Improving Democracy Through Constitutional Reform

Some Swedish Lessons

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This book is dedicated to James Buchanan and Gordon Tullock, whose thoughts have been so long intertwined with my own that it is often difficult to determine where one begins and the others end. I hope they too will find more than a bit new in the pages that follow.

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Preface

Do constitutions matter? Are constitutions simply symbols of the political times at which they were adopted, or do they systematically affect the course of public policy? Are the policy crises of failing democracies the result of bad luck or of fundamental problems associated with the major and minor constitutional reforms adopted during their recent histories?

These questions deserve serious attention. If the former is true, but not the latter, political constitutions will be of interest only to political historians as tangible evidence of political sentiment at various points in time. If the latter or both are true, constitutional design must be taken seriously as a method by which government itself can be improved and thereby the lives of all who live under them. The purpose of the present study is to address these questions using a blend of theory, history, and statistical analysis. The results provide considerable support for the hypothesis that political constitutions affect the course of public policy development by affecting ongoing day-to-day politics.

The particular constitutional arrangement focused on in this book is parliamentary democracy. Parliamentary governments have not received much attention from those working within constitutional political economy research programs, although parliamentary governments are widely used throughout the world to make public policies. This may reflect the common American assessment that the most well known of parliamentary democracies, Great Britain, lacks formal constitutional procedures.[1] However, parliamentary systems that are formally grounded in constitutional law are commonplace in Europe and around the world.

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[1] The procedures by which the British Parliament is constituted and its internal procedures are formally characterized by a long series of durable (constitutional) laws that are only occasionally revised by Parliament. What the British Parliament lacks is not stable and law-based political procedures, but rather formal constitutional constraints on its legislative domain and a distinct amendment procedure.

The British constitution also lacks any provision for independent review of the constitutionality of its laws, but this is largely unnecessary in the present British context, in which the legislative domain is essentially unbounded.

The analysis of the fundamental architecture of political institutions is, of course, a long-standing program of research. Indeed, it may be said to be one of the oldest within social science because any effort to organize a government must at some point evaluate the relative merits of alternative organizational structures. Consequently, interest in the "constitutional design problem" is as old as rule-based government itself and clearly predates by many centuries even Aristotle's (330 B.C.) well-known study of the relative merits of alternative Greek constitutions.

Political constitutions are the enduring legal and institutional setting in which ordinary day-to-day and year-to-year public and private decisions are made. Constitutions include both the formal political decision-making processes characterized by a nation's instruments of governance and other durable procedural rules and constraints, such as the civil code, which often predate modern political documents by many centuries. Constitutions affect the balance of political power within government, the scope of policies that should or should not be adopted, and thereby the extent to which an attractive society emerges within a given nation. Although constitutions have to be durable to serve as effective "rules of the game," constitutions are nonetheless revised from time to time.

A broad historical literature has analyzed the path of constitutional reform in the United Kingdom and United States. The bulk of these studies have argued that relatively modest changes in institutional structure can lead to substantial changes in policy and, in some cases, have played a large role in the growth of the modern state (North and Weingast 1989 and North 1990). However, it is clear that the British and American reforms did not fundamentally alter their constitutional templates. The basic presidential-congressional template adopted by the United States in 1783 remains in place, although the Senate was transformed into an elected body in 1914. The parliamentary template of the United Kingdom has also been remarkably stable. The United Kingdom retains its long-standing constitutional monarchy with a bicameral parliament composed of an elective House of Commons and an unelected House of Lords, although its election laws did undergo major reforms in the nineteenth and early twentieth centuries.

Sweden's constitutional history is similar to that of the United Kingdom insofar as its government has long been a constitutional monarchy, in the sense that royal prerogatives have long been constrained by formal written documents. The Royal Council and, subsequently, the Swedish parliament (the Riksdag) have had formal veto power over taxation for nearly 700 years. However, in contrast to the British case, constitutional reforms adopted in Sweden have affected fundamental features of its parliamentary template. During the past 200 years, Swedish governance has shifted from a king-dominated system with an unelected four-chamber parliament to a bicameral

legislature elected with wealth-weighted voting in 1866, and then to an electoral system with proportional representation and universal suffrage in 1920, and a unicameral system in 1970. All these radical reorganizations of the Riksdag were accomplished using formal amendment procedures established by previous constitutions.

The Swedish experience, thus, provides a nearly perfect laboratory in which to study the effects of constitutional change, and it is for that reason that Sweden is the focus of the present volume. The purpose of the present volume is not to write a history of Swedish constitutional reform, but rather to analyze and evaluate that constitutional history.

This book employs the analytical methodology of constitutional political economy (CPE) for that purpose. The modern analytical literature on constitutional design is relatively new. It began in 1962 with the publication of the *Calculus of Consent* by James Buchanan and Gordon Tullock and by now includes many academic papers and books that examine the properties of governmental institutions. This research uses analytical and statistical methods from economics to shed new light on the extent to which political procedures and constraints affect the incentives of politicians, governmental policy making, and economic performance. Mueller (1996) and Cooter (2000) provide excellent surveys of the constitutional political economy literature.

The first part of the book uses the CPE approach to interpret two centuries of Swedish constitutional history. The mode of historical analysis differs from most political history by its focus on constitutional developments rather than powerful persons and by its use of the concepts and results from theoretical work in public choice and economics to analyze those developments. The positive strand of CPE implies that constitutional changes affect political equilibria and, thereby, political policies. Much evidence exists of these effects in Swedish history.

The rest of the book attempts to determine whether Swedish constitutional reforms were improvements or not. This enterprise requires a method for ranking alternative constitutional arrangements. Part II of the book demonstrates that contractarian normative theory can be used to rank alternative democratic constitutions. It also suggests that various aggregate statistical measures provide serviceable gauges of the quality of governance. Part III uses that methodology to evaluate the past 200 years of Swedish constitutional reform. The results generally suggest that modern Swedish governance has been substantially improved by constitutional reform, although additional improvements are still possible.

By analyzing general rather than specific features of Swedish constitutional history, this book attempts to extend our understanding of constitutional democracy generally. By systematically applying the CPE methodol-

ogy, the book also extends our understanding of the power and limits of that mode of analysis.

In the course of analyzing the effects of Swedish constitutional reform, the book also dispels a variety of myths about Sweden. First, Sweden has not had a long egalitarian history. In the nineteenth century and early twentieth century, wealth mattered not only in markets, but also explicitly in the voting system used and in the qualifications for elected office. Second, Sweden has not always had a relatively large public sector. Until 1960 Sweden had a smaller public sector than Great Britain and one that was not significantly different in size from that of other European nations or the United States. Third, Swedish politics is not blessed with particularly high levels of political consensus. Major controversial policies have often been put in place with slim parliamentary margins, as, for example, with major tax and social security reforms adopted during the 1950s. Fourth, Sweden is not, nor has it always been, a highly centralized state. Most of the generous Swedish social welfare system is funded by locally controlled taxes and administered by locally elected governments, although minimal service levels are often mandated by the central government.

Research on the Swedish constitution was encouraged by Birgitta Swedenborg and supported as part of the constitutional project at the Studieförbundet Näringsliv och Samhälle (SNS). The actual writing of the manuscript at the Center for Study of Public Choice and at SNS was helped along by many conversations with and comments by Birgitta Swedenborg, Olof Petersson, Gordon Tullock, James Buchanan, Hans Söderström, Olof Ruin, Clas Olsson, Erik Tallroth, Karl Warneryd, Dennis Mueller, Geoffrey Brennan, Pierre Salmon, Bryan Caplan, David Levy, Douglas Hibbs, Gebhard Kirchgäsner, Mark Crain, Thomas Stratmann, Paal Foss, Arthur Lupia, Elinor Ostrom, Torsten Persson, Sarah Jennings, and Rob Nelson. Pamela S. Cubberly provided particularly helpful editorial assistance.

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Chapter 1

THE COURSE OF REFORM

Interests and Interest in Constitutional Reform

In modern times, parliamentary governance has become a very common constitutional template for democratic governance. Parliaments are widely used throughout Europe and in many other parts of the world. Yet, parliamentary systems have not always been liberal democratic institutions. The early parliaments were often consultative bodies with little real policy-making power. Nor were the early parliaments representative in the modern sense of the term. Membership was generally reserved for the elites of powerful and well-organized groups, the nobles, senior church officials, and wealthy commoners. In the nineteenth century, many of the ancient European parliamentary systems gradually took their modern form, as the locus of policy-making power shifted to the parliament and as parliaments came to be elected by universal suffrage. Parliamentary democracy, in this modern sense, is only approximately 100 years old in Western Europe.

That parliaments might still be improved once broad electoral methods have been put in place might seem unlikely to a modern reader. Indeed, Fukuyama (1992) has suggested that history is over once this important step takes place. Modern political sensibilities emphasize the use of majoritarian methods as collective choice methods and tend to neglect other institutional arrangements that substantially improve democratic governance. An ardent "democrat" is clearly tempted to conclude that the problem of constitutional design ends when elections come to determine public policy.

If all that matters is majority rule, surely all majoritarian political systems are perfect substitutes for one another. However, even modern democrats should acknowledge that constitutional design remains of interest whenever other institutional features systematically affect political outcomes and policy development. In such cases, one democratic system of governance can be said to perform better than another insofar as broadly supported policies are more likely under one constitutional design than another or political catastrophes are less likely.

Granting this point, the modern democrat may move on to the next. Are there not strong electoral pressures that lead every parliamentary government to perfect its procedures and constraints through some process of constitutional reform? Surely, every democratic nation's political arrangements are already as good as they can be.

It is certainly true that broad support often exists for constitutional reforms and that support has often led to improved political procedures and constraints. Interest in constitutional reform never entirely disappears because most democratic parliamentary governments can be further improved as instruments for advancing the shared interests of their citizens and because narrow interests can also be advanced by constitutional reform. Parliamentary systems are, therefore, continually subject to political pressures for and against an array of constitutional reforms, but not every constitutional reform or amendment that comes to be adopted is a step closer to perfection.

Just as democracies may differ in their effectiveness and robustness, so may procedures for constitutional reform. Moreover, any evidence of constitutional improvement implies that constitutions have not been perfect at every moment in time.

Why Sweden?

This book examines the course of one nation's parliamentary reform through the lens of modern public choice and constitutional analysis. It provides an interest-based explanation of the major constitutional reforms and examines whether the reforms adopted actually advanced the interests of those who supported reform and whether those reforms can be regarded as improvements for the average Swede. One might ask why Sweden has been singled out for special attention. Sweden is a relatively small country on the edge of northern Europe and one that has not been central to historical developments in Europe or around the world for at least two centuries, partly due to location and partly a long-standing policy of neutrality. Yet, Sweden remains special for many reasons.

The Swedish constitutional tradition of rule of law and parliamentary government is one of the oldest and most neglected in the world. The Swedish government has long had an explicit constitutional basis, beginning with a letter of privilege promulgated in 1319, which bound the crown to govern by rule of law, assured due process, and allowed new taxes to be imposed only after consultation with the Royal Council (Weibull 1993, p. 22). Indeed, it can be argued that the basic king and council template formalized in 1319 continues to the present day, although the balance of power between the king

and parliament has changed dramatically through time, especially during the past three centuries.

Swedish constitutional history is striking not only for its length, but also for its many systematic revisions of voting rules, its fundamental reorganization of parliament, and *its use of constitutional procedures to adopt those reforms*. The past two centuries of Swedish political history has witnessed the Swedish state lawfully transform itself from a king-dominated government with a four-chamber parliament to a parliamentary system of governance in which the king plays only a minor role in policy formation. Most of these changes took place in three great episodes of constitutional reform each separated by approximately 50 years. Swedish history, thus, provides a series of natural experiments in which both the political cause and effect of constitutional reforms can be analyzed. In much of the rest of Europe, wars and revolutions rather than amendment determined the course of constitutional development. The peaceful "revolution" in Swedish political procedures is nearly unique in scope and legal foundation.

This Swedish experience suggests that the advantage of formal constitutions does not depend upon their complete rigidity. This finding potentially increases the value of constitutional analysis. If constitutions could never be revised without undermining their effectiveness as rules of the game, successful constitutions would properly be regarded as subjects of interest only to historians, legal scholars, and perhaps revolutionaries, who might use errant phrases from such "permanent" constitutions as motivational battle cries. On the other hand, if constitutions can be amended every generation or two without substantial losses from "excessive flexibility," constitutional analysis becomes a potentially important area of policy research.

The core themes of this book are of interest in large part because constitutions can be lawfully refined through time as our understanding of them improves.[2]

Methodology

The broad questions of constitutional design addressed in the pages that follow clearly require an analysis that overlaps the indefinite boundaries of economics, political science, philosophy, sociology, law, and history. The author has more than a passing knowledge of these fields, but unfortunately cannot claim a broad expertise, except perhaps in constitutional political

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[2] Both Mueller (1996) and Jefferson (1789) have argued that constitutions are more legitimate when they may be reformed every generation or two.

economy. Fortunately, the CPE methodology allows such research to be undertaken by those of less than genius, because its methods are principally analytical, rather than historical or experimental. Sociological and biological considerations inform the goals and norms of individuals within a polity. Laws and political arrangements determine the incentives for political action and the constraints that bind those engaged in the policy-making enterprise. Rational—goal-oriented—choice under constraints has implications for both private and public behavior and thereby for the political outcomes that emerge within a given constitutional setting.

That constitutions change through time has been largely neglected by the CPE literature, although constitutional reform is a direct implication of the CPE methodology. The circumstances that give rise to constitutions are not entirely static. As circumstances, knowledge, and popular sentiments change, the political arrangements negotiated by previous generations may be revised to suit the present one. This possibility is clearly recognized by those framing constitutions, in that formal constitutional documents nearly always specify a process by which they can be modified or amended. In Sweden, constitutional revisions currently require majority affirmation by two successive parliaments separated by an election. In the United States, supermajorities of the federal legislature and of state legislatures are required to amend the constitution. The United Kingdom is peculiar in its failure to specify more restrictive procedures for amending its fundamental laws than for passing ordinary legislation.[3]

The theoretical analysis of the cause and effect of constitutional reform developed below draws heavily on the tools and concepts of what has come to be called CPE or the Virginia school of public choice. The origin of the CPE approach can be traced to the path-breaking book by Buchanan and Tullock (1962) that demonstrates how constitutional analysis can be deepened using rational choice models from economics and game theory. Buchanan and Tullock, of course, did not "invent" constitutional analysis, but brought new tools and concepts to that analysis. These tools allow the fundamental effects of constitutional reforms to be understood as changes in the political equilibria of day-to-day politics, rather than associated changes in the policy interests of politically active persons and groups.[4]

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[3] A single majoritarian vote within the House of Commons is sufficient to enact both ordinary laws and major constitutional reforms. A second vote (by the same House of Commons) is necessary only if the first is "vetoed" by the House of Lords.

[4] The first analytical approach to constitutions is sometimes attributed to Hobbes' *Leviathan* (1651). However, constitutional analysis can be traced back at least as far as Aristotle, who assigned his students the task of assembling the constitutions of the Greek city states to provide an empirical basis for constitutional theory (330 B.C.). See Gordon (1999) for a thoughtful and comprehensive overview of the history of constitutional analysis.

The *Calculus of Consent* distinguished between the rules of the political game and the subsequent day-to-day politics that emerge under a particular set of rules. It also developed an individualistic analytical normative methodology for evaluating the relative merits of alternative constitutions. If constitutions are the "engine" of policy formation, then constitutions may be evaluated by their anticipated effects on future policy choices. Buchanan and Tullock argued that uncertainty about the long-term distributive effects of alternative constitutional designs induces individuals to rank alternative constitutions according to the net benefits that an average person expects to receive from policy choices made under constitutional procedures and constraints.[5]

The early CPE literature focused, for the most part, on the effects of alternative electoral systems, although other features of governance were not entirely neglected. For example, an extensive theoretical and empirical literature exists on the effects of federalism (e.g., Riker 1962 and Ferejohn and Weingast 1997). The effects that the general architecture of governance may have on policy outcomes have attracted significant attention only in the past decade or two.

Recent statistical evidence shows that government policies are affected in a number of ways by institutional design. For example, spending tends to increase as the number of legislators increases (the "law of 1/n") (Weingast, Shepsle, and Johnsen 1981). De Vanssay and Spindler (1994) find that federal states within the Organization of Economic Cooperation and Development (OECD) tend to have higher per capita income, adjusted for economic freedom and education. Bradbury and Crain (2001) find evidence that bicameralism reduces the effect of the "law of 1/n," although it does not eliminate it.

Among Swedish economists, Wicksell and Lindahl are well known for their interest in political decision-making processes and policy innovations that would increase political consensus. Wicksell's work was a significant contribution to the ongoing Swedish debate on constitutional design in the late nineteenth century.

[5] Buchanan's Nobel Prize in 1986 was largely due to his pioneering work on constitutional design and his subsequent work on contractarian normative theory. The modern public choice–based analysis of constitutions is summarized and extended by Mueller (1996). A good introductory overview of the logic of the CPE approach is found in Brennan and Buchanan (1985).

Buchanan's Nobel speech (1987) acknowledged his intellectual debt to Wicksell's pioneering work in public finance (1896). See Hansjurgens (2000) for an overview of Wicksell's substantial influence on Buchanan's work. Wagner (1988) provides a good overview of Wicksell's substantial contribution to constitutional analysis in the Swedish context.

The policy effects attributable to institutions have been relatively small and often surprisingly so. This may reflect the fact that the influence of the architecture of governance is difficult to isolate in cross-country data. There are many differences among national legislative procedures—all of which might systematically influence policy. Moreover, the number of countries with long-standing democratic governments is fairly limited (Lijphart 1990, 1994). Cross-country studies must attempt to disentangle the interactive effects of various institutional structures and the effects of other economic, demographic, ideological, and historical characteristics that affect demands for government services and regulation using a relatively small data set.

Examining specific countries where major constitutional reforms were adopted can minimize the effects of noninstitutional variables. Unfortunately, only a few modern opportunities to analyze the effects of major constitutional reforms exist within an otherwise stable political and economic setting. For example, unicameral institutions have recently replaced bicameral ones in several countries: Denmark (1953), Sweden (1970), New Zealand (1950), and Peru (1993). However, all but Sweden may be said to have adopted unicameralism at a time of considerable domestic turmoil or crisis.

Generality of the Approach

The aim of the present study is not simply to arrive at a better understanding of Swedish constitutional history, but to improve our understanding of parliamentary government in general. It is partly for this reason that the book focuses on institutions rather than Swedish political life. Swedish institutional designs are potentially applicable elsewhere, whereas its many colorful and charismatic leaders cannot be so readily exported. The examples and histories of constitutional reform discussed below are essentially all Swedish, but the institutional analysis is general and can be broadly applied to any nation with similar parliamentary institutions. The book is among the first to use the CPE methodology to analyze and evaluate alternative forms of parliamentary democracy.

Swedish constitutional history demonstrates that radical reforms can be adopted through constitutional means and that such reforms can improve democratic governance. In most other nations, only constitutional theorists have contemplated such radical reforms and prospects for major reforms might be wrongly dismissed on empirical grounds. Among English analysts, only Verney (1957) has previously focused on Swedish parliamentary development in detail. That such a highly regarded democracy can be improved also suggests that other less fortunate democracies might also be improved through constitutional reform.

The book is also among the first to use CPE methodology to analyze long-term constitutional reform. For those working outside the CPE research program, the book, thus, provides a condensed, but systematic overview of the issues and methodology of the research program of constitutional political economy. The normative analysis developed in the second half of the book extends previous work several ways, especially with respect to its analysis of governmental constraints and constitutional review.

The book is organized into three parts. Part I provides a history of Swedish parliamentary and electoral reforms, discusses the interests that gave rise to those reforms, and analyzes the effects that constitutional reforms have had on ordinary politics and public policy. The remainder of the book focuses on issues related to constitutional design. Part II develops a unified normative theory based on the contractarian explication of popular sovereignty. It shows how contractarian logic can be used to assess the relative performance of alternative democratic and nondemocratic parliamentary constitutions. Many of these arguments are new, for example, the contractarian rationale for civil liberties, although much will seem to be "common sense" for those schooled in modern political theory. Part III evaluates current Swedish constitutional arrangements in light of Sweden's historical experience and the theory developed in Part II, and suggests possible reforms.

Part I: Constitutional Interests

Chapter 2

THE NATURE OF CONSTITUTIONS

Laws for Making Laws

A nation's political constitution consists of durable procedures and constraints that define the methods and limits of lawful governance. The procedural aspects of a constitution include the general architecture of the government—the legislature, executive, and court system—and the duties and powers of the constituent parts of government. Constitutional procedures also specify, at least in a general way, how persons are to be selected for important official positions within government and what their general responsibilities are. The constitutional procedures of a democracy include its electoral rules for selecting representatives and its procedures for making policy within the elected government. A democratic constitution may also constrain the proper domain of governance by requiring government to address certain policy issues and refrain from others. The latter are often characterized by a "bill of rights," which stipulates areas in which private decisions or those of other levels of government are to be protected from central government intrusion.

Together, these procedures and constraints define the methods and policy areas through which a national government may lawfully adopt and implement new laws. It is in this sense that a constitution may be regarded as the highest law of the land. A constitution is the law for making laws.

Not every constitution is a social contract, because not every constitution is broadly acceptable to the residents of the polity of interest. Stable procedures for enacting new laws are often used by unpopular authoritarian regimes as well as by successful democracies. And, even within constitutional democracies, the formal documents that define and bind the government may have been negotiated by a relatively small portion of the society of interest and may have relatively narrow support. The existence of a constitution does not by itself have normative significance, although it may have political significance and affect public policy.

The first part of this book provides an overview of the nature, origin, and effects of one nation's political constitutions. Normative aspects of constitutional design are taken up in parts II and III.

The most obvious part of a nation's political constitution is that which is explicitly written down in its fundamental laws of governance. For example, the most recent Swedish constitution specifies a parliament (the Riksdag) elected by proportional representation and able to write new laws by majority rule. It specifies procedures for selecting a prime minister and by which the prime minister may constitute a government. The government, thus constituted, is forbidden to write laws that violate certain fundamental rights and freedoms except in special circumstances. The present Swedish constitution also specifies that its own procedures and constraints can be revised by the majority approval of two parliaments separated by an election. Proposed amendments can also be vetoed by popular referendum. The Riksdag itself can also be reformed by a three-fourths supermajority of a single parliament.

In addition to the formal procedures outlined by a nation's written constitution are the durable procedures and constraints of the "unwritten constitution." The unwritten constitution is often implicit in the actual conduct of parliament and other agencies of government. For example, the degree of centralization in political decision-making procedures is largely determined by legislation and custom. Moreover, in practice, much of the actual drafting of rules and regulations within constitutional governments is delegated to commissions, government committees, local governments, party elites, and the bureaucracy. Such routine procedures for making laws have significant impacts on individuals, businesses, and other organizations, but are not specified by the written constitution; nor could such procedures and constraints be fully specified by a written constitution. This tends to be true even for democratic constitutions that make explicit reference to the autonomy of local governments, interest groups, and individuals. The relationship between the written and unwritten constitutions is itself largely unwritten.

It is clear that both the formal and informal parts of a nation's constitution are largely evolutionary products of trial and error. That is, historical experience plays an important role in essentially every "new" constitution. A good deal of what is written in "new" constitutional documents consists of procedures and constraints already contained in previous documents, and most changes in formal procedures implicitly assume the continuation of most of the informal practices and constraints associated with the previous "unwritten constitution." This is, of course, what is meant by a constitutional reform. Such piecewise changes allow the gradual accumulation of constitutional knowledge and practice over the centuries.

In this sense, a long-standing parliamentary democracy may be said to have a constitution that is substantially older than the government defined by

its most recent formal documents. Laws, customs, procedures, and norms that have evolved over the centuries influence many parts of a nation's constitution.[6]

Nonetheless, every change in a nation's written constitution explicitly creates a new combination of procedures and constraints for the development and enforcement of law, and every newly written constitution legally supersedes both the written and unwritten parts of the previous constitution. Changes in the formal documents that affect fundamental procedures and constraints also tend to induce changes in the unwritten practices, especially in areas directly affected by the constitutional reform. In this sense, major constitutional reforms can be thought of as revolutionary (discrete), rather than evolutionary (continuous) in nature.

The present analysis focuses on the fundamental rules of the political game, most of which appear in written constitutional documents. These truly constitutional laws define the electoral system, specify the organization of the Riksdag, the relation of the king to the Riksdag, and characterize many of the constraints that define the limits and obligations of governmental activities. Much of this is explicitly written down in formal constitutional documents (the Instrument of Government, the Laws of Succession, and the Riksdag Acts.) These rules directly shape the broad outlines of modern Swedish governance by specifying the manner in which Swedish citizens choose representatives and the domain in which those representatives may and should act.

It bears noting that the CPE usage of the term constitution differs somewhat from that used by some Swedish political scientists and legal scholars. The term constitution, as used here, refers to the fundamental procedures and constraints of Swedish governance, rather than the subset of formal legal documents that claim constitutional status per se.

Durability and Stability

If a political constitution can be characterized as *the rules for making rules,* it is clear that the procedures and constraints of a constitution have to be fundamentally more durable and stable than the laws developed under them. That is to say, the procedures defined by constitutional laws have to be *taken as given* by policy makers on most occasions in order to serve as "rules of the game." It is in this sense that durability is a defining characteristic of political constitutions, and it is in this sense that ordinary legislation can be

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[6] See Sterzel (1994) for a concise history of administrative law and procedures within Sweden.

said to be developed through constitutional means. Constitutional procedures can only constrain ordinary day-to-day politics if they are not themselves a decision variable in every policy contest.

A written constitution is durable only if it remains in force. It is stable only if the formal and informal procedures in place at the time it is adopted remain in place until constitutional documents are formally amended. Constitutional durability and stability normally go hand in hand. A written constitution that does not provide a stable set of procedures is unlikely to be durable. A written constitution that provides stable procedures with a broadly supported political equilibrium tends to be durable.

However, a written constitution can be durable in the sense that it remains in force, but not stable insofar as fundamental policy-making procedures change radically through time without formally amending the constitution. For example, the 1809 Swedish Instrument of Governance and the present Norwegian instrument of 1814 have been durable, but not stable. The basic king and parliament template specified by those instruments remains in place in that these branches of governance continue to exist more or less as described by those constitutional documents. However, the division of policy-making power between king and parliament in these two countries was only partially characterized by their respective instruments of governance. In both countries, the power to make public policy shifted dramatically from the king to the parliament in the course of a century without significant changes in these formal constitutional documents.[7] The stability and durability of procedures for making new laws are related, but are not identical properties of constitutional law.

The stability of a particular constitution is largely a consequence of its formal and informal processes of amendment. In most constitutional democracies, revising constitutional procedures and constraints is more difficult than adopting ordinary legislation. For example, as noted above, article 15 of the Swedish constitution requires amendments to be approved by two successive parliaments separated by an election; ordinary laws require approval by only a single parliament. Article 5 of the U.S. constitution requires amendments to be approved by a two-thirds majority of both chambers of the legislature and by three-fourths of the state legislatures; ordinary legislation requires only majority approval in both chambers of the legislature and acceptance by the president. The laws and customs that specify the procedures by which a constitution can be amended determine the difficulty and cost of

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[7] Most new laws in constitutional monarchies are formally issued in the name of the king or queen. However, in the cases noted and several others, the sovereign has not attempted to overrule parliamentary "recommendations" regarding new laws for many decades. The Swedish constitution of 1974 formally ended this practice in Sweden, although the king had not exerted significant influence over policy in the twentieth century.

lawful constitutional reform. Relatively more complex amendment procedures help assure that a political constitution will be more stable than the laws developed under them.

Because every constitutional procedure can be amended or abandoned, stability requires some minimal continuing consensus among those with the power to reform (or ignore) existing constitutional procedures and constraints. Support by a nation's most powerful interest groups and political leaders can be sufficient to assure stable government procedures and constraints, as in early nineteenth-century Sweden and England. However, in a modern democratic setting, the constitutional consensus must be more broadly shared by those eligible to vote. This is one sense in which a democratic constitution can be regarded as a social compact. The amendability of such constitutional documents implies that ongoing procedures have continuing support within the electorate.

All that is required to assure a constitution's durability is a consensus or balance of power sufficient to support the existing constitutional *amendment process*. Stability occurs when relatively few formal and informal amendments are adopted. The more difficult the formal process of amendment, the less dependent formal constitutional stability is on the existence of a continuous political consensus of relevant policy makers.

The stability of legislative procedures and constraints not included in a nation's formal constitutional documents tends to depend more on continuing popular support than those included in formal documents within parliamentary democracies, because formal amendment procedures tend to be more cumbersome than those required to pass ordinary legislation.[8] Legislative stability, however, may also implicitly require supermajority support insofar as majoritarian law making is inherently unstable. (Public choice theory indicates that nearly every majority coalition can be replaced by another.) For legislative procedures and constraints to remain in place, they must advance the common interests of a wide range of majority coalitions. Indeed, stability itself may be one such interest.

Ordinary legislative procedures often include significant decision costs for the express purpose of increasing the stability of majoritarian decision

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[8] The constitutional law of the United Kingdom is nearly unique in not specifying an amendment process that is more complex than that of ordinary legislation. Majority approval in the House of Commons is sufficient for both new constitutional provisions and new legislation. The latter makes it difficult to discern clearly the difference between constitutional and ordinary legislation, yet, as argued below in section C, the latter is not uniquely a problem for the United Kingdom. Essentially all political constitutions include durable procedures and constraints that are enacted as ordinary legislation.

making.[9] For example, the stability of democratic legislation is increased by a variety of durable institutions such as internal rules of order, legislative norms, the internal discipline of political parties and ideologies that reduce the number of feasible majority coalitions.[10] In this manner, both formal and informal political institutions affect the cost of "amending" the informal portions of a nation's constitution.[11]

It bears noting that the cost of changing the status quo can be so high that it prevents amendments from ever taking place. In such extreme cases, institutions may provide so much stability that even an overwhelming consensus cannot secure desired policies or amendments. Political revolution or civil war may be said to occur out of necessity in such circumstances, because peaceful constitutional reform is essentially ruled out. To avoid the extremely high cost of civil warfare, while securing the advantages of stable constitutional governance, the amendment process should ideally be difficult enough to prevent temporary partisan interests from securing a permanent constitutional advantage, but not so difficult as to eliminate the long-term advantages of constitutional reform. When the amendment process is well designed, only those revisions with broad and continuing long-term support come to be adopted.

Difficulty of Completely Defining the Swedish Constitution

Because a nation's complete political constitution consists of all of its durable procedures and constraints for creating new laws, providing a complete description of a nation's constitution is a nearly impossible task. No single document exists where one can find a complete account of all long-standing

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[9] A modern curiosity for constitutional theorists is the current Swiss constitution. It includes many checks and balances on both ordinary legislation and constitutional revision, but actually specifies a *less restrictive* petition to force ordinary legislation to be passed by referendum (50,000 signatures, see article 89) than to force a proposed constitutional revision to be subjected to direct referendum (100,000 signatures, see article 120).

[10] Public choice theory indicates that, in the absence of procedural and other constraints, majority coalitions will be unstable, especially with respect to distribution issues. Shepsle and Weingast (1981) use the term "structure-induced equilibrium" to describe the stabilizing effects of institutions on majoritarian politics. For example, the division (2, 2, 2) can be defeated by (3, 3, 0), which can be defeated by (5, 0, 1) and so forth. Congleton (1997) and Buchanan and Congleton (1998) suggest that policies such as equal protection of the law and the generality principle are critical for the stability and durability of democracies.

[11] Congleton and Tollison (1999) demonstrate that the cost of organizing new majority coalitions can itself be substantial. The existence of such costs tends to promote the development of institutions and norms that make legislative outcomes more stable and, therefore, more durable than majoritarian voting rules imply; indeed, democracy may not be a feasible form of government without such institutional solutions to cycling problems.

governmental procedures and constraints. The "true" constitution of Sweden combines the durable parts of the written Swedish constitutional documents with other durable procedures and constraints adopted as ordinary law or by custom.

The modern Swedish constitution, thus, includes both more and less than specified in the formal language of its fundamental documents. Many informal parliamentary procedures and programs are sufficiently durable that they are taken as given in day-to-day policy-making decisions, whereas some parts of the documents that constitute the formal Swedish constitution are nearly constantly on the political agenda.

Broad procedures and constraints previously adopted as ordinary legislation are often deferred to in subsequent legislation in much the same manner that formal parts of the written constitution are. These include the internal organization of Riksdag committees and positions of leadership below those mentioned in constitution documents. The current outlines of many broad public policies, such as those regarding public pensions, unemployment insurance, and taxation, are similarly taken for granted in the course of ordinary legislation. Much of the internal organization of the state, especially in areas of federalism and civil law, predate by many centuries the most recent constitutional reforms.[12]

Sweden's present instrument of government is easily amendable, and neither a durable consensus nor informal aversions to amendment have been sufficient to make all parts of it equally stable. Many portions of the current instrument of government consequently resemble a handbook of governance subject to ongoing revision rather than an enduring social contract. Indeed, the many pages of formal amendments to the Swedish instrument of governance adopted in 1975 are now as long as or perhaps longer than the original constitutional documents.

Nonetheless, there remains a stable constitutional core to Swedish governance. Most fundamental aspects of Swedish governance have been both durable and stable for periods on the order of 50 years. The essential parliamentary template—the use of proportional representation, universal suffrage, adherence to the rule of law, and significant fiscal federalism—has remained in place for most of the past century. These stable and fundamental parts of the Swedish constitutional documents and "ordinary" legislation clearly serve as "the rules of the political game," which is the meaning of the term constitution that is used for the present analysis and throughout the constitu-

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[12] The civil code of modern Sweden is based on the Code of 1734, which is formally still in force today. Its formulation was influenced by many factors outside Sweden, but may be said to have evolved gradually from the 1350 common law established for Sweden during Magnus Eriksson's reign (Cronhult 1994, p. 37)

tional political economy literature. Major revisions to the "rules of the political game" have been formally undertaken only three times in modern Swedish history.

The three major reforms of Swedish constitutional law took place over periods of several years as a series of revised procedures and constraints were adopted. These episodes of reform are often referred to in this book by time periods rather than dates, for example 1907/9 or 1907/20, or 1970/75. This dating convention differs somewhat from that used by constitutional scholars in Sweden, but it is often a better description of the reforms of interest than a single date can be. The periods between these episodes of major reform—four or five decades—have generally been long enough for the reforms to be regarded as truly constitutional in nature, that is, as changes in the fundamental and durable rules of the political game.

Two of the episodes of reform involved major changes in electoral and parliamentary law, rather than changes to the instrument of governance. That is to say, there were only two instruments of governance during this time—those of 1809 and 1975—but four substantially different procedures for making new laws. The reforms adopted in 1866 and in 1909–20 clearly created substantially new political environments, and the results, consequently, will be referred to as the Constitution of 1866 and Constitution of 1920, respectively, rather than some less descriptive or more cumbersome phrase. This convention is faithful to the discussion above and simplifies the description of major constitutional reforms. The meaning of the term "constitution" used here implies that any major reform of the fundamental procedures and constraints of governance creates a new constitution, whether the IG is changed or not.

That not all major constitutional reforms are incorporated into Sweden's instruments of governance is sometimes a source of confusion, because Swedish legal scholars often mistakenly refer to the past and present instruments of government as "the" Swedish constitution. Prior to 1975, the Swedish instruments of government had specified only the very broad outlines of Swedish governance.[13] After 1975, the IG began to include many details of

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[13] This confusion is partly conceptual and partly linguistic. The various Swedish instruments of governance are often referred to as *grundlag,* which literally means "ground law." In common usage *grundlag* means "grounding law" or foundational law, and is very reasonably interpreted as constitution. However, prior to 1975, the instruments of governments failed to characterize the structure of the Riksdag or the manner in which its members were selected and so, as developed below, failed to characterize the fundamental process by which Swedish public policies (legislation) were put into place. The older term, *regeringsform,* is also translated as constitution, and literally means "ruling form" or governmental form, which is a more accurate description of the 1809 instrument of government (Herlitz 1939, p. 8).

policy having little to do with fundamental governmental procedures or constraints.

The modern Swedish constitution may be said to have emerged from four episodes of constitutional reform: one that produced the instrument of governance of 1809, one that created an elected bicameral Riksdag in 1866, one that created a much more democratic Riksdag in 1920, and one that ultimately produced a new instrument of governance with a unicameral Riksdag and a bill of rights in 1975.