12. Amendment Procedures and Constitutional Stability

Bjørn Erik Rasch
Department of Political Science,
University of Oslo
and
Roger D. Congleton
Center for Study of Public Choice,
GMU, Fairfax

I. INTRODUCTION

The study of constitutional design is of interest, in large part, because constitutions can be amended from time to time. Not every constitutional procedure or constraint will stand the test of time, and most constitutional designers take this into account by including constitutional procedures for changing the fundamental rules of the political game. Almost all national constitutions include articles that provide for partial or total change of their constitutions. Less than 4 percent of the world's constitutions lack articles on formal amendment procedures (Maarseveen and Van Der Tang 1978: 80). In this respect, constitutions differ from rules governing parlor games insofar as the latter do not include rules for changing the rules. Other less formal methods for reforming constitutional practice are also commonplace. Constitutional procedures and constraints may also be altered by judicial interpretation and political adaptation, and by irregular (nonlegal or unconstitutional) means. In democratic systems, constitutional developments are often gradual or incremental, although replacement of the entire document is also a possibility.[i]

Empirical work on the effects of amendment procedures is, however, a relatively recent and underinvestigated area of research. Contemporary empirical research begins with Lutz's (1994) pioneering investigation of the effects of amendment procedures and constitutional length on the frequency of amendment using data from state constitutions within the United States and a small international sample of constitutional democracies. Relatively few studies have extended his work. This chapter is consequently somewhat more descriptive and speculative than the preceding chapters.

The narrowness of this literature is not because amendment procedures are unimportant or a secondary matter in democratic constitutional design. If variations in the details of constitutional design have important effects on public policies and welfare within a polity, changes in the procedures by which constitutions may be changed are obviously important as well. Moreover, amendment processes may contribute to both the stability and durability of a constitutional regime, which may themselves have significant effects on welfare insofar as prosperity, health, and trust are promoted by stable public policies.

Indeed, the age of a particular constitution is often measured by the period in which its rules of amendment are followed, rather than by the period in which particular political procedures and constraints have been in place. By this measure, Norway has one of the oldest constitutions in the world, second only to the U.S. constitution. It was signed and sealed by the Constituent Assembly at Eidsvoll (north of Oslo) on May 17, 1814, a few weeks after elected delegates from all parts of Norway had assembled. Since 1814, however, more than 200 amendments to the constitution have been adopted. During that time, the balance of power within the Norwegian government and the nature of the electorate underwent substantial transformations. The authority to make public policies shifted from the King to the parliament. Suffrage was greatly expanded. The union between Norway and Sweden was broken in 1905.

Similarly, the constitution of the United States is generally regarded to be more than 200 years old, although it has been amended 27 times, most recently in 1992. A bill of rights was passed soon after the constitution was adopted in 1787.[ii] The manner in which the vice president is selected was changed in 1804. The manner in which representatives are selected for its federal chamber, the Senate, was changed by the 17th amendment in 1913 as direct election of senators replaced appointment by state governments. Suffrage rights for blacks and women were greatly expanded by the 15th and 19th amendments (1870 and 1920), and the term of office for American presidents was limited to two terms by the 22nd (1951).

Despite all of these very substantial constitutional reforms, the constitutional regimes of Norway and the United States are normally dated to 1814 and 1789, respectively, rather than to the dates of their most recent amendments, 2004 and 1992.

If durability is measured by the existence of a stable amendment procedure rather than core features of political procedures and constraints, an important difference clearly exists between a constitution's durability and the stability of its associated pattern of governance. The fundamental rules and procedures of governance may change substantially—as they have in Norway, the United States, and many other countries—without changing amendment procedures.

This chapter investigates the extent to which formal amendment procedures affect the stability of a nation's written constitution. Changes in constitutional text can serve as a useful first approximation for constitutional stability, insofar as all formal changes in the constitution require changes in constitutional language, and all formal changes to a nation's written constitution in principle change related unwritten parts of the constitution as well. It bears noting, however, that to the extent that other unwritten parts of a nation's constitution change as a consequence of other factors, the true underlying stability of a polity's constitution will be somewhat understated by this approach.

Our analysis is organized into four sections. The next section discusses the demand for and the procedures of constitutional amendment. The third section compares formal amendment procedures, with an emphasis on OECD countries. Section four analyzes the relationship between the frequency of formal amendments and the stringency of the amendment process. The final section concludes the discussion. In general, we find that the stringency of amendment processes, specifically the number of veto points, affects the frequency of formal changes to modern democratic constitutions.

II. Constitutional Design and the Demand for Constitutional Reform

Formal constitutional documents describe the "law for making laws" (Congleton 2003: 11). Constitutions, consequently, include some of the most fundamental rules of the game in a society. Most constitutions include rules on the machinery of government as well as more or less extensive and general specifications of the rights of citizens. These procedure and constraints enable societies to make collective decisions to achieve outcomes that require coordination and joint action (Hardin 1989) while reducing the risks of collective action. Constitutional law differs from most other laws, because it also includes normally includes procedures for changing its own required procedures and constraints.

Not all constitutions are democratic, but the present analysis is restricted to this subclass.[iii] Four general objectives can be ascribed to democratic constitutions. First, there is the practical convenience of having standing collective decision-making routines to adjust the existing laws and services to better advance citizen interests as economic and political conditions change through time. The standing routines of modern democratic governments include competitive elections to select representatives, who in turn select among policy options, and a largely apolitical bureaucracy that implements the policies chosen.

Second, democratic constitutions attempt to assure majority rule rather than minority rule. Representative democracy requires *delegation,* and there is always the risk that the *agents* employed will fail to act on the electorate's

behalf.[iv] An important task of a constitutional arrangement is to prevent delegation of authority from turning into abdication. Any agent may have an incentive to shirk, as long as the interests of principals and agents are not completely identical. The institutional problem, then, is to align the agent's interests with those of their principals. Democratic constitutions accomplish this alignment through provisions that assure competitive and open elections. Protections for the press and political speech also help to assure open policy debates, which simultaneously improves the quality of policy choices and reduces opportunities for malfeasance among elected officials. Amendment procedures and similar rules also restrain a temporary majority from abusing its power by manipulating electoral rules and the management of elections. For example, constitutional provisions that establish maximal times between elections reduce legislative opportunities for governments that have outlived their majorities.

Third, democratic constitutions address the classical "constitutionalist" concern of protecting individual and minority rights (e.g., Brennan and Buchanan 1985, Duchacek 1973). Democratic constitutions, consequently, include lists of fundamental rights that specify policy domains in which policies must or must not be made. Such constitutional constraints on the domain of government policy reduce the ability of simple majorities to transgress individual rights and the rights of permanent ethnic, religious, linguistic, or other identifiable minority groups. For example, "equal protection" clauses protect individuals and groups from discriminatory legislation, and "takings clauses" protect personal property by requiring compensation to be paid to those whose property is taken to advance public purposes.

Fourth, democratic constitutions address dynamic problems involving the stability and flexibility of the constitutional regime itself. Modesty on the part of constitutional designers requires them to acknowledge that even their best efforts may need to be adjusted to take account of new circumstances, new ideas, or new information. However, a constitution that is too flexible ceases to serve as "rules of the game" for day-to-day politics, which can undermine a constitution's ability to advance the first three objectives. A democratic constitution's amendment process has to allow reforms that advance broad interests to be adopted, without undermining its practical value as a standing routine for advancing majority interests and protecting minorities.

The Demand for Constitutional Reform

Demands for constitutional reform may emerge whenever alternative procedures or constraints appear to advance the first three goals more effectively than existing ones—or whenever a more or less temporary majority believes that it can improve its own situation through constitutional reform. Political interests are not constant over time, nor are all institutional structures equally effective at

advancing the shared interests of the electorates. A nation's citizenry may want to modify their system of governance as they learn about unintended, unexpected, and unwanted consequences of their present institutions. Voters may also wish to modify core procedures and constraints of governance as their values and goals change through time, as with women's suffrage and religious and racial tolerance, or as constitutional innovations are found to deliver more effective governance. Major realignments in the political arena may also generate relatively narrow partisan pressures for institutional reforms. Not every demand for constitutional reform attempts to advance broad interests.

General Methods of Constitutional Reform

Although there are always risks associated with constitutional reform because constitutional "mistakes" are more difficult to correct than ordinary policy mistakes, there are also risks associated with constitutional rigidity. A perfectly rigid constitution could not accommodate widespread demands for reform, and in limiting cases, a very costly civil or revolutionary war might be the only possible method of "amendment." An amendable constitution allows such changes to be made at a more reasonable cost. The tradeoffs between constitutional rigidity and flexibility are complex and are, for the most part, beyond the scope of the present analysis. However, it is clear that constitutional stability is partly determined by the requirements of ratification.

Four general methods of constitutional reform exist, as shown in table 1 (Voigt 1999: 70, Giovannoni 2001). This simple matrix rests on two dimensions. One of them focuses on the *formality* (altering the text or not) of constitutional change and the other on *lawfulness* of the process by which constitutional reforms are introduced (whether a reform is consistent with existing constitutional procedures and constraints). As indicated, this gives us four combinations. The text may be changed through constitutional procedures or not. Constitutional practices may be changed informally through judicial review and quasi-constitutional legislation or through corruption and fiat.

Table 1: Main types of Constitutional Change—around here

Our analysis concentrates on formal and lawful reforms of constitutional documents, those in the upper left corner in the figure. However, first, a few words on the other methods of reform. Most constitutions explicitly or implicitly allow constitutional procedures and constraints to be altered without altering constitutional documents. For example, a constitutional framework may be substantially reformed by means of judicial interpretation. An example is the landmark Marbury vs. Madison decision of the U.S. Supreme Court in 1803, through which the principle of judicial review was established (Murphy 2000).

Similarly, the Norwegian Constitution did not mention judicial review, but the courts introduced it through interpretation during the first half of the nineteenth century (Smith 1993). Another lawful method of constitutional reform involves revision of the constitutional framework by means of political customs within the legislative and executive bodies. An important example in many other European constitutional monarchies was the gradual evolution of the procedures for government formation during the nineteenth century (Congleton 2001).[v]

It is also possible for a nation's constitutional practices to be revised by irregular means. This is illustrated by the 13th and 14th Amendments to the U.S. Constitution in the 1860s, which emancipated the slaves and gave them suffrage (Mueller 1999). The amendments would not have been ratified if the formal process laid down in Article V of the Constitution had been strictly followed, as the southern states had enough votes to block the amendment, but in the circumstances following the Civil War the southern state governments were not fully operational. Similarly, when the wording of Article 1 of the Norwegian Constitution was changed in November 1814, reflecting the union with Sweden and in 1905 marking the dissolution of the union, the formal amendment procedure was not followed.

In addition, constitutional procedures and constraints may simply be ignored or reconfigured without reference to constitutional documents. For example, constitutionally required election laws may be suspended, as the British government has occasionally done during periods of war, or permanently altered, as fascist Italy and Nazi Germany did prior to World War II. Indeed, major extra-legal reforms often mark the end of constitutional governance.

These three methods of constitutional change are alternatives to formal amendment procedures and may to some extent be used instead of formal procedures when formal procedures are too cumbersome. That is to say, as the marginal cost of formal constitutional reforms increase, the use of informal or illegal methods of reform would naturally tend to increase.

However, to the extent that formal documents continue to describe the fundamental processes and constraints of governance, informal reforms may be regarded to be of secondary importance. In cases in which illegal methods are used, the principle of constitutionalism—politics by the rule of law—is undermined by illegal or extra-legal methods of reform. In such cases, the term "constitutional government" clearly does not fully apply. For the purposes of this volume, we thus focus on formal methods of reform.

III. Formal Constitutional Amendment Procedures

Almost all constitutions specify procedures for rewriting or replacing the constitutional text, and they are almost always more stringent or demanding than ordinary legislative procedures.[vi] However, a wide range of formal

amendment procedures potentially satisfy this condition, and, this allows the stringency of amendment processes to vary widely. More stringent amendment procedures help make constitutional commitments stable and thus credible. Such procedures, consequently, help to create a higher legal system that will stand above and limit ordinary legislation (Ferejohn 1997). Less stringent amendment procedures allow constitutional mistakes to be readily corrected and institutional experimentation to be more readily conducted.

The stringency of a formal amendment process reflects a commitment by constitutional designers to *entrench* certain rules and procedures or specific programs and prohibitions. Often formal amendment procedures are quite complex, and in many cases different methods of amendment are stipulated for different provisions in the constitution or allowed in more or less urgent times. Finland, for example, has a main procedure requiring delay and decision by two-thirds of the members of parliament (MPs), as well as an urgency procedure in which the threshold is increased to a five-sixths majority for adoption of an amendment via a single vote. Estonia also has an urgency procedure. All the Baltic States have tried to protect the most important articles of their constitutions by saying that they cannot be amended unless the voters agree (referendum). In Lithuania, no less than a qualified majority of three-fourths is needed to change the first article of the constitution.

Other constitutions rule out particular formal constitutional reforms altogether. For example, Article V of the U.S. Constitution says that "no state, without its Consent, shall be deprived of its equal Suffrage in the Senate." In Germany, the federal system is protected against changes. Similarly, amendments of the basic principles of Articles 1 (on human dignity) and 20 (on basic principles of state order and the right to resist) are inadmissible (see Article 79). A recent example to the same effect is found in the constitutional framework of Bosnia-Herzegovina, based on the Dayton agreement. Paragraph 2 of Article X states that "No amendment to this Constitution may eliminate or diminish any of the rights and freedoms referred to in Article II of this Constitution or alter the present paragraph."

Several authors have suggested simplified classification schemes to facilitate the comparison of constitutional amendment procedures. For example, Hylland (1994: 197) points to four main techniques: delays, confirmation by a second decision, qualified majorities and participation of other actors than the national assembly. Lane (1996: 114) lists six mechanisms: no change, referendum, delay, confirmation by a second decision, qualified majorities, and confirmation by subnational government. Lutz (1994: 363) differentiates among four general amendment strategies: legislative supremacy, intervening election (double vote), legislative complexity (referendum threat), and required referendum or equivalent. Lijphart (1999: 219) reduces the great variety of methods of amendment to four basic types: ordinary majorities, between two-thirds and

ordinary majorities, two-thirds majorities or equivalent, and supermajorities greater than two-thirds. In effect, Lijphart disregards the procedural aspects of the amendment except the majority requirements. Elster (2000: 101) suggests the following categories: absolute entrenchment, adoption by a supermajority in parliament, requirement of a higher quorum than for ordinary legislation, delays, state ratification (in federal systems), and ratification by referendum.

In general, it becomes more difficult to change a constitution as the number of actors and decision points increase, and as the required degree of consensus increases. To put it differently, the stability of a constitution depends to some extent on the number of veto players, that is, actors whose agreement is necessary for amending the constitution (Tsebelis 2000).

Although amending processes are often strikingly complex, usually a relatively small set of devices are actually used in constitutions around the world (Maddex 1996). Table 2 characterizes amendment ratification processes for two dozen countries by tabulating veto players, decision points, and required majorities.

Table 2: Formal amendment rules—around here

Table 2 suggests that constitutional stability is typically achieved in two ways. First, some form of *repeated decisions or a series of decisions by multiple actors* may be used. The purpose of these devices could simply be delay in order to ensure that society acts on well-founded and stable expectations about the consequences of reform and sufficient time is provided at the preparatory stages of the decision process. Second, ratification may require a broader consensus than ordinary legislation. Consensus can be broadened through supermajority rules or by including extra-parliamentary actors, such as the voters by means of a referendum or an intervening election, or subnational units of the state by means of a decentralized ratification method in federal systems. In most constitutional systems the elected representatives of the citizenry play a prominent, but not necessarily exclusive, role in amendment processes.

With respect to the Nordic region, constitutional amendments require multiple decisions in parliament in all the countries but Norway. In Norway, it is sufficient to submit the constitutional amendment to parliament one year before the next election, and it is the task of the next parliament to decide on the proposal after the election.[vii] Denmark, Sweden, Finland, and Iceland require consent from two different parliaments, that is, those assembled before and after an election. The Baltic states require repeated decisions in parliament, but none of them demands that proposals must rest over an election (as in all the other countries of table 2). Denmark is the only Nordic country requiring direct voter

involvement as part of any constitutional process, not only with respect to the most important changes.

Bicameral and presidential systems normally require separate approvals by both chambers of the legislature and / or by an independently elected president. Germany illustrates this possibility. The consent of both the Bundestag and the Bundesrat is needed, but not an intervening election. In the Netherlands, both chambers must agree to the constitutional amendment before and after an election, which requires a total of four separate decisions (or perhaps five, if the intervening election is counted). [viii] In several countries, separate constitutional referenda are also required, as in Denmark and Switzerland. In federal states, consent of regional governments as in the United States, Canada, and Australia is also required for constitutional reform.

The degree of consensus can be increased through explicit supermajority requirements within legislatures, or implicitly through other institutional means. Bicameralism and presidential systems achieve a similar result insofar as the chambers are elected on a different basis and each chamber has veto power over constitutional reforms. In such cases, the implicit electoral support for the constitutional reform is broader the more diverse the two legislative chambers are, and the greater are the supermajority requirements in the two chambers. Agreement after an intervening election may also implicitly increase the degree of consensus required insofar as the ideological composition of the new parliament is different from the previous one.[ix]

In addition to protecting substantial minority interests, the use of qualified majorities also creates constitutional inertia. Although simple majority rule ensures that alternative proposals are treated neutrally, a qualified majority introduces a bias against any constitutional amendment.

Majority *voter* interests are protected by requirements for an intervening election. The requirement of intervening elections and referenda reduces prospects for elected leaders to adopt reforms that insulate them from electoral pressures. The referendum requirement in Denmark and Switzerland plays a similar role. However, by separating constitutional and ordinary political issues, constitutional referenda make the amendment procedures more directly responsive to voter opinion. (See chapter 2 for a lengthy discussion of the use of referenda in constitutional reforms.) The more restrictive the voting rule, the stronger is the bias in favor of the status quo or protection of the existing constitution.

V. Frequency of Constitutional Amendments

The stringency of a constitutional amendment process might be expected to have systematic effects on the frequency of formal changes to the constitutional text. Insofar as a stringent amendment process increases the “cost”

of each constitutional reform, the number of reforms demanded by voters and their elected representatives would tend to decline. Moreover, as the time requirements of reform increase, fewer such reforms would be feasible within a given time period, other things being equal. However, more demanding amendment procedures also imply that an amendment may be in place for a longer time and, consequently, that the value of each amendment is increased somewhat. This value effect tends to increase the demand for constitutional amendments relative to ordinary legislation as the stringency of the amendment process increases. The overall effect of the difficulty of amendment on the frequency of amendment is, thus, ambiguous, and no systematic effect will be found unless the cost or value effect tends to dominate in most real-world settings.

Empirical evidence, to this point, suggests that the cost effect tends to dominate. Lutz (1994 and 1995) demonstrates that the degree of rigidity of a constitution affects the amendment rate in a cross-national analysis. He builds a complex difficulty of ratification index, and his measure clearly correlates with formal changes to the constitution. After disaggregating the index, Ferejohn (1997: 523), in a reanalysis, claims that "the requirement of special majorities or separate majorities in different legislative sessions or bicamerality is the key variable to explaining amendment rates." He continues by saying that "there is no evidence that a ratification requirement, whether involving states or a popular referendum, has any significant impact on amendment rates." In other words, Ferejohn suggests that special majorities in the legislature may be both necessary and sufficient to achieve a moderate amendment rate.

Figure 1: Amendment rates in selected countries—around here

The empirical relationship between stringency and amendment rates found by Lutz and Ferejohn, however, is not very robust. And, perhaps more important, the number of constitutional changes is unfortunately an imperfect measure of constitutional stability. Not only do "document amendment counts" neglect other methods of change, and but amendment counts assign equal importance to both major and minor amendments. For example, a change in rules governing alcohol consumption (as with the 18th and 21 amendments to the U. S. constitution) has a trivial effect on a nation's fundamental political procedures and constraints, whereas a great expansion of suffrage, a change in governmental architecture (presidential or parliamentary system), new electoral system, or new policy constaints (bill of rights) may have very substantial effects on subsequent policy decisions. The latter suggests that the estimated relationships may understate the importance of amendment procedures insofar as those procedures may be more important for major than for minor reforms.

There are basically two requirements to consider, as noted above. Constitutional stability may be increased by increasing the degree of consensus required and by increasing the number of veto points in the amendment process. The data on amendment rates from Lutz (1994) can be combined with the institutional information of table 2 to create indices of consensus and of the number of central government veto players or points of agreement required to secure a constitutional amendment. The number of governmental veto players is coded as 0 through 3, with a single point awarded for each center of institutional authority beyond parliament that must agree to a proposed amendment: bicameral, presidential, and federal. The number of veto points is the number of governmental veto players plus an additional point if an intervening election is required and another if a referendum is normally used to ratify constitutional amendments. As noted above, several of these features also tend to implicitly increase the breadth of consensus as well, although less explicitly than the requirement of supermajority approval.

TABLE 3 around here

Table 3 summarizes the result of a series of estimates that regress the log of the Lutz amendment rates against institutional features of national amendment procedures. Relatively sparse models are necessitated by the small data set of OECD countries used here (19 countries). The results suggest that the number of veto players and veto points have systematic effects on the amendment rates of these OECD countries. Amendment rates fall as the number of veto players increases and with requirements for intervening elections and / or referenda. The requirement of supermajorities in the legislature and the age of the constitution have no systematic effect within the present sample. (The results are slightly weaker if New Zealand is dropped from the sample or coded as having supermajority and referenda requirements.) Overall the regression results are consistent with the existence of a significant cost-effect on the demand for constitutional amendments. As the costs of passing an amendment increases, fewer amendments are adopted.

In contrast to Ferejohn's results, however, the salient factor seems to be multiple decisions with voter involvement rather than special majorities in the legislature. The lack of a discernible effect for supermajorities is a bit surprising, but may reflect the kinds of amendments normally passed in these polities. In many cases, the constitutional amendments more closely resemble ordinary public policies and legislative procedures than profound changes in the fundamental procedures and constraints of governance. As such, efforts to secure coalitions sufficient to pass a particular amendment will attempt to craft amendments that secure sufficient approval, much as the coalitions assembled

(see chapter 5) are formed with the rules for forming and dissolving governments in mind. For example, in Sweden there is no requirement of super majority for constitutional reform. Still, most constitutional reforms have been based on very broad support in the parliament. This support has been achieved by yielding a little to each interest in the parliament, with the result that the constitutional language is often lengthy (and quite often ambiguous).

The Demand and Supply of Constitutional Amendments in Norway

Just as the market demand for ordinary goods and services are affected by more than a product's cost, so are political demands for constitutional amendments.

A variety of political and economic circumstances can clearly affect the overall pattern of demand for constitutional amendments. Table 5 shows the number of constitutional changes to articles accepted for the Norwegian Constitution from 1814 until today. The amendment activity was significantly lower during the years 1814–1905, than in the twentieth century. The explanation certainly has something to do with the union with Sweden, which was dissolved in 1905. Constitutional conservatism was a deliberate strategy by the (Norwegian) parliamentary majority to restrict Swedish influence in general and the power of the Swedish kings in particular. Already in the early 1820s, the Storting rejected a reform package from King Karl Johan to strengthen the executive branch of government. Conversely, major reform proposals from the Norwegian parliament would often have failed to attract the assent of the Swedish crown during this period.

Table 5: Formal amendments of articles—around here

The content as well as the number of amendments is also of interest. The section of the constitution dealing with various aspects of the legislative branch accounts for a majority of the changes. Many of the articles concerning the electoral system are found here, and they have been altered in various ways quite frequently. The set of individual rights and freedoms in the constitution has been relatively stable and so far not been subject to any more fundamental upgrading or modernization.

A more complete picture of the demand and supply of constitutional reforms through time is found in figure 2, depicting the number of constitutional issues and the actual number of changes in each legislative period since 1905. Until 1936 the MPs were elected for three years only, making the yearly amendment rate much higher during the first decades of the century than later. There were no constitutional changes in the final legislative period recorded in

the table (1997–2001), but this is, in fact, the only one without any revision of the constitutional text. The constitution has subsequently been revised several times.

Figure 2: Proposals to amend the Norwegian—around here

The number of constitutional proposals is on average more than five times the actual number of changes. With time, the number of proposals has diminished (in particular, the annual proposal rate), although the number of proposals in the 1997–2001 legislative period was the highest in nearly 50 years. This might indicate a new willingness to put constitutional questions on the legislative agenda. Nonetheless, almost all proposals for constitutional change are rejected with overwhelming majorities.

V. Conclusion

The frequency of lawful constitutional changes, unfortunately, cannot be understood by focusing on the number of veto players and degree of required consensus alone. The political demand for constitutional reform reflects economic, political, and cultural circumstances, as well as the magnitude of unresolved problems at any given point in time. External pressure for revision, constitutional traditions, and recent innovations in constitutional design, as well as the cost of formal amendments, will also affect the types of constitutional reforms proposed. It would be useful to have a more complete model of the demand for constitutional reform, so that the effects of "demand" can be clearly separated from those of "supply."

Moreover, measures of constitutional reforms can clearly be improved, insofar as formal constitutional documents do not include all of the core procedures and constraints of governance. For example, election law is often not included in constitutional documents. That some core procedures and constraints are not fully specified by constitutional documents implies that some constitutional reforms may be lawfully adopted through other means. Constitutions can be—and often are—changed without altering the text of constitutional documents. Election laws can often be reformed through ordinary legislation. The courts may reinterpret formal constitutional documents as well as "quasi-constitutional" legislation. Moreover, not all constitutional reforms have the same effect on a nation's fundamental procedures and constraints of governance. The constitutional reforms adopted in the first part of the twentieth century by many European parliaments included such radical changes as the adoption of universal male suffrage, women's suffrage, and proportional representation. Although the more recent constitutional histories of many countries include many dozens of reforms, relatively few of these affect such

fundamental procedures or rights. Consequently, the number of formal changes to constitutional documents is a far from perfect measure of constitutional stability.

Clearly, there may be much more to be learned about the relationship between amendment rates and amendment procedures. We do not yet know exactly how to strike a good balance between flexibility and rigidity; a unique optimal solution may not exist at all. (The variation in amendment rates among successful OECD nations is clearly greater than that of per capita income.)[x] The new empirical analysis of constitutional stability remains very much a work in progress.

Nonetheless, the new empirical work clearly suggests that amendment procedures affect the stability of constitutional documents. Insofar as constitutional law and practice are similar in long-standing democratic states (an issue that we leave for further study), these results suggest that politics in both the large and small tends to be relatively more routinized and, consequently, more predictable in polities with relatively demanding amendment procedures.

Table 12.1: Main Types of Constitutional Change

	LAWFUL CONSTITUTIONAL REFORMS	UNLAWFUL REFORMS
EXPLICIT CHANGE: [CHANGE OF CONSTITUTIONAL TEXT-]	FORMAL AMENDMENT PROCEDURES	IRREGULAR PROCEDURES
IMPLICIT CHANGE [CHANGE OF CONSTITUTION WITHOUT CHANGING THE TEXT]	JUDICIAL INTERPRETATION DURABLE LEGISLATION	POLITICAL ADAPTION CORRUPTION

Table 12.2: Formal Amendment Rules (Simplified) in Selected Countries.

Country	Legislative Decision(s)	Referendum and/or Ratification	Comments
Norway	(–Pre-election proposal) –Post-election 2/3		Delay, but single decision in parliament
Sweden	–Pre-election ½ –Post-election ½	(Referendum threat)	Referendum if claimed by more than 1/3 of MPs
Denmark	–Pre-election ½ –Post-election ½	Majority (½+)	Majority more than 40 percent of electorate
Finland	–Pre-election ½ –Post-election 2/3		Urgency: Single decision with 5/6 majority
Iceland	–Pre-election ½ –Post-election ½ –Consent by President	(Selected articles only)	Referendum required to change the status of the church
Estonia	–First vote ½ –Second vote 3/5	(Selected articles only)	Referendum required to amend important articles (e.g., general provisions). 3/5 in parliament to call referendum. Urgency: Single decision with 4/5 majority
Latvia	–2/3 majority in *three* readings	(Selected articles only)	Referendum required to amend important articles (e.g., general provisions)
Lithuania	–First vote 2/3 –Second vote 2/3	(Selected articles only)	Referendum required to amend important articles (in which ¾ of electorate support the amendment). Delay of at least 3 months between decisions in parliament
Australia (Federation)	–Lower house ½ –Upper house ½	Majority (½+)	Constitutional amendment must secure the support of a majority of the whole electorate and majorities in a majority of states (i.e. in four of six states)
Austria (Federation)	–Lower house 2/3	(Referendum threat)	Referendum if claimed by more than 1/3 of lower *or* upper house Separate procedure for "total revision" (referendum required)
Belgium (Federation)	–Pre-election declaration of revision (by federal legislative power) –Post-election Lower 2/3 –Post-election Upper 2/3		
France	Either (I) –Lower house ½ –Upper house ½ or (II) –Parliament 3/5	Majority (if procedure I)	No referendum if President decides to submit proposed amendment to Parliament convened in Congress (i.e., procedure II) The republican form of government is not subject to amendment
Germany (Federation)	–Lower house 2/3 –Upper house 2/3		Some articles of the constitution cannot be amended (e.g., division of federation into states)
Greece	–Pre-election 3/5 twice –Post-election ½		The pre-election decisions should be separated by at least one month. Reversed majority requirements possible (i.e., absolute majorities before election and 3/5 majority after election). Some articles of the constitution cannot be amended (e.g., the basic form of government)

Ireland	–Lower house ½ –Upper house ½	Majority ½	
Italy	Either (I) –Lower house ½ twice –Upper house ½ twice or (II) –Lower house ½ and 2/3 –Upper house ½ and 2/3	(Referendum threat if procedure I)	Referendum according to proedure I (absolute majority—but less than two-thirds—in second vote in the chambers) if claimed by (i) 1/5 of members of either chamber, (ii) 500.000 electors, or (iii) at least five regional councils
Japan	–Lower house 2/3 –Upper house 2/3	Majority	Referendum requirement: "the affirmative vote of a majority of all votes cast thereon"
Luxembourg	–Pre-election ½ –Post-election 2/3		
Netherlands	–Pre-election Lower ½ –Pre-election Upper ½ –Post-election Lower 2/3 –Post-election Upper 2/3		Ratification by King required
New Zealand	–Majority vote (½)	(Majority)	Confirmation in referendum expected or customary if the amendment is considered sufficiently important
Portugal	–Parliament 2/3		Some limits on revision of substance of the constitution specified in Art. 288.
Spain	Either (I) –Lower house 3/5 –Upper house 3/5 or (II) –Lower house 2/3 –Upper house ½	(Referendum threat)	Referendum if claimed by more than 1/10 of the members of either chamber Separate procedure for total revision (i.e., 2/3 majority in each chamber, dissolution, 2/3 majority in both chambers, and ratification by referendum) Absolute majority required in the Senate according to procedure II
Switzerland (Federation)	–Lower house ½ –Upper house ½	Majority (½+)	In referendum, majority of votes nationwide as well as majority support in a majority of Cantons
United States (Federation)	Either (I) –Lower house 2/3 –Upper house 2/3 or (II) –Constitutional Convention (called by 2/3 of the states)	Ratification by ¾ of the states	Procedure II has never been used

Key to table: Simple or absolute majority = ½; qualified majorities indicated by 3/5, 2/3, 4/5, etc.
Sources: Formal constitutions (www.uni-wuerzburg.de/law), Taube 2001 and Rasch 1995.

Table 12.3: Estimated Amendment Rates (in Logs, LS)

	(1)	(2)	(3)	(4)	(5)
Constant	0.517 (1.17)	1.819 (2.32)**	1.668 (3.07)**	1.581 (2.79)**	3.249 (2.35)**
Number of Veto Players	-0.789 (2.17)**	-0.864 (2.40)**			
Number of Veto Points			-1.045 (3.82)**	-1.039 (3.68)**	-0.911 (3.14)**
Supermajority Required		0.023 (0.03)		-0.564 (0.21)	-0.027 (0.04)
Referenda Threat		-1.537 (2.40)**			
Intervening Election Required		-1.278 (1.95)*			
Log of Constitutional Age					-0.486 (1.37)
F-statistic	4.709**	3.44**	14.656**	6.940**	5.517**
R-square	0.217	0.496	0.462	0.464	0.524

Data from Lutz (1994) and Table 2.

(New Zealand is coded as lacking referenda and supermajority requirements as per footnote xx above. Absolute value of t-statistics are in parentheses below coefficient estimates; * denotes significance at the 10 percent level and ** at the 5 percent level; N=19)

Table 12.4: Formal Amendments of Articles in the Norwegian Constitution, 1814–2001.

	Number of Changes 1814–1905	Number of Changes 1905–2001
Section A (Articles 1–2): ***Form of Government and Religion***	2	2
Section B (Articles 3–48): ***The Executive Power, the King and the Royal Family***	13	36
Section C (Articles 49–85): ***Rights of Citizens and the Legislative Power***	36	93
Section D (Articles 86–91): The Judicial Power	1	8
Section E (Articles 92–112): General Provisions	4	16
Total number of changes to articles (Σ = 211)	**56**	**155**

Note: Most of the articles on individual rights and freedoms are found in section E of the constitution. The table shows the number of articles that have been amended (some articles more than once). Thus, if two separate changes have been made simultaneously in one article, this revision is counted as only one change. If the changes to two articles are related and have been made simultaneously, the amendment is nevertheless counted as two changes. In practice, the kind of complications hinted at above are rare.

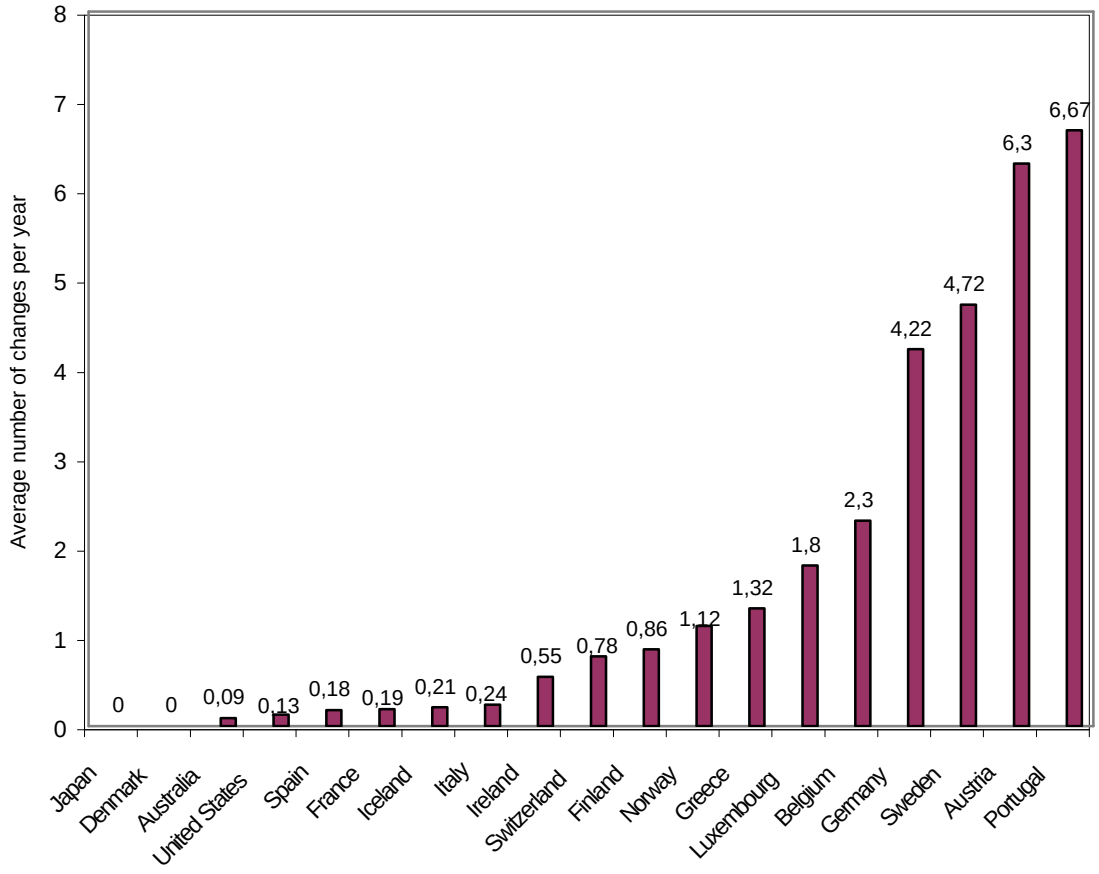

Figure 12.1: Amendment rates (yearly) in selected countries.

Source: Lutz (1994, 1995); Denmark corrected and Norway (1814–2001), Sweden (*Instrument of Government* only, 1975–2000) and Germany (1949–1994) updated.

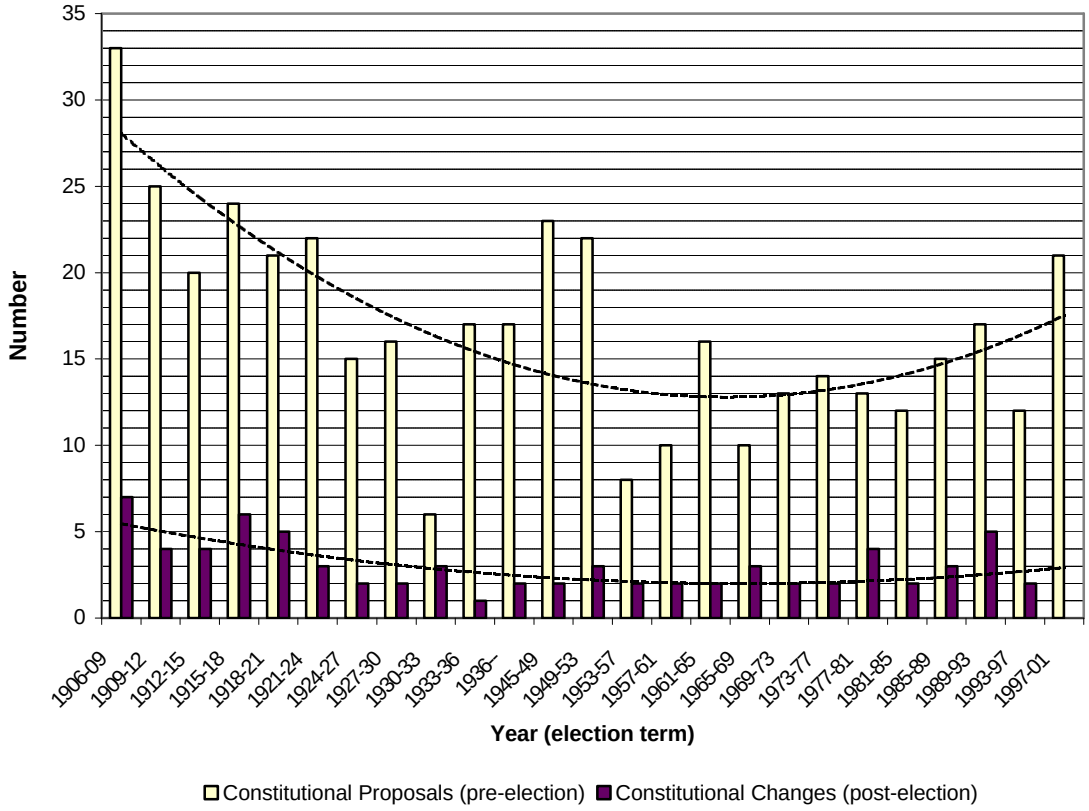

Figure 12.2: Proposals to amend the Norwegian Constitution, and actual changes to the Constitution, 1905–2001.

Proposals are put forward before general elections (without a vote) and need a two-thirds majority in a vote after the election to be accepted (see Article 112 of the Constitution). The diagram is based on a total of 422 constitutional proposals and 73 constitutional amendments.

Table 12.5: Correlation matrix (Pearson's r). Variables measuring constitutional rigidity. N = 20 (selected countries).

	Constitutional Rigidity (Rasch)	Super-Majoritarianism (Rasch)	Index of Difficulty (Lutz 1994)	Constitutional Rigidity (Lijphart 1999)
Index of Difficulty (Lutz 1994)	**0,380*** (0,099)	**-0,109** (0,649)		
Constitutional Rigidity (Lijphart 1999)	**0,329** (0,157)	**0,407*** (0,075)	**0,480**** (0,032)	
Constitutional Rigidity (Anckar and Karvonen 2002)	**0,489**** (0,029)	**0,716***** (0,000)	**-0,049** (0,838)	**0,496**** (0,026)

*** p<0,01 ** p<0,05 * p<0,1

Index of Difficulty (Lutz 1994): Additive index (continuous)
Constitutional Rigidity (Rasch): See Table 2. Four categories.
Supermajoritarianism (Rasch): See Table 2. Dichotomy; qualified majority requirements (1) or not (0)

Constitutional Rigidity (Lijphart): See Table 12.1 in Lijphart 1999: 220.
Four categories: "Supermajorities greater than two-thirds," "Two-thirds majorities or equivalent," "Between two-thirds and ordinary majorities," and "Ordinary majorities."

Constitutional Rigidity (Anckar and Karvonen): Based on information from a forthcoming paper. Five categories: "Ordinary majority," "Strengthened majority, "Weakened qualified majority," "Qualified majority," and "Strengthened qualified majority."

References

Barros, Robert 2002. *Constitutionalism and Dictatorship. Pinochet, the Junta, and the 1980 Constitution*. Cambridge: Cambridge University Press.

Busch, Andreas 2000. "The Grundgesetz after 50 Years: Analysing Changes in the German Constitution." *German Politics* 9: 41–60.

Brennan, Geoffrey and James M. Buchanan 1985. *The Reason of Rules. Constitutional Political Economy*. Cambridge: Cambridge University Press.

Congleton, Roger D. 2001. "On the Durability of King and Council: The Continuum Between Dictatorship and Democracy." *Constitutional Political Economy* 12: 193–215.

———. 2003. *Improving Democracy through Constitutional Reform, Some Swedish Lessons*. Boston: Kluwer Academic Press.

Duchacek, Ivo D. 1973. *Power Maps: Comparative Politics of Constitutions.* Santa Barbara: ABC Clio.

Elster, Jon. 2000. *Ulysses Unbound. Studies in Rationality, Precommitment, and Constraints*. Cambridge: Cambridge University Press.

Ferejohn, John. 1997. "The Politics of Imperfection: The Amendment of Constitutions," *Law and Social Inquiry* 22: 501–31.

Giovannoni, Francesco. 2001. "Amendment Rules in Constitutions." Paper presented at the European Public Choice Annual Meeting, Paris, April 18–21.

Hardin, Russell 1989. "Why a Constitution?" in Bernard Grofman and Donald Wittman, eds. *The Federalist Papers and the New Institutionalism.* New York: Agathon Press.

Hylland, Aanund. 1994. "Konstitusjonell treghet. Bør noen saker være unndratt flertallets kontroll?" in Bjørn Erik Rasch and Knut Midgaard, eds. *Representativt demokrati. Spilleregler under debatt.* Oslo: Universitetsforlaget.

Kiewiet, D. Roderick and Mathew D. McCubbins. 1991. *The Logic of Delegation. Congressional Parties and the Appropriations Process.* Chicago: University of Chicago Press.

Lane, Jan-Erik. 1996. *Constitutions and Political Theory*. Manchester: Manchester University Press.

Levinson, Sanford, ed. 1995. *Responding to Imperfection. The Theory and Practice of Constitutional Amendment.* Princeton: Princeton University Press.

Lijphart, Arend. 1999. *Patterns of Democracy. Government Forms and Performance in Thirty-Six Countries.* New Haven: Yale University Press.

Lutz, Donald S. 1994. "Toward a Theory of Constitutional Amendment." *American Political Science Review* 88: 355–70.

———. 1995. "Toward a Theory of Constitutional Amendment." in Sanford Levinson ed. *Responding to Imperfection. The Theory and Practice of Constitutional Amendment.* Princeton: Princeton University Press.

Maarseveen, Henc van and Ger van der Tang. 1978. *Written Constitutions: A Computerized Comparative Study.* Dobbes Ferry: Oceana Publications.

Maddex, Robert L. 1996. *Constitutions of the World.* London: Routledge.

Mueller, Dennis C. 1999. "On Amending Constitutions." *Constitutional Political Economy* 10: 385–96.

Murphy, Walter 2000. "Constitutional Interpretation as Constitutional Creation." The 1999–2000 Harry Eckstein Lecture. Center for the Study of Democracy. University of California at Irvine. (Available at: www.democ.uci.edu/papers/murphy.htm)

North, Douglas 1990. *Institutions, Institutional Change and Economic Performance.* Cambridge: Cambridge University Press.

Rasch, Bjørn Erik. 1995. "Parliamentary Voting Procedures." in Herbert Döring ed. *Parliaments and Majority Rule in Western Europe.* Frankfurt/New York: Campus/St. Martin's Press.

Rasch, Bjørn Erik. 2000. *Demokrati - Ideer og Organisering.* Bergen: Fagbokforlaget.

Salmon, Pierre 2001. "Ordinary Elections and Constitutional Arrangements." in Ram Mudambi, Pietro Navarra, and Guiseppe Sobbrio, eds. *Rules and Reason: Constitutional Political Economy.* Cambridge: Cambridge University Press.

Smith, Eivind. 1993. *Høyesterett og Folkestyret.* Oslo: Universitetsforlaget.

Taube, Caroline. 2001. *Constitutionalism in Estonia, Latvia and Lithuania: A Study in Comparative Constitutional Law.* Uppsala: Iustus.

Tsebelis, George 2002. *Veto Players.* How Political Institutions Work. Princeton: Princeton University Press.

Voigt, Stefan. 1999. *Explaining Constitutional Change. A Positive Economics Approach.* Cheltenham: Edward Elgar.

[1] Denmark can serve as an example. The 1849 constitution was replaced by a new one in 1953. The fact that Denmark celebrated a 150-year constitutional anniversary in 1999 indicates that the change is evidently not considered to be fundamental. The most important part of the 1953 reform package was abolishment of the second chamber.

[2] September 17, 1787 is the date at which the "present" U.S. constitution was signed by members of the constitutional convention. It was formally ratified by the requisite nine states, often by narrow margins, in late 1788 (Article 7), although the last of the original 13 states to ratify, Rhode Island, did not formally agree to the new constitution until 1790. The 1789 constitution replaced the Articles of Confederation negotiated in 1777 and ratified in 1781.

[3] As mentioned above, only 4 percent of national governments today lack a constitution. Even dictatorships often adopt formal documents that characterize the formal procedures of governance. The traditional view is that rulers wielding absolute power cannot limit themselves by constitutional arrangements. Barros (2002) discusses the arguments against autocratic self-limitation and tries to specify conditions under which institutional constraints might be effectively introduced under an authoritarian regime. Congleton (2001) explores advantages that a dictatorship may realize by sharing power with a council or parliament.

[4] See chapter two ("Delegation and Agency Problems") of Kiewiet and McCubbins (1991) for an introduction to the principal-agent approach.

[5] Indeed, the British constitution can be revised only in these ways insofar as its constitutional regime lacks formal methods of amendment. Ordinary legislation, judicial interpretation, and the evolution of binding intragovernmental norms are the normal method of British constitutional reform, and these methods are also widely used elsewhere.

[6] New Zealand is an exception to this, because, formally, the constitution is amended in the same way as ordinary legislation. Thus, the Constitution Act 1986, as with other standard legislation, can be amended by a simple parliamentary majority. Only a subset of the Electoral Act 1993 requires a supramajority for amendments. The entrenching provision, however, is not itself entrenched and thus (in theory at least) could be amended or removed by a simple majority. Moreover, in practice, major changes of a constitutional nature are typically the subject of a binding referendum, but these have been few and far between.

[7] This is the wording of Article 112 of the Norwegian Constitution: "If experience shows that any part of this Constitution of the Kingdom of Norway ought to be amended, the proposal to this effect shall be submitted to the first, second, or third Parliament [Storting] after a new General Election and be publicly announced in print. But it shall be left to the first, second, or third Parliament [Storting] after the following General Election to decide whether or not the proposed amendment shall be adopted. Such 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, and such amendment requires that two-thirds of the Parliament [Storting] agree thereto. An amendment to the Constitution adopted in the manner aforesaid shall be signed by the President and the Secretary of the Parliament [Storting] and shall be sent to the King for public announcement in print, as an applicable provision of the Constitution of the Kingdom of Norway." The article has been changed six times since 1814, but the stipulated amendment procedure is essentially unchanged.

[8] Norway has a kind of bicameralism, but this fact has no relevance with regard to constitutional changes. After each election the Storting (parliament) divides itself into two sections: the Odelsting (the General Chamber) and the Lagting (the Permanent Chamber). Politically, there is no difference between the sections. Bills are first introduced to the Odelsting, and the Lagting has to agree for the bill to become law. (See Article 76 of the constitution for details.) Financial matters (e.g., the State Budget) are, just like constitutional amendments, handled by the Storting as a single chamber.

[9] A recent trend in well-established democracies is increased instability at the polls (volatility). This makes it more difficult to amend those constitutions that require consent of the pre-election and post-election parliament; thus, an easily overlooked external factor may affect the difficulty of the amendment process significantly.

[10] Average 30-year growth rates of real per capita GNP (1995 dollars) range from 1.1 percent a year (Switzerland) to 3.2 percent a year (Japan) within the sample of countries listed in table 2. Amendment rates are negatively correlated with growth rates within this sample, but not at a statistically significant level. Particular features of constitutional amendment procedures are more strongly correlated with long-term growth. For example, federalism is negatively correlated with long-term growth rates within this sample.