.35)	Comprehensive Single-Track
Japan (3.10)	Comprehensive Single-Track
Chile (3.05)	Restricted Multi-Track
Ireland (3.00)	Comprehensive Single-Track
Belgium (2.85)	Comprehensive Single-Track
Denmark (2.75)	Comprehensive Single-Track
Iceland (2.75)	Exceptional Single-Track
France (2.50)	Comprehensive Multi-Track
Finland (2.30)	Comprehensive Multi-Track
India (1.81)	Restricted Single-Track
Greece (1.80)	Comprehensive Multi-Track
Luxembourg (1.80)	Comprehensive Multi-Track
Germany (1.60)	Comprehensive Single-Track
Sweden (1.40)	Comprehensive Multi-Track
Botswana (1.30)	Restricted Single-Track
Austria (0.80)	Exceptional Single-Track
Portugal (0.80)	Comprehensive Single-Track
New Zealand (0.50)	Comprehensive Single-Track

Using Lutz's data, we can begin to make some preliminary observations. The most-difficult-to-amend constitutions that appear in both Lutz's study and mine are, in descending order of difficulty, the constitutions of the United States, Australia, Costa Rica, Spain,

312. This ranking is drawn from Donald Lutz's study of amendment difficulty. *See* LUTZ, *supra* note 61. Lutz's data covers a limited time period; he includes no constitution drafted after 1976 in his list of thirty-two constitutions. *Id.* Some of the constitutions in my study were adopted after 1976. In this Article, my references to the easiest or most difficult formal amendment processes identified in Lutz's study include only those constitutions that were then and remain today in force. Lutz's study of thirty-two democratic constitutions does not include the following democratic constitutions in my list of thirty-six: Canada, Cape Verde, Czech Republic, Estonia, Malta, Mauritius, the Netherlands, Slovenia, South Africa, South Korea, Taiwan, and Uruguay. My study of thirty-six democratic constitutions does not include the following democratic constitutions in Lutz's study of thirty-two constitutions: Argentina, Brazil, Colombia, Kenya, Malaysia, Papua New Guinea, Venezuela, and Western Samoa.

Italy, Norway, Japan, Chile, Ireland, Belgium, Denmark, Iceland, France, Finland, India, Greece, Luxembourg, Germany, Sweden, Botswana, Austria, Portugal, and New Zealand.[313] Of these twenty-three shared data points, the two most-difficult-to-amend constitutions entrench one of the two exceptional amendment frameworks (United States, Australia); two of the three next-most-difficult-to-amend constitutions entrench the comprehensive multi-track framework (Costa Rica, Italy); and the two least-difficult-to-amend constitutions entrench the comprehensive single-track amendment framework (New Zealand, Portugal).[314]

Among the top fifteen most-difficult-to-amend democratic constitutions, five entrench the comprehensive single-track framework (Norway, Japan, Ireland, Belgium, Denmark), four entrench the comprehensive multi-track framework (Costa Rica, Italy, France, Finland), one entrenches the restricted single-track framework (India), two entrench the restricted multi-track framework (Spain, Chile), two entrench the exceptional single-track framework (Australia, Iceland), and one entrenches the exceptional multi-track framework (United States).[315] Of the ten easiest-to-amend democratic constitutions, three entrench the comprehensive single-track framework (New Zealand, Portugal, Germany), four entrench the comprehensive multi-track framework (Sweden, Luxembourg, Greece, Finland), two entrench the restricted single-track framework (Botswana, India), and one entrenches the exceptional single-track framework (Austria).[316] Further country-specific study could illuminate why exceptional amendment frameworks are associated with a higher index of amendment difficulty and correspondingly whether and why comprehensive amendment frameworks are associated with a lower index.

CONCLUSION

An unamendable constitution is not an option for democratic constitutional design. It would lack the legitimacy of popular consent,[317] it would betray the self-assurance constitutional designers have in themselves and the distrust they bare for

313. *Id.* I have excluded from this list the Swiss and Venezuelan Constitutions, which respectively entrenched the second- and third-most difficult formal amendment procedures, because the Swiss and Venezuelan Constitutions that formed the basis of Lutz's study have since been replaced by new constitutions.

314. *See supra* Subpart II.B.

315. See *id.*

316. See *id.*

317. Dellinger, *supra* note 6, at 386–87. I have elsewhere suggested that unamendability is undemocratic. *See* Richard Albert, *Constitutional Handcuffs*, 42 ARIZ. ST. L.J. 663, 667 (2010).

others,[318] and its rigidity would risk provoking revolution.[319] Yet hyper flexibility is as inadvisable as hyper rigidity because it erodes the distinction between a constitution and a statute. Constitutional designers must therefore design impermanent yet stable constitutions and entrench rules for their amendment. Karl Loewenstein has observed that designers have appropriately sought to strike the right balance between stability and flexibility: "[T]he process of constitutional amendment everywhere is kept sensibly elastic, neither too rigid to invite, with changing conditions, revolutionary rupture, nor too flexible to allow basic modifications without the consent of qualified majorities."[320]

Although constitutional scholars have emphasized the importance of formal amendment rules,[321] they have offered constitutional designers little guidance on how to actually design them. In this Article, I have endeavored to illustrate and explain the structure of formal amendment rules in a way that is useful both to constitutional designers tasked with creating them and to constitutional scholars engaged in their study. I have created a new classification of formal amendment rules in democratic constitutional states. I have demonstrated that formal amendment rules are structured in three tiers, and around options within each of these tiers: one of two fundamental foundations, one of six operational frameworks, and a combination of supplementary specifications. I have also shown how constitutional designers may use this new classification to manage federalism, express constitutional values, enhance or diminish the judicial role, and pursue democratic outcomes related to governance, constitutional endurance, and amendment difficulty.

My corollary purpose has been to re-enliven the study of formal amendment rules. There are many empirical, historical, and normative questions to explore in the comparative study of formal amendment: whether democratic outcomes are more likely to follow from the entrenchment of any of the foundations, frameworks, or specifications of formal amendment rules; whether any of the foundations, frameworks, or specifications are associated with constitutional mortality or endurance; and whether the ease or difficulty of amendment is influenced by the choice of amendment

318. *See* Sanford Levinson, *The Political Implications of Amending Clauses*, 13 CONST. COMMENT. 107, 112–13 (1996).

319. A.V. DICEY, INTRODUCTION TO THE STUDY OF THE LAW OF THE CONSTITUTION 66 (Liberty Fund 8th ed. 1982) (1915).

320. Karl Loewenstein, *Reflections on the Value of Constitutions in Our Revolutionary Age*, *in* CONSTITUTIONS AND CONSTITUTIONAL TRENDS SINCE WORLD WAR II 191, 215 (Arnold J. Zurcher ed., 2d ed. 1951).

321. I have argued elsewhere that formal amendment rules are *so* important to constitutionalism that they should be subject to a higher threshold of amendment than other constitutional provisions. *See* Richard Albert, *Amending Constitutional Amendment Rules*, 12 INT'L J. CONST. L. (forthcoming 2015).

foundation, framework, or specification. My larger purpose has been to contribute to the understanding and evaluation of formal amendment rules and to suggest that constitutional designers would benefit from the revived study of formal amendment rules as a helpful complement to the continuing study of informal amendment.