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ORDER FROM CHAOS?
Typologies and models of constitutional change

Oran Doyle*

Introduction
Constitutions change. Sometimes they are replaced. Sometimes constitutional actors utilise a textually prescribed mechanism to change the text of the constitutional document. Sometimes the operation of the constitution informally changes without any formal alteration of the constitutional text. Each of these methods of constitutional change has its own sub-varieties. Constitutional replacement can occur through violent revolution or consensual processes. Formal change mechanisms are numerous and can be combined with one another and/or subjected to limitations in a bewildering number of ways. Informal constitutional change is a label applied to very different practices that achieve the substance of constitutional change without following the forms. Replacement, formal change and informal change also interact with one another. The availability of one method of change makes the utilisation of other methods less likely, and vice versa.

The field of comparative constitutional change, in short, presents in a state of confusion and complexity. Faced with such chaos, it is unsurprising that comparative constitutional scholars have sought to develop typologies and models of constitutional change that impose order on the diversity of constitutional practices, providing a conceptual map to the field.1 Maps can be aesthetically beautiful, but their utility is always relative to a particular purpose. The mapmaker must decide what sort of information the map will present: is it a street-map or a topographical map? What scale is appropriate? Is the map intended to help a pedestrian navigate a city or an airline pilot to navigate a continent? In order to be useful, a map must omit information. This is also true of conceptual maps, typologies and models.2 It therefore

* I am grateful to the editors and to Richard Albert and Juliano Zaiden Benvindo for their helpful comments on an earlier draft.
2 For a helpful account of typologies in relation to constitutions generally, see Dieter Grimm, ‘Types of Constitutions’ in Michel Rosenfeld and Andras Sajo (eds), The Oxford Handbook of Comparative Constitutional Law (Oxford University Press 2012) 98. Although Grimm’s project is far more ambitious than that undertaken in this chapter, his comments about the limits and uses of typologies apply equally here.
makes no sense to criticise a typology or model on the basis that it omits detail. A good typology or model coherently provides the right type of information at a sufficient level of detail (but no more than that) in order to serve some useful purpose.

In this chapter, I analyse typologies and models of constitutional change, critically assessing their utility both for constitutional designers and within comparative constitutional scholarship. In the next section, I introduce the concept of a master-text constitution and formal change, before exploring the abstract function performed by formal change mechanisms and defining the parameters of the discussion. I present typologies of formal change mechanisms that have been advanced in the academic literature. I draw out a distinction between typologies that seek to compare the difficulty levels of formal change mechanisms and typologies that identify differences in the way that formal change mechanisms distribute power among constitutional actors. Next, I show how typologies grapple with these different dimensions (difficulty level and distribution of power) in relation to different components of formal change mechanisms: initiation, ratification and constraints. I argue that typologies that seek to compare difficulty levels across jurisdictions face probably insuperable obstacles. I then present models of constitutional change that seek to account for formal and informal constitutional change alongside political culture. Although these provide a good basis for a theory of constitutional change, they cannot simultaneously account both for the difficulty of constitutional change and the distribution of constitutional power.

**Master-text constitutions, formal change and informal change**

We can think of a constitution both as the set of rules and principles that constitute the governance system of a state and as a canonical written text that claims to be the highest law in a legal system, codifying the most important constitutional rules—in other words, the master-text constitution. The master-text constitution is the highest posited law within the legal system. Among other things, it establishes the procedures for changing other laws in the legal system, what we might call the standard legal change mechanism. Typically the standard legal change mechanism involves a majority in each house of the legislature. For a master-text constitution to be amenable to formal change, it must contain a provision that allows for and regulates its own change. If the master-text constitution were changeable only in accordance with a provision laid down in another document, this would undercut its status as the constitutional master-text.

It is not technically impossible for a master-text constitution to allow for its own change in accordance with that standard legal change mechanism. However, such an approach would prevent a constitution from performing a number of functions that are commonly attributed to constitutions, such as the protection of minority rights and majoritarian procedures from the self-interested actions of the current electoral majority. If a parliamentary majority can

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4 In Canada prior to 1982, the constitution could only lawfully be changed by a constitutional actor in another legal system, the Westminster Parliament. However, this apparent exception is one that proves the rule: this process for amendment of the British North America Act cast doubt on whether Canada had its own autochthonous legal system, a doubt that was only fully resolved by patriation in 1982. For discussion of these issues, see Brian Slattery, ‘The Independence of Canada’ (1983) 5 *Supreme Court Review* 369 and Peter Oliver, *The Constitution of Independence: The Development of Constitutional Theory in Australia, Canada, and New Zealand* (Oxford University Press 2005) Chapter 6. For a view that emphasises changes to the identity of the legislator, see Geoffrey Marshall, *Constitutional Conventions: The Rules and Forms of Political Accountability* (Clarendon Press 1984) 207–208.
rewrite the constitution, constitutional restraints on its powers become legally meaningless. I do not here take a position on whether these constitutional functions are necessary features of constitutions. But nearly all master-text constitutions perform these functions insofar as they make constitutional change more difficult than the standard legal change mechanism. This approach might be taken because of a high-minded devotion to the values of constitutionalism or a more self-interested desire to entrench a transient partisan advantage against easy change in the future. Either way, formal constitutional change tends to be more difficult than legal change in general. As well as retarding constitutional change, formal change mechanisms make an important political choice in their distribution of the power of constitutional change between constitutional actors. Constitutional change mechanisms can therefore be assessed along two dimensions: the extent to which they retard constitutional change and the way in which they distribute constitutional power. These dimensions are reflected in the typologies that we will consider in the next section.

Much ink has been spilt in an attempt to demonstrate that formal constitutional change mechanisms are necessarily limited and never authorise major changes that fundamentally alter the constitution. Some have argued that any such purported change is conceptually impossible, and hence legally invalid. For others, there is an analytical distinction between amendment and more fundamental change, labelled by Richard Albert as dismemberment. I am not persuaded by the conceptual basis for these types of claim. Furthermore, I share Strum’s view that general distinctions between minor amendments and major amendments are ‘conceptually slippery, impossible to operationalize, and therefore generally useless’. Particular constitutions may, of course, prescribe more onerous formal change mechanisms for more significant types of constitutional change, but this is a contingent legal distinction not a conceptually necessary distinction. We need not resolve these disagreements for present purposes, however. Our focus is on formal constitutional change mechanisms, which includes all constitutional provisions for the constitution’s own change, whether that change is labelled as amendment, reform, revision or replacement. This not only avoids pre-emptively removing subject-matter from the field but also escapes the difficulty of assessing at what point a particular change is so large as to be excluded from our purview. Quantifying all constitutional changes would be close to impossible; relying on the terminology in constitutional texts would be inappropriate where we are necessarily working with translations.

**Typologies of formal constitutional change mechanisms**

When one surveys formal constitutional change mechanisms, what immediately stands out is the sheer variety. Core requirements tend to recur across constitutions, but often with very

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5 This is the position of Carl Schmitt and contemporary theories that build on his work in different ways. For a presentation of this argument, see Po Jen Yap, ‘The Conundrum of Unconstitutional Constitutional Amendments’ (2015) 4 Global Constitutionalism 114, 116 and Yaniv Roznai, ‘Unconstitutional Constitutional Amendments: The Migration and Success of a Constitutional Idea’ (2013) 61 American Journal of Comparative Law 657, 690–693.


7 See Oran Doyle, ‘Constraints on Constitutional Amendment Powers’ in Richard Albert, Xenophon Contiades and Alkmena Fotiadou (eds), The Foundations and Traditions of Constitutional Amendment (Hart 2017).

slight variations. These requirements can be combined together in a number of different ways. Moreover, any one constitution can prescribe multiple change processes: whether by allowing constitutional actors to choose between alternatives or requiring different processes for different levels of change or for change initiated by different constitutional actors. Typologies seek to reduce this complexity by making sound decisions about what differences are important and unimportant, reducing the wide variety of mechanisms to a small number of types, thereby providing a conceptual map that provides a simplified view of the field.

Dawn Oliver and Carlos Fusaro present a simple typology that essentially distinguishes between a super-majority in parliament and extra-parliamentary participation, including both referendums and intervening elections. The core distinction between parliamentary and non-parliamentary mechanisms is significant, but there is considerable scope for differentiating further among non-parliamentary mechanisms. Other theorists have provided more detail in this regard.

In his seminal work of constitutional theory, *Ulysses Unbound*, Jon Elster identifies six main hurdles for constitutional amendment:

- Absolute entrenchment;
- Adoption by a super-majority in parliament;
- Requirement of a higher quorum than for ordinary legislation;
- Delays;
- State ratification (in federal systems);
- Ratification by referendum.10

The characterisation of the formal change mechanisms as ‘hurdles’ is telling. The purpose of Elster’s typology is to assist an exploration of the extent to which constitutions can usefully be understood as societal pre-commitments. This claim gains plausibility if there are ‘hurdles’ to constitutional change. Elster quickly notes that there is greater variety than is captured by this typology: there can be constraints on the adoption of constitutional change; there can also be significant differences between the level of super-majority required in parliament; delay mechanisms can function in very different ways.11 The omission of these details does not establish that Elster’s typology is flawed. Recall that we should think of typologies as navigational maps for a particular purpose. Elster’s typology maps the domain in a way that is adequate for his broad theoretical inquiry into constitutions as pre-commitment devices. Although Elster’s theoretical concern is with amendment difficulty, his types do not attempt to mark out different levels of amendment difficulty. Rather, the typology shows how formal constitutional change mechanisms can retard constitutional change by effecting different distributions of constitutional power. We could inquire whether the distribution of constitutional power is consistent with other features of the constitutional system, e.g. federalism or popular control. But this is not Elster’s purpose and

9 Dawn Oliver and Carlo Fusaro, ‘Changing Constitutions: Comparative Analysis’ in Dawn Oliver and Carlos Fusaro (eds), *How Constitutions Change* (Hart 2011) 395. In this context, Oliver and Fusaro also mentioned intra-parliamentary protections, terminological provisions, and states of exception, but these do not seem as relevant to our concern, formal constitutional change mechanisms.


11 Ibid 101–103.
he does not seek to theorise the differences between different hurdles. In sum, Elster’s typology is a rather basic one but a good one in the sense that it is useful for his purpose of showing that very different formal change mechanisms can all retard constitutional change.

In a similar vein, Jan Erik Lane provides a typology of constitutional change mechanisms that is designed to support an argument about constitutional inertia. He identifies at least six types:

- No change;
- Referendums;
- Delay;
- Confirmation by a second decision;
- Qualified majorities;
- Confirmation by sub-national government.¹²

This differs from Elster in not listing quorum requirements while treating delays as a separate category from confirmation by a second decision. His typology, like that of Elster, illustrates how ideologically different distributions of the constitutional change power can each cause constitutional inertia. It provides a useful conceptual map to these differences, although again it does not offer a theoretical account of the differences.

Lane’s typology does not account for all differences and in some circumstances one might seek a more detailed exposition. Having used Lane’s conceptual map to orient oneself to a consideration of countries that use referendums as part of their constitutional change mechanism, one might perceive an important difference between a referendum with a simple majority requirement (50% + 1 of those voting) and a referendum with an absolute majority requirement (50% + 1 of those registered to vote). The absolute majority requirement values definitive popular approval for any constitutional change. The simple majority requirement, in contrast, simply enables electors to have their say in the constitutional change process if they wish. But it is not a criticism of Lane’s typology that it does not capture this level of detail. The typology provides a conceptual map at a particular scale that adequately serves Lane’s purpose. If one needs more detail for a particular purpose, one could develop a sub-typology in much the same way as one might consult a larger scale map. But if Lane were to provide all this level of detail at the outset, it would be far more difficult to find what one is looking for, undermining the whole purpose of the conceptual map.

Arend Lijphart identifies four basic types of change procedure:

- The standard legal change procedure (an ordinary majority);
- Approval by a two-thirds majority;
- Approval by a less than two-thirds majority but greater than 50% (e.g. a 60% majority or combination of a legislative majority and a referendum);
- Approval by more than a two-thirds majority (e.g. a 75% majority or a combination of a two-thirds majority and approval by sub-national legislatures).¹³

Lijphart’s typology is more parsimonious than that of Elster, and directly addresses the degree of change difficulty. The same basic type can accommodate very different
distributions of constitutional power: approval by referendum is equated with a 60% super-majority in parliament; approval by sub-national legislatures is equated with a 75% super-majority in parliament. Lijphart’s indifference to these differences is not a flaw in his typology. To re-emphasise, a typology is a navigational map for a particular purpose. Lijphart’s purpose is not an ideological characterisation of formal change mechanisms; rather his typology attempts a classificatory scheme that forms part of a wider endeavour to place constitutional democracies along a spectrum from majoritarian to consensual. The easier it is to amend a constitution, the fewer constitutional actors need to agree to that change and the more majoritarian the political system. In this regard, Lijphart (correctly in my view) treats a referendum requirement as a delaying (and hence consensual) device rather than a majoritarian device. This contradicts a general view of referendums as crude majoritarian devices. Where a referendum is required in addition to a legislative majority, as distinct from where it is used to circumvent standard representative democracy, it serves to delay change and prompt consensus building.

Unlike Elster and Lane, who sought to explore a general conceptual claim about constitutions, Lijphart seeks to compare constitutions. In this regard, a more sound challenge to his typology might be that the four types do not reliably capture differences in amendment difficulty. Lijphart’s equation of a referendum with a 60% parliamentary super-majority and his equation of sub-national approval with a 75% parliamentary super-majority are both questionable. In any one country, it will be difficult to assess how onerous a referendum requirement is against the counter-factual of a particular legislative super-majority. It is even more heroic to postulate that the correlations of referendums and sub-national approval with legislative super-majorities will be the same in all countries. Nonetheless, Lijphart might reasonably respond that some simplification is required or we will get nowhere.

Finally, Lijphart’s typology draws into sharp focus a problem with attributing a difficulty level to formal constitutional change in a particular country. Many countries have alternative formal change mechanisms. Which one is to be counted? Lijphart suggests two ways of dealing with this problem. When alternative methods can be used, he counts the least restraining method. When different rules apply to different parts of constitutions, he counts the rule pertaining to amendments of the most basic articles of the constitution. While the first manoeuvre is sound, the second is more problematic. Article 148 of the Lithuanian Constitution, for example, adopts three amendment processes. Most provisions can be amended by two votes, separated by at least three months, with a two-thirds majority in the Seimas. The provisions of the First Chapter (the State of Lithuania) and the Fourteenth Chapter (Amendment) can only be amended by referendum. Finally, the provision of Article 1 that provides ‘the State of Lithuania shall be an independent democratic republic’ may only be altered by referendum if not less than three-quarters of the citizens of Lithuania with the electoral right vote in favour thereof. This provision is tantamount to making the provision unamendable; indeed the subject-matter is often made unamendable in other constitutions. It arguably distorts the level of amendment difficulty in Lithuania (both in absolute terms and as a comparison with other countries) to focus on this clearly exceptional amendment procedure.

14 Ibid 1–2.
15 Ibid 219–221.
16 Ibid 252.
Donald Lutz provides a far more detailed typology designed to capture amendment difficulty. As we noted at the outset, the variety in formal constitutional change mechanisms derives considerably from the different ways in which the same basic mechanisms can be combined with one another. If we were to faithfully account for each possible combination of change mechanisms, we would end up with an absurd number of types, making the typology useless. Lutz provides a way around this problem. He exhaustively assigns a score to each requirement that the approval of a particular constitutional actor is needed for a formal constitutional change. Those scores can then be added together where the approval of two or more constitutional actors is needed. He identifies 30 variations on how an amendment proposal can be initiated and 38 variations on how an amendment proposal can be approved. He attributes a score to each variation. For instance, if an election is required between two votes in order to initiate a proposal, this has a score of 0.25. If an absolute majority is required at a referendum in order to ratify an amendment proposal, this has a score of 1.75. One can then add up all the requirements in a particular amendment process to assign it a level of difficulty. This, in turn, allows Lutz to rank the countries under examination in terms of amendment difficulty, without simplifying them into a limited number of types.

Lutz’s project is to develop and test a number of propositions about the relationship between amendment difficulty and other constitutional features. For instance, he wishes to test whether a more difficult change mechanism correlates with a lower amendment rate. This in turn supports a normative project of arguing for a constitutional design that allows for a moderate amendment rate. Lutz’s typology is finely honed to allow a comparison of amendment difficulty in different countries in a way that will test his propositions. However, the apparent comprehensiveness and mathematical certainty of his approach should not blind us to certain issues. First, everything turns on the initial factor of difficulty identified by Lutz. These are obviously contestable. To take one example: Lutz attributes a score of 1.5 to a popular referendum with a simple majority requirement (50% plus one of those voting) and, as we just saw, a score of 1.75 to a popular referendum with an absolute majority requirement (50% plus one of those registered to vote). It seems questionable to me whether this adequately captures the difference in difficulty levels. For instance, in Ireland from 1937 to 2019, 30 amendments have passed the simple referendum requirement but only two of these passed by an absolute majority. Contrastingly, 25 of the amendments exceeded a 60% threshold, to which Lutz attributes a weighting of 2, i.e. a higher difficulty rating than he attaches to an absolute majority requirement. Now it could be that Ireland is an outlier in this regard, but this reveals a further problem. While it might be possible to identify that in a particular constitutional system, mechanism A is a specific amount more difficult than mechanism B, it is highly unlikely that this degree of difference will hold constant across all constitutional systems.

Second, Lutz also faces the difficulty, where a country has more than one constitutional change mechanism, of deciding which procedure’s score should be attributed to that country. In this regard, Lutz essentially takes the opposite approach to that taken by Lijphart. He weights the score for each amendment path according to the percentage of

17 Lutz (n 8) 167–168.
18 He states that a successful constitution is an old one with a moderate rate of amendment. Ibid 155.
19 The amendment in 1972 to allow Ireland to become a member of the European Communities and the amendment in 1998 to allow Ireland to ratify the Northern Ireland peace settlement and make consequential changes.
20 Lutz (n 8) 169.
amendments passed by means of it during the relevant time period. But this is problematic in a different direction. Part V of the Canadian Constitution establishes different change mechanisms for different issues, with the most difficult change mechanism reserved for matters related to core features of the state and the balance between federal and provincial powers. This is seen as one of the most onerous amendment provisions in the world, leading some to contend that on those matters the Canadian Constitution is de facto unamendable. In this regard, the fact that a change mechanism has not been used might itself be an indication of amendment difficulty. Lutz does not categorise Canada but it well illustrates why it is problematic to discount an amendment mechanism because it is too difficult to use if what you are trying to do is assess the level of amendment difficulty. In short, Lutz’s approach to the problem of alternative procedures raises the opposite problems from Lijphart’s. For accurate comparison, we should neither assume that the most difficult mechanism is always used nor that the non-use of a more difficult mechanism renders it irrelevant. Ideally, to compare amendment difficulty in different countries, we should contrast how the levels of difficulty on the same topic differ. However, this would require further levels of categorisation that might render the typology too convoluted to serve as a useful conceptual map.

Based on a survey of 101 world constitutions, Edward Schneier provides a wider typology, identifying 18 methods of constitutional amendment and ascribing each one to a number of countries:

- Legislative amendment by simple majority vote +
  - No further action;
  - Referendum;
  - Intervening election or referendum;
  - Referendum or two-thirds vote plus president;
  - Approval by Provincial Legislatures or Constitutional Convention.

- Legislative Amendment by three-fifths vote +
  - Referendum or different majority;
  - One month to one year delay;
  - Constitutional convention.

- Legislature by 65% vote +
  - Three readings and presidential assent;

- Legislature by two-thirds vote +
  - No further action;
  - Executive approval;
  - Referendum;

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22 The same logic would suggest that Japan’s Constitution should be accorded an amendment difficulty rate of 0 because the amendment process has never been used.
○ Majority of provinces;
○ Two-thirds of provinces;
○ Three-quarters of states.

- Legislature by three-quarters vote +
  ○ No further action (or by majority vote plus referendum);
  ○ Majority of provinces;
  ○ Four-fifths majority after one year.²³

This typology accounts for a wider range of change mechanisms than Elster and Lijphart, without engaging in the comparative ranking of Lutz. However, its rather open-ended character renders it a less than useful typology. We might question whether it is really necessary to distinguish between a legislative two-thirds majority combined with either two-thirds of provinces or three-quarters of states. These are clearly different, but if our conceptual map is to be useful, we would surely be justified in eliding these differences. Conversely, the reduction to 18 types is achieved by a number of questionable judgments and simplifications. For instance, no account is taken of different majority thresholds for referendums, and it is not clear why constitutional amendment by a simple majority with approval by provincial legislatures should be categorised the same as a constitutional amendment by a simple majority with approval by a constitutional convention. These reflect very ideologically different distributions of power. The point here is not to criticise Schneier’s failure to be comprehensive. However, his typology falls between two stools: too large to be immediately helpful but still beset with unjustified and sometimes misleading categorisation choices.

Schneier provides a further way of addressing the problem that many constitutions provide alternative methods: he ascribes to each country the change mechanism that he believes to be the common practice of the method most frequently used.²⁴ However, this leads to a repeat of the Canada problem discussed above in relation to Lutz. Schneier identifies Canada as a country where a legislative amendment by simple majority combined with approval by provincial legislatures is required. But if this is the most common practice in Canada, it perhaps simply reflects that other amendment processes are too difficult to use. That is a highly salient fact that is obscured by Schneier’s typology.

The typologies considered thus far have focused on the basic process through which constitutional changes must be approved. While some of the authors refer to the fact that there might be categorical restrictions on constitutional change, they make little effort to include those restrictions within their typologies. For some authors, this might be because this would multiply the problem of alternative procedures. How do we compare the difficulty of formal constitutional change in country X with country Y, if in country X the republican character of the state is amendable while in country Y the republican character of the state is not amendable? A further complicating factor is that many restrictions of this type derive not from the constitutional text but rather from judicial action.²⁵

²⁴ Ibid 225.
In 2017, I published a chapter that provided a stand-alone typology of constraints on constitutional change powers. I argued that constraints on powers of constitutional amendment could be conceptualised in terms of three cross-cutting distinctions:

- Process v. content;
- Rule v. standard;
- Legislator-created v. court-created.26

Similar to the typologies above, I used these three distinctions to map how a particular constraint makes the constitution more difficult to amend, by moving power away from current electoral majorities toward either the past generation or the current courts or both. This was a much more intuitive and impressionistic presentation of change difficulty than that attempted by Lijphart or Lutz. It was designed to sharpen a political and moral inquiry into whether such constraints on the amendment power could be justified. The other side of the equation was an ideological categorisation of the constraints in terms of whether they served foundational values (such as territorial integrity), majoritarian values (such as a fair electoral process), or counter-majoritarian values (such as human dignity). We could then inquire whether particular moral values justified decisions to move the change power away from a contemporary electoral majority.

Xenophon Contiades and Alkmene Fotiadou have presented a typology of constitutional change mechanisms that is alert to the ideological stakes in both the formal change process and the constraints that can be imposed on the powers of change. They ask the following questions:

- Whether the amending formula is an attempted simulation of the constituent moment endeavouring to imitate the exercise of pouvoir constituent;
- Whether the formula includes eternity clauses;
- If and to what extent the amending formula includes popular participation;
- Whether revision is concluded in one parliamentary term or more than one after a general election;
- Whether the amending formula provides for super-majorities or enhanced majorities;
- Whether, as well as the Parliament, the Head of State or Cabinet has a role in constitutional revision;
- As well as central state, whether organs of constituent or peripheral states participate;
- Whether there is a mandatory lapse of time between the conclusion of the amending process and initiation of the new one.27

This typology is perhaps less closely defined than some of the others we have considered, but this is because it serves a different purpose of establishing broad models of constitutional change, to which I shall return below.

Reflections on typologies of constitutional change mechanisms

We have seen how two concerns animate the typologies in the academic literature: comparing the level of amendment difficulty and identifying different constitutional

26 Doyle (n 7).
distributions of constitutional power. The typologies in turn focus on three discrete, though related, aspects of a constitutional change mechanism: initiation, ratification and constraints. Adopting this schema, we can present the typologies as shown in Table 3.1.

If I can flog the map analogy for a while longer, this schema is akin to the contents page of an atlas, directing the reader to where more detailed conceptual maps, oriented to different purposes, focusing on each aspect of the constitutional change mechanism, can be found.

The distinction between initiation and ratification, while important legally in particular jurisdictions, is of limited (but real) conceptual significance. For instance, in Ireland a proposal to amend the constitution must be introduced by a member of the lower house (the Dáil). However, as the approval of a majority of the Dáil is also necessary for the proposal to pass, the method of initiation adds nothing to our understanding of either the difficulty level or the distribution of constitutional power. In terms of assessing difficulty level, there is little to be gained by distinguishing (as Lutz does) between initiation and ratification: we can simply take cognisance of all constitutional actors whose approval is necessary (at whatever stage) for a formal constitutional change to be made. Sometimes, however, constitutions grant alternative rights of initiation. This does not affect the difficulty level of formal constitutional change as it merely opens up another way to commence the process without reducing the threshold for ultimate approval. But it does affect the constitutional distribution of power by granting (or perhaps formalising) a role for another constitutional actor.

In this regard, I would suggest that the most important types of alternative initiation rights are popular and presidential initiation.28 The Baltic Republics, Switzerland and Venezuela, for example, all allow for popular initiation. These countries can make a much better claim to instantiate popular sovereignty in their change processes than can the (far more numerous) countries that merely provide for a referendum as part of the approval process. Popular sovereignty is not established by merely allowing the people to vote on changes approved by elected representatives. Presidential initiation is commonplace in Latin America, practised for example in Brazil, Chile, Ecuador and Paraguay. In many situations this might not make a practical difference, given that the president might well have the support of the majority in the legislature. Nevertheless, it is always important symbolically and at least enhances the status of the president vis-à-vis her co-partisans if she formally holds that role. It is a very relevant factor in assessing whether the constitution feeds hyper-presidentialism.29

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28 Guatemala allows for initiation by the Constitutional Court, but this is an outlier.
29 I am grateful to Juliano Zaidan-Benvindo for these insights.
Much greater consideration is given in the typologies to the distribution of constitutional power in the ratification stage. For Elster and Lane, this is essentially an elaboration of how constitutional change mechanisms retard the pace of constitutional change—a fundamental feature of constitutions that they then seek to theorise. For Oliver and Fusaro and for Contiades and Fotiadou, the diversity of power distributions is explored in order to allow a characterisation of constitutional change rather than being immediately put in service of a broader theoretical claim about constitutions. Nevertheless, all of these typologies use terminology that departs little from a description of the change mechanism. I suggest that we could usefully abstract somewhat to allow a more theoretical characterisation of these different distributions of constitutional power (see Table 3.2).

This ideological characterisation of the distribution of constitutional power in relation to formal constitutional change allows a characterisation of constitutional change that can also feed into a broader characterisation of the constitution as a whole. For instance, it is important that some countries (for instance India) that are federal in some respects do not adopt a federal approach to constitutional change. This might allow us to distinguish between a bottom-up federalism and a top-down federalism and inquire which is more vulnerable to centrifugal secessionist forces. Furthermore, if we see a constitution combine a number of different distributions of power reflecting very different ideological approaches, we might conclude that the formal change mechanism is not based on a clear ideological vision of which constitutional actors should hold the power but rather is designed just to make formal change very difficult. For instance, the Additional Articles to the Constitution of Taiwan in 2005 introduced a new change process that requires a legislative super-majority (75%), a delay period (six months), and a referendum (absolute majority), thereby simultaneously following a consensus, deliberation and popular approach. The combined effect of these is to make the constitutional settlement of Taiwan’s democratisation virtually unamendable. That unamendability, rather than an ideological commitment to consensus, deliberation or popular control, was probably the point.

Finally, the typologies of difficulty have been shown to be less than satisfactory. There is no convincing solution to the problem of how to ascribe one level of amendment difficulty to a country when there are alternative mechanisms of formal constitutional change. Moreover, any categorical assigning of difficulty levels to particular change processes fails to account for how other political rules (e.g. electoral systems) and background political culture determine how those processes will operate. Lijphart’s typology is less problematic in this regard since the ease of amendment difficulty is but one factor in assessing whether a democracy is majoritarian or consensual in character. But if our focus is narrowly on constitutional change, it is highly questionable whether we can assume that the change-difficulty differential between methods will be a constant across all countries that adopt those methods.

Lutz’s typology promises an answer to an intriguing question: how difficult is it formally to change the constitution in each country? Given the difficulties just explored, however, it

### Table 3.2 Distributions of constitutional power

<table>
<thead>
<tr>
<th>Consensus</th>
<th>Legislative super-majorities</th>
<th>France, Spain</th>
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</thead>
<tbody>
<tr>
<td>Deliberation</td>
<td>Delays, intervening elections, constitutional assemblies</td>
<td>Belgium, Norway, Russia, Argentina</td>
</tr>
<tr>
<td>Popular</td>
<td>Referendums</td>
<td>Switzerland, Ireland</td>
</tr>
<tr>
<td>Federal</td>
<td>Sub-unit approval</td>
<td>USA, Canada</td>
</tr>
</tbody>
</table>

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might simply be impossible to answer this question. Indeed, Ginsberg and Melton have argued that the choice of amendment rule is not so important in measuring amendment difficulty; amendment culture (measured as the rate of amendment in the immediately preceding constitution) is a much more important predictor of constitutional change.  

Lutz’s typology, or some variation thereof, might help constitutional designers assess which constitutional change mechanism would be more difficult within their own system (thereby holding other factors steady). Even there, however, the constitutional designers are likely to have better insight into their own system and not need the typology in the first place.

I have distinguished between difficulty typologies and distribution of power typologies. However, we must recognise that making change more difficult can itself serve ideological purposes. On the one hand, it can lock in a political compromise so that those who fear losing power under the new constitutional dispensation can protect their own interests. On the other hand, it can serve the value of constitutionalism by making it more difficult for a transient majority (other than the founding generation) to interfere with minority rights or the fairness of majoritarian processes. Even without assuming that the founding generation had a stronger commitment to constitutionalism than the current generation (who might choose to amend the constitution so that it better protects minority rights or majoritarian processes), the value of constitutionalism is still generally served by slowing down democratic politics. This involves a cost to democracy but potentially a cost worth paying. In principle, the ideological choice about who should have the power formally to change the constitution is separate from the ideological choice about how difficult formal change should be. Ideally, those designing formal change mechanisms should consider both issues in tandem. However, it is possible that one concern could dominate the other as arguably is the case with the change provisions in the Constitution of Taiwan, considered above.

This discussion hopefully demonstrates that typologies have a genuine but limited use in our analysis of comparative constitutional change. They provide conceptual maps to discrete aspects of formal change mechanisms. These maps allow us better to understand the choices, both concerning the distribution of constitutional power and the difficulty of formal change, that are reflected in particular mechanisms. This may provide some assistance to constitutional designers, at least providing a menu of options that could give effect to the values of their own political community. The conceptual maps are also of assistance to comparative constitutional scholars, in terms of reducing the complexity of the field. They only serve this function, however, where they make coherent and plausible distinctions, reducing the number of types to an easily manageable level. In this regard, no typology can be comprehensive, nor should we desire this. Instead, we should adopt a typology that serves our own purpose. If one does not exist, we can develop one. No typology, however, provides a convincing account of change difficulty across constitutions.

Models of constitutional change

The typologies of formal change mechanisms that we have considered are, perhaps counter-intuitively, rather unconcerned with constitutional change. The typologies of Elster and
Lane are oriented toward a characterisation of constitutions as retarding political change. Lutz’s typology, while attempting to facilitate comparative analysis of formal change difficulty in constitutions, is again oriented to high-level claims about the purposes of constitutions. Those typologies that focus on the distribution of constitutional power make relatively little attempt to theorise different types of formal change, largely describing different approaches rather than articulating the values that lie behind them. Of course, the typologies are not unconcerned with constitutional change but for the most part it is not seen as a discrete phenomenon within comparative constitutional law that warrants theorisation. In this, they are reflective of the priorities of comparative constitutional law in general. It is striking that the Oxford Handbook of Comparative Constitutional Law, published in 2012, did not contain a discrete chapter on constitutional amendment, let alone a section on constitutional change. This comment is in no way a criticism of that excellent publication but instead is intended to illustrate how it is largely in the last five to ten years that comparative constitutional change has become such a significant focus of scholarship. This increasing concern with constitutional change is also reflected in a desire to move beyond typologies of formal constitutional change mechanisms and develop models of constitutional change more broadly.

Before considering the models, it is necessary to say a brief word about informal constitutional change. Informal constitutional change occurs where the constitution in some sense changes even though there has been no formal change through the stipulated constitutional change process. This requires us to conceptualise both what this constitution is and how it can be changed. As this is more directly the focus of the contributions in Part III of this volume, I shall not consider it in detail here. However, since the models that I shall explore below incorporate both formal and informal change, it is necessary to give the topic some consideration. On occasion, the political elite may bypass the amending formula, as happened with President de Gaulle’s use of a referendum to amend the French Constitution in 1962. Informal change can also occur through political practice; this will be particularly apparent in constitutional systems in which constitutional conventions play an important role. The legislator may legislate on issues of constitutional significance that are not directly regulated by the master-text constitution. Informal change might also occur through judicial interpretation and judicial review. This category depends on some conception of when interpretation is so significant as to amount to change, itself a rather contested matter. Sub-national entities may prompt informal change at the national level by altering their regional constitutions or legislation. Actions by supranational legislators and courts, particularly but not exclusively in Europe, might prompt informal change at the national level.

With this outline of informal change in mind, we can now consider the five models of constitutional change presented by Contiades and Fotiadou. These aim to give a far deeper insight into the way in which constitutional change occurs in a country, but still through the approach of defining types. Their models are as follows:

- **Elastic model**: an unentrenched constitution may be changed simply through the law-making process with no procedural limits or eternity clauses.

31 Rosenfeld and Sajó (n 2).
32 This discussion draws partly on Contiades and Fotiadou (n 27) 436–440.
These models provide a much more detailed picture of constitutional change than do the typologies considered in the previous section. The first four models are focused on the difficulty of constitutional change. They are more sophisticated than the typologies considered above (in the section headed ‘Typologies of formal constitutional change mechanisms’) in that they recognise (a) that change difficulty is a factor of other constitutional rules and political culture as well as the formal change mechanism and (b) that difficulty in formal change might sometimes push political actors toward informal change. They lack the simplicity of a typology but they provide us with a considerably richer and broadly convincing account of constitutional change, thereby providing a good basis for developing a theory of constitutional change. The fifth model, in contrast, focuses on the distribution of constitutional power. As such, it seems to cut across the other models rather than offering a discrete category on the same dimension. A particular country could be an example of the direct-democratic model and yet also be an example of the evolutionary model if it is difficult to secure constitutional change (as is arguably the case with Japan\(^\text{35}\)), of the pragmatic model if the referendum hurdle can relatively easily be passed (as is arguably the case with Ireland\(^\text{36}\)), or of the distrust model if the referendum model forms part of a political culture in which compromise is difficult (as is arguably the case with Italy\(^\text{37}\)).

What this suggests is that even when one develops sophisticated models rather than simplistic typologies, it might not be possible simultaneously to explain change difficulty and distribution of constitutional power. Models of constitutional change can still assist in developing a theory of constitutional change but they do not of themselves provide a theory of constitutional change. They help to reduce the diversity of constitutional practices to a manageable number of models, but they do not provide a comprehensive spectrum of constitutional change practices. One final word should be said about models. A strength of Contiades and Fotiadou’s approach is that it shows the extent to which constitutional change practice is not deliberately designed. Political culture is as important as the precise amendment formula; overly difficult amendment rules might prompt a turn to informal change in its stead. But we can safely assume, I suggest, that few constitutional drafters

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33 Ibid 442–454.
34 Oliver and Fusaro share this insight, but are less sanguine than Contiades and Fotiadou, counselling that this can lead to a lack of constitutional legitimacy. Oliver and Fusaro (n 9).
37 Tania Groppi, ‘Constitutional Revision in Italy: A Marginal Instrument for Constitutional Change’ in Contiades and Fotiadou (n 27) 203.
adopt difficult formal change rules in order to encourage informal constitutional change. An important lesson must be drawn from this. Because the models are not deliberately produced, they cannot serve as examples for others to follow. They aid our understanding of comparative constitutional change by plausibly dividing countries’ constitutional change practices into four categories, in a way that is much richer than the typologies of formal change mechanisms. But they serve the interests of constitutional scholarship rather than constitutional design.

Conclusions

In this chapter, I have explored a number of typologies and models of constitutional change presented in the academic literature. I have drawn attention to how these models and typologies are animated by two competing concerns: the difficulty of constitutional change and the distribution of constitutional power among constitutional actors. There is no model or typology that can simultaneously present an account of these two concerns. We have seen the limited, but real, way in which typologies can help us understand the different components of formal change mechanisms. They can provide us with an overview of the components of mechanisms (initiation, ratification and constraints); they can also provide a somewhat simplified (and therefore manageable) account of either the difficulty level or the power distribution associated with particular formal change mechanisms. All of this can assist us in mapping and theorising the field of constitutional change. However, there seems little prospect that a typology of formal change mechanisms will ever allow us to compare the difficulty of formally changing constitutions.