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Constitutional Negotiations In Federal Reforms: Interests, Interaction Orientation, and the Prospect of Agreement

ASTRID LORENZ

University of Leipzig, Institute of Political Science, Leipzig, Germany

ABSTRACT Constitutional amendments in federal political systems have to be negotiated between national and sub-national actors. While theories of negotiation usually explain the outcome by looking at these actors, their preferences and bargaining powers, the theoretical model developed in this article also includes their interaction orientation. The article determines a typical sequence of bargaining and arguing and identifies favourable conditions for cooperation based on different interaction orientations. The article states that actors can reconcile the conflicting logics of intergovernmental or party competition and joint decision-making in constitutional politics through a sequence of bargaining and arguing. However, constitutional amendments negotiated in this way run the risk of undermining the legitimacy and functionality of constitutions.

KEY WORDS: Constitutional negotiations, federalism, interaction orientation, political reforms

Introduction

Given the important role of constitutions as the central framework to establish and preserve the preconditions for democratic governance, the lack of theoretical knowledge as to why actors in established democracies amend their constitutions is unsatisfactory. We know that changes in the political environment can cause pressure to adapt political institutions. Such pressure is particularly high in federal countries where the complex distribution of powers perpetuates the existence of various political and regional interests and ‘gives rise to demands for shifts in the allocation of functions from one government to the other’ (Livingston 1956: 11f.; see also Benz & Colino in this volume). However, despite a large number of existing case studies, we still have little general knowledge about how such pressure is transformed into constitutional amendments.

Veto players and negotiation theories attempt to fill this gap by focusing on the actors and their power and interests, but empirical evidence casts doubt upon such explanations of constitutional amendments. First, there are many more amendments than one would expect to result from rational choice reasoning. Second, the willingness of actors to cooperate is not always consistent over time, while the text of the amendment proposal, the interrelations between actors and the system and its rules remain constant. Third, many constitutional amendments do not maximise the net benefit of the veto players in the issues concerned.

Therefore, this article addresses the following question: Why do veto players usually agree to constitutional amendments? The article complements theories on institutions and negotiations based on conventional rational choice approaches by including dynamics of interaction orientations in the model of explanation. The first section describes the theoretical and empirical framework. The second section specifies patterns of negotiation behaviour and argues that varying interaction orientation affects the impact of interests and bargaining power, thus causing a characteristic sequence of bargaining and arguing in negotiation and varying conditions for agreement. While the article is based on comparative empirical research, its focus is on the theoretical argument, leaving the empirical material to serve an illustrative function. The third section places the proposed explanation into a more general theoretical framework. It argues that the sequence of bargaining and arguing allows actors to optimise their overall cost-benefit calculation rather than just the issue-related cost-benefit calculation. It can reconcile the conflicting logics of intergovernmental or party competition and joint decision-making in constitutional politics, but runs the risk of undermining the legitimacy and functionality of the constitution.

Theoretical and Methodological Framework

The most promising approach to explain negotiations and their outcomes is an actor-centred institutionalism (Scharpf, 1997). Actors' decisions are generally considered to be based on rational choice because it is a fundamental prerequisite for long-term survival in the system (Rescher, 1990: 117). Rational actors pursue interests from which they derive objectives and use instruments to achieve these objectives. They endeavour to maximise their individual benefit (see, among others, North, 1990; Czada & Windhoff-Héritier, 1991; Voigt, 1999). Decision-making is rational if actors evaluate a proposal using comprehensive information and evaluation criteria, explicitly formulate their preferences, anticipate the positions and behaviour of the other actors involved (particularly those with negotiating power), define acceptance zones for the negotiations, and derive options for action (Scharpf, 1997).

A main driving force for day-to-day politics in democracies is competition among parties that are committed to vote-seeking and policy-seeking in order to survive in the system. We may expect that this also holds true for constitutional negotiations, in particular those concerning the allocation of power and resources in a federal system. Unlike many other legal norms, they directly affect the decision makers. All this favours a rational cost-benefit calculation. For constitutional negotiations, there is another aspect to be taken into account: Amendments of the constitution usually have to be passed by majorities larger than day-to-day political decisions which

very often involve opposition parties in parliament (Maddex, 1996; Rasch & Congleton, 2006). Broad active approval of the norms shall guarantee the legitimacy of constitutional norms, their

long-time acceptance and binding effect. This rationale behind constitutionalism – cooperation in favour of the common good – obviously conflicts with the logic of party competition.

Conventional analyses of negotiations focus mainly on the bargaining powers and overlapping policy preferences of the veto players involved, an approach that was reinforced by veto player theory (Tsebelis, 2002). Its theoretical plausibility may not outweigh its limited ability to predict constitutional amendments. The political practice in federalist systems shows that, despite the aforementioned conflict of logic, parties are able to make joint decisions. This is especially true for federal countries with a higher number of parliamentary parties participating in the political process, which are reported to have the highest rates of constitutional amendments in all democracies. On the other hand, federal systems with a predominant party holding 50 per cent or more of the parliamentary mandates have the lowest rates of constitutional amendments (Lorenz, 2008).

The willingness to cooperate often changes over the course of time and therefore cannot be explained by rather static cost-benefit calculations, actor interrelations or bargaining powers provided by institutions. Such observations led authors such as R. Kent Weaver to increase the number of ‘independent’ variables. On the basis of his analysis of Canadian constitutional negotiations, he asserts that the key parameters that are likely to affect prospects for a constitutional amendment fall into roughly three categories: the characteristics of decision makers in a particular decision-making arena and their preferences, the number of arenas required for approval, and inter-arena relations (Weaver, 2000: 51, 74f.). Other empirical analyses of constitutional politics in multi-level and unitary systems also highlight the role of process dynamics for explaining constitutional change (Braun, 2009; Schultze, 2000; Schönlau, 2003; Elster, 1993; Elster et al. 1998). This is consistent with findings for other policy fields, observing the importance of processes, time, and sequences (Cohen et al., 1972; Kingdon, 1995; Pierson, 2000; Rueschemeyer & Stephens, 1997; Thelen, 1999). Nonetheless, why actors cooperate in constitutional amendment politics is still not clear. In particular, scholars disagree on how the process determines the outcome.

In order to contribute to theory-building in this field, the author has conducted process tracing studies of constitutional amendments in established democracies. The case selection provided for diverse politico-institutional and regional contexts, including unitary and federal countries, the presence or absence of a party holding at least 50 per cent of the parliamentary mandates, the number of ‘effective’ parties, the frequency of constitutional amendments in the given system, the age of the constitution, the constitutional rigidity and the amendment procedure. The cases covered different topics of constitutional amendments in two federal and two unitary states. All of the reforms analysed affected the territorial organisation of the state and the allocation of powers between levels.

The selected cases included the Canadian Constitution Act, 1999 (Nunavut) of 11 June 1998, which introduced political representation of the newly-created territory of Nunavut at the federal level; the Greek constitutional revision of 16 April 2001, which, among other issues, altered the relation between the nation state and the regions; the

Irish Twenty-sixth Amendment of the Constitution Act, 2002 of 7 November 2002, which explicitly permitted the state to ratify the Treaty of Nice; and the Amendment of the German Basic Law of 20 October 1997, which addressed financial self-responsibility of local governments and the assignment of tax revenues (for a more detailed account, see Lorenz, 2008).

The aim of the study was to detect similar patterns of actor behaviour in the constitutional negotiations within dissimilar contexts. These similar patterns of behavior were expected to explain the willingness to alter the constitution (cf. Przeworski & Teune, 1970). The approach increased the number of variables typically observed in process-tracing analyses by including the interaction orientation of the actors. Findings of some other recent analyses focusing on the constitutional developments within the European Union encourage the focus on patterns of behaviour (Scharpf, 2003: 10f.). Interaction orientation is defined as the guiding philosophy of actors which affects their choices and modes of interaction.

Interaction and conflict studies propose different typologies of philosophies guiding human action. While Scharpf distinguishes between solidarity, altruism, hostility, individualism and competition (Scharpf, 1997), Maki et al. (1979) distinguish between the motives of altruism, cooperation, individualism, competition, aggression, sadomasochism, masochism and martyrdom. For this study, the decision was made to distinguish only four ideal types according to two criteria: the relations of the benefit calculation (is it to benefit only one or more than one actor?), and the actors' disposition to come to a compromise (considerable or low).

'Individualistic' interaction orientation is defined as a mode that is geared solely to maximising self-benefit with little willingness to compromise. This orientation is consistent with the rational-choice approach. An interaction orientation is 'competitive' when an actor, while intending to maximise his or her own benefit, balances it in relation to the benefit of others and thus integrates others' perception into his or her own calculation. Individualist and competitive orientations both become manifest in what is often called a bargaining mode of behaviour. 'Cooperative' interaction orientation is defined by willingness to arrive at joint decisions and to at least partially abstain from maximising self-benefit. The interaction orientation is 'altruistic' if an actor is willing to compromise on institutional change for the benefit of other actors. Both cooperative and altruistic orientations become manifest in what is often called an arguing mode of behaviour or deliberative action (cf. Elster, 1991, 1998).

Interaction orientations, like preferences (Ganghof 2003: 5), can be inferred by interpreting the statements, reasoning and demands of negotiation participants. The analysis is based on documents and on information provided by media coverage, surveys and interviews.

Constant and Varying Factors for Agreement During Negotiations

This section draws theoretical conclusions from the empirical findings of the study on constitutional amendment processes, first pointing out the constant effect of power, day-to-day routines and vague preferences for negotiations. It then describes how varying interaction orientations during negotiations affect the conditions for agreement.

The Effect of Power, Day-to-Day Routines and Vague Preferences

The study confirms that the bargaining powers and policy preferences of actors are very important for understanding the negotiation process. Typically, constitutional amendments are proposed by the federal or central government or the (federal) government parties in parliament. Other agenda-setters usually fail to win the majorities necessary to adopt their bills. Even when an arguing mode of negotiation is predominant, powerful actors are more successful in persuading others.

However, the institutional veto structure does not perfectly mirror the real influence of actors. Actors who lack formal agenda-setting power may still realise their plans if they convince the government of their proposal (the federal government in federal states). This frequently used strategy follows routines in day-to-day politics. Here, the government is the formal, not the real agenda-setter. Moreover, a major part of the negotiations often takes place outside the institutional framework, on an informal basis. This is especially true for federal countries such as Canada and Germany where the (federal) governments substantially coordinate and influence the whole reform processes, although they never have formal *veto* capacity but are usually only one of the possible agenda-setters.

Finally, although varying formal procedures for constitutional amendments, especially those applied in federal systems, provide for participation of various actors at different levels, the negotiations are *de facto* structured by the interplay between only two (informal, ideational) coalitions. While the identity of these actors (or groups) and the level of the main game may change during negotiations and may vary between countries, the general dualist structure does not. While the first reactions to the amendment proposal are highly diverse and lines of conflict are not yet clear, the actors very quickly and voluntarily group themselves into two blocs. This effect is illustrated in Figure 1. The self-positioning of the actors with regard to these blocs is clearly influenced by routines and the power relations of day-to-day politics. Therefore, such blocs emerge in a shorter time in countries where routines of cooperation exist, such as in the cooperative federalism of Germany. Because of the self-grouping of actors, multi-level games and negotiations with many veto players may actually be played much more easily than would be expected by looking at the demanding formal institutional procedures for constitutional amendments.

Contrary to approaches which explain collective decisions by the allocation of (fixed and measurable) preferences, the study shows that such preferences often do not actually exist or that they are formulated too vaguely to establish specific preference orders and to bind the actors in constitutional negotiations. The proposals of the agenda-setters often surprise the other actors. Therefore, instead of following binding preferences of the collective actors, the representatives of these actors only make ad-hoc statements as individuals.

The explanatory power of veto power and preferences alone is also called into question by the fact that constitutional amendments usually benefit mainly the agenda-setter. Two examples help illustrate this important empirical finding.

In 1998, the Federal Parliament and the Senate of Canada adopted a Constitution Act which gave the right to self-government to about 25,000 people, most of them

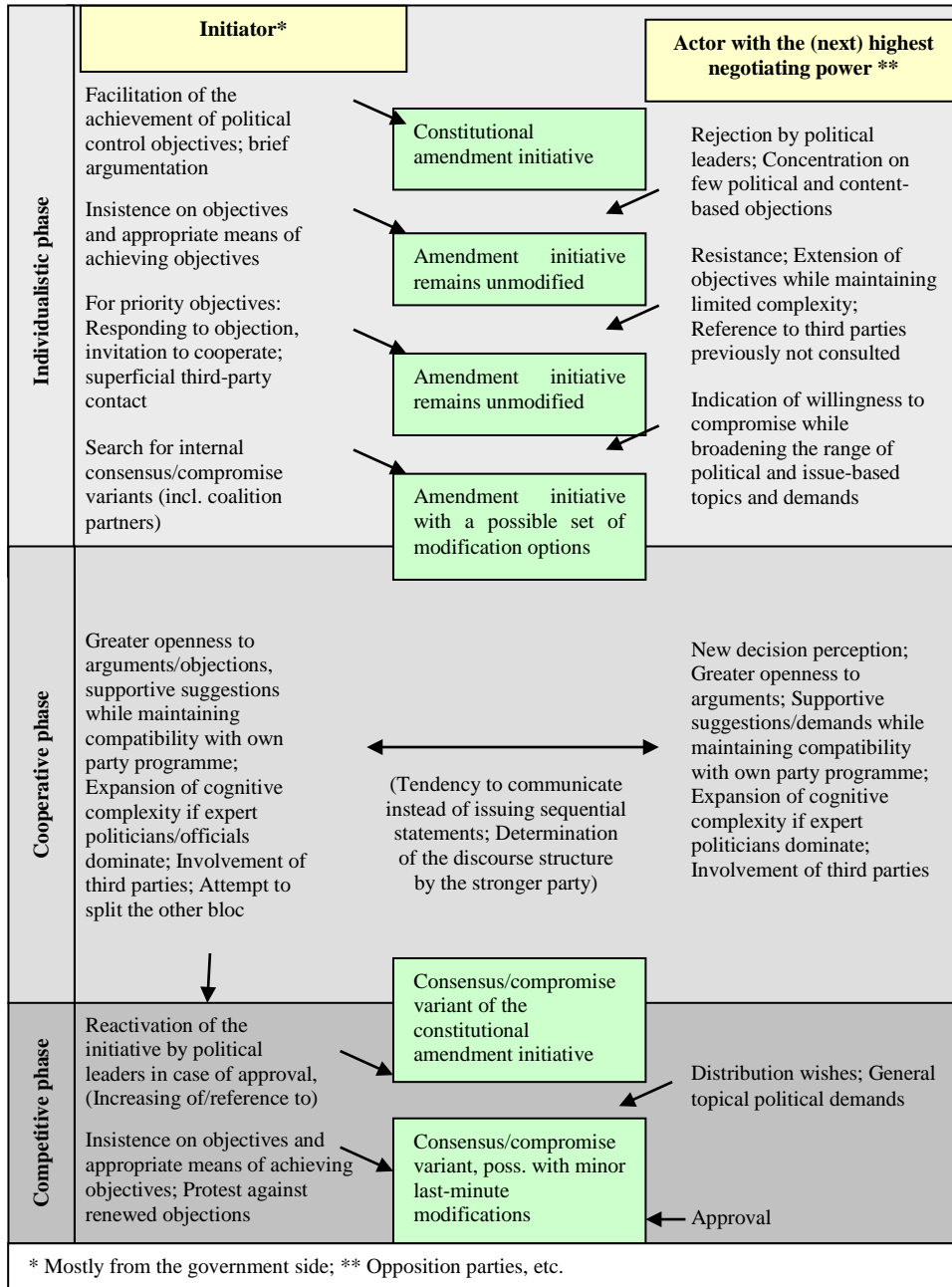


Figure 1: Observed course of constitutional negotiations in democracies

Inuit, in a region covering about 20 per cent of the Canadian territory. The negotiators agreed that the entire budget of the new territory of Nunavut, including extensive reform costs, would be paid by the federal government (and its successors), and that Nunavut would receive administrative and political autonomy which would be open to further expansion in the future. The veto players received no immediate benefit from this reform.

In Germany, in 1997, the Social Democratic Party and Alliance '90/The Greens, then in opposition, agreed to a constitutional amendment which was necessary to substantially decrease local trade tax. In doing so, the parties deviated from their own preferences on two issues: They allowed the conservative/liberal Federal

Government to realise a core issue on its agenda (a tax policy to support enterprises), and to limit local financial autonomy although they had long promoted strengthening it. In return, local

governments got the right to have a permanent share of the federal value-added tax, but this implied neither the authority to decide on this tax nor a constitutional guarantee to actually receive a fixed share. There was no benefit for either opposition party from this reform.

Varying Interaction Orientations During Negotiations

In addition to the observations related to bargaining power and preferences, the study also allows for some general conclusions concerning interaction orientations. Obviously, interaction orientations of the major actors typically vary in a particular sequence over time, along with conditions for cooperation. Three of the four ideal types – individualistic, cooperative and competitive interaction orientation – were observed empirically. Figure 1 summarizes the findings.

The individualistic phase

During the first negotiation phase, an individualistic interaction orientation is usually predominant (for the agenda-setting phase, see also the article by Toubeau in this volume). The agenda-setters’ approach to keep the scope of the reform and the text of the proposal as narrow as possible and to provide only brief explanations to avoid conflicts (the ‘keep-it-simple’ principle) does not prevent other actors from bringing forward many objections regarding the purpose of the proposed constitutional amendment, the nature of the underlying objectives, the way these objectives should be achieved, and other aspects. Even proposals for minor alterations of the constitution cause distributive, ideological and organisational conflicts. Routines of day-to-day politics structure the interactions.

At this stage, as Figure 2 illustrates, actors who have little negotiating power and *apparently* little benefit from the proposed constitutional amendment tend to refuse to cooperate. Actors who have little prospect of benefiting and strong negotiating power tend to cooperate only if the agenda-setter signals a willingness to consider modifications to the proposal according to their demands, if they expect other benefits from promised package deals or if they expect to increase their public reputation. Actors who have a greater prospect of benefiting from the proposal

Figure 2: Predicting the willingness to cooperate during the individualistic phase

		Prospect of benefit from the amendment	
		Little	Great
Negotiating power	Strong	Cooperation only if proposal is significantly modified or in case of great non-substantial prospect.	Greater willingness to substantial cooperation; little willingness to compromise
	Little	Refusal to cooperate	Greater willingness to cooperate/ compromise on matters at issue

and little negotiating power tend to demonstrate a willingness to cooperate and compromise. Actors who anticipate benefiting from the proposed constitutional amendment and who have strong negotiating power are less willing to consider compromises and demonstrate much less willingness to cooperate. The actors thus follow the rational choice paradigm of risk avoidance and limit cooperation to issues that further their own aims. However, they often do not carefully anticipate the perspectives or demands of other actors and their statements lack conceptual coherence.

From the empirical evidence one may conclude that, given an individualistic interaction orientation, actors agree to cooperate only if they generally support one or some of the agenda-setters' objectives, if they expect to benefit from a package deal and if the agenda-setter signals a willingness to compromise on certain aspects. For example, the Social Democrats, the main opposition party in the German case, which also governed some *Länder* which had to agree to the proposed constitutional amendment in the *Bundesrat*, were interested in compensation by the federal government for the tax decrease which could bring a net benefit for the many poor communities in 'their' *Länder*. Moreover, they were interested in 'selling' their approval to the constitutional amendment in exchange for an 'ecology-tax' to be introduced by the federal government and for concessions in other non-related policy fields such as social policy. Since such conditions are not easily met, this phase is usually very long. The mode of interaction is bargaining, and the relevant interplay takes place between the agenda-setter and the actor with the next greatest power in day-to-day politics. An agreement to cooperate is the signal for entering negotiations.

The cooperative phase

The decisions of the two main actors to enter into negotiations are usually accompanied by the delegation of the power to negotiate to individual delegates. Most of these are either politicians with special expertise or administrative experts. The chief delegates demonstrate a considerably high degree of issue-specific competency and are well prepared at the meetings. Driven by the agenda-setter's wish to pursue their plans, the actors meet more frequently and in a more coordinated manner. These changes generally coincide with a striking modification of interaction orientation. At this stage, statements and actions indicate cooperative interaction orientation, resulting in a distinct mode of negotiation. Arguing is now prevalent, which confirms observations made in policy studies and empirical analyses of other constitutional amendment processes (cf. Prittwitz, 2007: 15; Braun, 2009; Weaver, 2000; Joerges & Neyer, 1997).

At this stage, the agenda-setters' delegates act conciliatorily, size down the conflicts, insistently repeat key arguments and attempt to translate major conflicts into technical or judicial ones. In the German case, for example, the government insisted that the trade capital tax hampered the economic development in the new federal *Länder*. It forced the other negotiation participants to deal with organisational and financial issues of decreasing this tax by repeatedly setting these issues on the agenda of the meetings and providing the other actors with comprehensive information. Dealing with these issues prevented the participants from discussing the general relevance of the argument.

The other actors are often positively impressed with the agenda-setter's strong commitment to its amendment proposal and ideas, despite the critical objections and

vetoed looming. In the course of time, the constant repetition of key arguments by the agenda-setters seems to break down resistance. In addition, the willingness of the negotiation partners to compromise is strengthened by a growing trust in the expertise of the agenda-setter and the feeling that they are provided with comprehensive information and are taken seriously as a negotiating partner.

As a result, discussants are willing to consider the positive aspects of the proposal, to take into account issues which they had not found particularly relevant before, to reach the best solution for the political system irrespective of their own policy preferences and to accept measures as useful. They pay attention to arguments and refer to each other's proposals and statements. Frameworks of interpreting reality change and key arguments become weightier. In the Canadian case, the Inuit's wish to have their own territory became understandable through the historical background. In the German case, the negotiators accepted the argument that the trade capital tax hampered the economic development in the new federal *Länder*. In the Greek case, the chief delegate of the government was able to make the point that the planned revision of the constitution was a measure of (positively connoted) Europeanisation and modernisation. Third parties are also listened to, and they can influence the discussion if the agenda-setter or their main opponent takes up their ideas and suggestions. Thus, the dualist negotiation structure partially breaks down.

During the meetings delegates demonstrate a more complex understanding of the amendment proposal, including the different dimensions of decision making. Giving the Inuit their own territory within Canada, for example, was no longer perceived as just doing justice to a minority group: The participants also discussed how the proposal would affect various other issues, including the political, judicial and financial relationships between the federation and the territories (and provinces); the specific rights for minorities (First Nations); the constitutional principle of representation; modernisation conflicts; the internal political-administrative reforms in the Northwest Territories (NWT) which were already underway; the allocation of finance, goods and jobs in the Northwest Territories; and conflicts on land claims in the NWT.

However, the deliberative turn is not complete in this phase. Although the delegates are more inclined to compromise even though the initially proposed deals have not yet been realised and the general political climate does not encourage compromise, the cooperative interaction orientation does not imply endless openness to other actors' views. This openness is limited to the (countless) details of the constitutional amendment proposal which are not covered by clear programmatic positions of the collective actors. Politically salient issues are often addressed in the programmes and these positions may not be easily ignored by the delegates. In the Irish case, such sensitive points included abortion, tax policy and the military neutrality of the country. In these areas where Ireland's legislation deviated from the policies of the EU, some parties feared that further European integration would diminish national sovereignty. In the smaller number of the issues where the preferences are formulated clearly, the arguing mode of negotiation is less likely to lead to a change of positions of the collective actors represented by their delegates. Thus, arguing is practiced not so much in a cognitive sense as in a social sense of listening to each other.

Since discussing complex issues is demanding and since the agenda-setter's main interest is to realise its specific proposal, the participants primarily evaluate the *inside* options, that is, the best design for the proposed constitutional amendment if it

were to be adopted. Rather than on completely new ideas, considerations and negotiations focus on the initial proposal and the first counter-demands that are discussed in-depth. Accordingly,

conflicts are no longer related to the amendment proposal as such, but to the appropriateness of the means of achieving the goals of the agenda-setter, to conflicts between different goals, to the particular formulation of the amendment bill or to the distribution of resources. As a result, perspectives and perceptions narrow down in spite of the aggregated expertise of the negotiation participants. In the German case, for example, both the government and the other actors ignored the option of creating a completely new local tax (*Wertschöpfungsteuer*), whose introduction had been recommended by many economic experts in the main political advisory councils, although this new tax was able to compensate the losses of the local entities from decreasing their trade tax without hampering the economy. Obviously, arguing does not guarantee that a theoretically ‘best’ solution is considered.

In a nutshell, given a cooperative interaction orientation, veto players are more inclined to compromise and argue. Constitutional norms are often agreed upon, even if they require considerable changes of powers and routines of the participants and are therefore very costly (Scharpf, 1988, 2003; Closa, 2004). Thus, the cooperative interaction orientation of the delegates tends to decrease their collective actor’s benefit from the constitutional amendment (cf. also Prittwitz, 2007: 108). The emerging asymmetry of possible benefits provided by the informal agreement gives an advantage to the agenda-setter. This contradicts rational choice thinking.

The competitive phase

When a (still informal) agreement is reached, the delegates have to communicate the details to the collective actors. As a consequence, the infrastructure of the negotiation falls apart. Often the dominant interplay shifts to another arena of the political system, particularly in federal systems. Moreover, inter-level games may be played informally through side negotiations or re-negotiations at a different level or if actors invite participants of previous negotiations at a different level through hearings or informal talks in order to improve their own negotiation position. In the Canadian case, for example, the opposition parties invited Inuit NGOs and the NWT government which had negotiated the amendment with the federal government to present their position regarding the constitutional amendment bill in parliament. In the Greek and Irish cases, side negotiations took place at the European level. But even when the level is not changed and the participating collective actors remain basically the same, that does not necessarily mean that the majority of them specifically commit themselves to the interim agreement on a constitutional amendment proposal. From this point on, a competitive interaction orientation prevails.

All players involved now check to see whether the agreement conforms to their own objectives and, even more than during the first stage, whether the agreement is appropriate to meet their current needs in domestic or international politics. Party-political considerations which do not actually concern the substance of the constitutional amendment bill become significant in the decision-making and trigger demands for modifications. Thus, parallel developments in domestic politics and international relations can influence the amendment process. A catalyst for competitive

behaviour is that the negotiations now attract the interest of the media and the broader public, often for the first time. Media coverage can contribute to increasing conflicts between the political actors.

As a result of the changed interaction orientation, many collective actors reformulate their positions and demands regardless of their negotiating power. Previously raised objections are reactivated and compromises are called into question. Details of the agreement which had never previously played a significant role in the negotiations can provoke major conflicts. In the Greek case, for example, the government's plan to limit the constitutional protection of wooded areas, which played only a marginal role in the planned constitutional reform, surprisingly became a publicly debated salient issue. Although the number of conflicts is limited during this phase, with the distribution of goods and competencies always being an important topic, discussions are intense. Negotiations become chaotic and in many cases are likely to collapse.

While the bargaining mode of interaction indicates that the actors are trying to maximise their gains and to correct previous negotiation errors, an analysis of their demands shows that this strategy only works to a certain extent. The actors only seem to be concerned with the appropriateness of the central paradigm or philosophy guiding the agreement, including the distribution of power and resources, while only selectively investigating into the details. Again, alternatives to the constitutional amendment are not systematically evaluated.

The strategy to maximise their own benefits is also hampered by the misperception of the motives of other actors. The actors think that they are provided with full and comprehensive information about the opportunities and risks of the constitutional amendment, particularly by those who are directly affected by the planned constitutional amendment. However, these actors have hidden agendas and do not provide full information. Actors who had participated in previous negotiations at another level and are now being reactivated by veto players are usually much more interested in getting the agreement ratified, rather than just reopening the game for better negotiation results. This is also true for actors whose demands were not fully met during the cooperative stage of negotiations. Instead of using the opportunity to find allies to reintroduce their demands or to support actors who formulate their previous demands, they generally tend to support the achieved agreement of the amendment bill as a good solution. The Inuit and the NWT government, for example, told the committee members in parliament that the negotiated solution was the best compromise even though they were dissatisfied with the reform process. Their aim was to guarantee that the reform would be implemented as scheduled.

In order to reach the final agreement, agenda-setters often accept minor modifications, either to the constitutional amendment bill itself or to laws relating to the amendments. They may also compromise on other policy issues. Moreover, they regularly show some willingness to renegotiate matters with third parties, as long as these actors are not actually interested in extensive modifications. Symbolic acceptance of the demands in public statements and declarations without legal relevance is also very common at this stage. At the end of this competition over changes to the amendment bill, many actors then adopt the bill, declaring that they have achieved the *best possible* solution. Those who vote in favour of the bill often include actors who have neither significantly influenced the amendment nor gained from its substance.

Thus, competitive interaction orientation implies having distinct conditions for an agreement. Actors agree to cooperate if they expect gains from an amendment proposal or from side benefits, if the adoption is compatible with tactics in political competition, and if the agenda-setter is willing to make necessary modifications or to accept demands symbolically. While the bargaining mode of interaction is comparable to the individualist interaction orientation, competitive orientations go along with different calculations. Small gains are more acceptable because the actors evaluate them in relative rather than absolute terms, comparing the gains with those of others who had previously negotiated with the agenda-setter. In addition, the constitutional amendment proposal is the result of a negotiation path, and it may be costlier to change this path and renegotiate the proposal completely than to accept the reached agreement. The actors want to close the often protracted negotiation process with an actual decision rather than with no decision being made at all.

These observations show that interests and interaction orientations, along with the general distribution of power, explain the prospect of agreement in constitutional negotiations. The conditions to reach an agreement vary according to the respective interaction orientation, making them an adequate parameter to structure the negotiation processes into different phases. Table 1 summarises their main characteristics. In addition, the path of negotiations structured by the varying interaction orientations

Table 1: Characteristics of negotiation phases

	Individualistic Phase	Cooperative Phase	Competitive Phase
Contacts between actors	Sporadic	Regular to quasi-permanent	Sporadic
General willingness to cooperate	None	High	Limited
Form of governance	- (Elements of competition at the end)	Negotiations, network, hierarchy*	Competition
Conflicts	Extensive, including non-related policy matters	Extensive to intensive	Intensive for specific points (esp. distribution, symbolic matters)
Attempt to resolve conflicts	Initiator indicates options for compromise with reference to non-substantive benefits	Translation of major conflicts into technical, legalistic issues, search for compromise (importance of third-party involvement)	Small concessions, including non-related matters and symbolic action
Process-related agreements	None or with non-binding power	Yes, but no predetermination of final decision	Yes
Context sensitivity (politics, media, elections)	Medium	Low	Medium to high

* Hierarchy refers to the ministries and administration

has a great impact on the negotiation result. When a constitutional amendment is finally adopted, the ensuing distribution of gains is substantially shaped by the first proposal of the agenda-setter as well as certain agreements made during the competitive stage of negotiations. Compromises reached during the cooperative stage of negotiations are usually related to operational and legal issues.

Interpreting the Patterns of Negotiation Behaviour

The absence of clear, stable preferences that are pursued with a high level of commitment, along with the typical sequence of constitutional negotiation processes, have strong implications for the theoretical understanding of constitutional amendments. This section is an attempt to interpret the observed patterns of behaviour and determinants of constitutional outcomes with regard to rational choice thinking and to demonstrate that the conclusions, while working for all democracies, are particularly relevant for understanding constitutional development in federal systems. Amending federal constitutions is not as difficult a task as many authors assume it to be. Indeed, in most federal systems amendment initiatives are less likely to result in constitutional stalemate than in incoherent constitutional change.

Following a concept of 'thin rationality' (cf. Ferejohn, 1991), one notes that actors who behave in the aforementioned ways combine 'errors' made in the individualistic phase (lack of anticipation and coherency) and 'errors' stemming from cooperative social behaviour (compromising outside overlapping preference zones) with 'errors' provoked by ad-hoc competition that is focused on conflicting side issues. The negotiation behaviour favours asymmetric gains through cooperation, and constitutional amendments take place much more often than expected by conventional constitutionalist, rationalist or veto player theories, especially in federal systems with many parties.

Contrary to concepts of 'thin rationality', it appears that adhering to this sequence of interaction orientations is useful for the actors in coping with an increasingly complex and dynamic environment and making many parallel decisions on possible institutional adaptations quickly. Constitutions are complex social constructs, which are affected by various dynamics of the political environment, particularly in federal systems with high institutional complexity and a large number of actors involved. Therefore, actors in federal systems are constantly forced to expect and deal with a wide range of possible changes of the constitutional order. Even incremental changes of the constitution often create complex normative, substantial and organisational problems. This forces actors to develop features of adaptive behaviour.

The first point of this study is that being rational implies inventing means to cope with problems when they start to become permanent difficulties. Rational actors in complex societies have to develop systems of internal functional differentiation which include experts for various issues who may be sent to negotiations as individual delegates. Other mechanisms include the reduction of social complexity by dualist grouping and the use of cognitive heuristics (looking at the general objectives of a proposal) or social heuristics (looking at what others do) as shortcuts in making fast and appropriate decisions (Goldstein & Gigerenzer, 2002; Gigerenzer & Selten, 2002).

The empirically observed means of dealing with problems may fail to solve the problems completely and may even create new ones. Functional differentiation, for

example, may cause problems of control, coordination and implementation (Scharpf, 1999). In fact, the issues at stake in the negotiations on a federal constitution are usually too complex and too difficult to explain to politicians without a certain special expertise, while the political options and risks of the political game as a whole which is played by the top politicians are too complex and too difficult to convey to specialised politicians, who usually tend to consider their own issues as the highest priority. This makes it complicated to control whether delegates deviate from the preference order of the collective actor and whether their decisions are efficient to realise internally agreed political programmes (cf. Lau & Redlawsk, 2001: 951f.; Shepsle & Bonchek, 1997: 53 ff.).

However, risking some particular suboptimal decisions with routines may be more promising for an actor in the long run than optimising the decision-making processes for each particular negotiation. Also, accepting negotiation results which do not offer maximum utility gives time and resources to deal with other political issues. This offers an overall benefit. In this light, the particular modes of the individualist, cooperative and competitive phases of negotiations may be interpreted as various shortcuts of decision-making that together are compatible with the rational interest in optimising costs and benefits of internal decision-making in the long run.

The second point is that the environmental dynamics make it unreasonable for collective actors to clearly set many specific fixed preferences because they will not stand the test of time. Preference-related conflicts will undoubtedly arise, unintended or unrecognised effects of previous decisions will occur, new tools to achieve objectives will have to be considered, or new objections to the use of traditional tools for achieving objectives will be raised. Even where fixed preferences are set, the complexity of issues makes a clear calculation of costs and benefits impossible (Landwehr, 2005) and actors may lack the capacity to calculate costs and benefits properly.

In this light, a perfect rational choice is not only time- and resource-consuming (thus favouring the search for decision-making shortcuts and functional differentiation), it is actually nearly impossible to achieve at all. It makes no sense to invest resources in optimising decision-making which may never be optimised. Instead, it is much more reasonable to develop compensation strategies that are designed to maximise gains from cooperation which do not refer to the material substance of the negotiation. Actors offer general approval to an amendment bill to gain side benefits either from compromises on other policy issues (package deals) offered by the agenda-setter, from improving public reputation or from strengthening the agenda-setter's willingness to reciprocate in the future. Making demands that do not refer to the substance of the amendment and a certain context sensitivity of decision-making which are typical of the individualist and competitive interaction orientations may therefore be suitable to maximise overall gains.

The third point is that the collective actors accept bargaining and arguing as tools for preference building and preference readjustment. Agenda-setters are aware that possible mistakes and negative externalities of their own decisions can be expensive. They are also aware that other actors will raise various objections to their constitutional amendment proposal during negotiations and that the audience, if there is one, knows that this is part of the political business. Therefore, it makes sense for them to offer proposals for constitutional amendments which are good but not yet perfect and to

focus on minimising possible public criticism only with regard to a few potentially high salient issues at the agenda-setting stage. Possible errors or inappropriate solutions in the proposal may be

corrected later if uncovered by others. This has the positive side effect that the agenda-setter may present such corrections as results of a compromise, thus strengthening the chance for reciprocal compromises.

For the other collective actors, criticising policy proposals is something they do because they are expected to. However, arguing can also be beneficial. Deliberating on arguments for and on objections against the constitutional amendment proposal provides a chance to outweigh internal cognitive and organisational shortcomings in preference formation, and sharing experiences with others reduces the individual costs of designing policy concepts. Therefore, all actors have an interest in talking with each other and in achieving a certain degree of compromise.

The fourth point is that being rational implies anticipating future negotiation settings in the given politico-institutional context. It is reasonable to do this in a very general form to save costs. Nearly all modern democracies have institutionalised systems of checks and balances which require a certain degree of inter-party cooperation to govern. Elections change the distribution of power among actors, but they rarely change the identity of the actors involved in politics. Anticipating to meet powerful negotiation partners again and again in varying settings in the future favours cooperation, irrespective of the specifics of a proposal under negotiation.

The incentive to take future settings into consideration is particularly high in federations where governments have to cooperate in dealing with day-to-day politics. When a government knows that they will meet with other governments several times in the future and that one day it may need the other's agreement to implement their own policies, making other governments inclined to cooperate in the future should be a very strong motivation to make concessions, provided that there is a realistic chance for reciprocity. Only actors who do not expect a positive 'tit for tat' reaction because they anticipate being excluded from future decision-making will benefit more by dissenting strongly, thus focusing on image-building to attract votes while reinforcing their special status.

The study indicates that, in general, actors are more willing to make sacrifices to benefit their negotiation partners than is usually expected (cf. Scharpf, 1997), even when there are no immediate package deals determining what they will get in return. This has strong long-term implications. Every decision made under similar conditions decreases the costs of the next one over a certain period of time. The effect lowers, *ceteris paribus*, the threshold at which future joint decisions become profitable (Silvestre, 1987; Lorenz & Seemann, 2009). Thus, cooperation routines have a certain effect. While, in principle, cooperation is always possible, the politico-institutional context of negotiations and past interactions affect the probability or frequency of cooperation. As Michael Taylor puts it, the 'egoism-altruism combination changes in a way which depends on the history of the players' choices in previous games and on whether these choices were made voluntarily' (Taylor, 1991: 176).

Considering all these points, non-maximising individual benefits from constitutional amendments may be rational from the point of view of the collective actors, if the principle of rationality is not defined too narrowly as the maximisation of gains from every single decision. According to a wider concept of rationality, sequentially

following different interaction orientations during constitutional negotiations can make sense for collective actors because it allows them to make flexible and fast decisions, to save decision costs and to maximise accumulated gains in the long run. From the collective actors' point of view, the sequence of arguing and bargaining may be a way to reconcile the different logics of competition

and cooperation which are inherent in the political structure of modern democracies, especially in federal systems with many actors involved.

From this reasoning, we may derive the following hypotheses to explain constitutional amendments: First, the more complex and dynamic the environment of the negotiations, the higher the probability that they are structured by a sequence of different interaction orientations of the participating actors. This is particularly true for federal systems. Second, the more the general politico-institutional context favours routines of cooperation among different actors, the higher the probability that the actors agree to an ordinary constitutional amendment without benefiting from its substance. This is particularly true for cooperative federalism and federal systems with many actors in parliament.

Comparative studies on long-term collective decision-making will have to show if this reasoning holds true for many cases and various types of reforms (cf. Behnke et al. in this volume). In addition, the effects of the negotiation behaviour on the constitution and a federal system have to be analysed. Every amendment to a constitution which is rejected because of interests which do not refer to its substance, and every amendment which is adopted for reasons other than its substantive benefit for the common interest jeopardises the normative legitimacy of constitutions and their capacity to really bind parliaments and governments. In each of these cases, the sum of the choices of a higher number of actors may not protect against unilateral interest politics, as it is predicted by constitutionalist theory. One may question whether the partial consideration of systemic needs which is observable during the cooperative stage of negotiations may outweigh such a risk. Many critical notes on the coherence and problem-solving capacity of recent constitutional change in federal democracies remind us that the ability to win large majorities for amendments does not necessarily imply a special quality of these amendments. Cooperation is not a value in itself (Benz 2008, 2009).

Conclusion

This article has analysed constitutional negotiations in established democracies, based on an actor-centred institutionalist approach. Starting from the observation that conventional negotiation studies fail to adequately explain constitutional amendments, it complements these studies by considering not only the interests of the relevant actors but also by their interaction orientation. Generalising findings of a comparative study on constitutional negotiations, the article confirmed that the effect of competing interests is not always the same. Moreover, asymmetric gains from cooperation are accepted. Interaction orientation has proved to be a dynamic element of the explanatory model. Three typical interaction orientations during the negotiation processes were identified which determine how actors negotiate, resulting in distinct conditions for agreement and generating a sequence of arguing and bargaining.

Given an individualistic interaction orientation, actors strive to follow the principle of ‘thin’ rational choice. While the agenda-setter is very important in determining the direction of the constitutional amendments, other actors agree to cooperate only if they are generally in favour of one or more of the agenda-setter's objectives, if they expect an additional benefit from a package deal and if the agenda-setter signals a willingness to compromise on certain aspects. Cooperative interaction orientation makes it easier to reach an agreement but does not automatically guarantee it. Favourable factors include translating political conflicts into organisational or legal conflicts, providing comprehensive information, insistently repeating key statements and giving other actors the feeling that they are taken seriously as negotiation partners. Given a competitive interaction orientation, the actors re-evaluate their cost-benefit situation and are influenced by contexts. But in contrast to the individualist interaction orientation, they evaluate the relative rather than the absolute benefit.

The last section of the article proposed an overarching theoretical framework according to which the described pattern of negotiation behaviour may prove beneficial to the actors, particularly in federal systems. They facilitate flexible and fast action, reduce decision-making costs and allow actors to maximise the balance of present and future gains. The more complex and dynamic the environment of the negotiations, the higher the probability that they are structured by a sequence of different interaction orientations of the participating actors because this sequence, from the actors' point of view, may reconcile the antagonistic logics of competition and cooperation, particularly in federal systems with many actors. The more the general politico-institutional structure favours routines of cooperation among different actors, the higher the probability that the actors agree to an ordinary constitutional amendment without benefiting from its substance.

Future studies will have to discuss the long-term effects of such negotiation behaviour on the legitimacy and functionality of constitutions. The balance between competition among collective actors who pursue their own interests and cooperation in favour of the public interest, which constitutionalism should stabilise, is fragile. Political science should take any signs indicating a possible structural imbalance seriously.

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References

- Benz, Arthur (2008), From Joint-decision Traps to Over-regulated Federalism – Adverse Effects of a Successful Constitutional Reform, *German Politics*, Vol. 17, No. 4, pp.440-456.
 Benz, Arthur (2009), Ein gordischer Knoten der Politikwissenschaft? – Zur Vereinbarkeit von Föderalismus und Demokratie, *Politische Vierteljahresschrift*, Vol. 50, No. 1, pp.3-22.

- Braun, Dietmar (2009), Constitutional Change in Switzerland, *Publius*, Vol. 39, No. 2, pp.1-27.
- Cohen, Michael and March, James and Olsen, Johan P. 1972: A Garbage Can Model of Organizational Choice, *Administrative Science Quarterly*, Vol. 17, pp.1-25.
- Closa, Carlos (2004), The Convention method and the transformation of EU constitutional politics, in: Erik O. Eriksen and John Erik Fossum and Agustín J. Menéndez (eds.), *Developing a Constitution for Europe*. London and New York: Routledge, pp.183-206.
- Czada, Roland and Windhoff-Héritier, Adrienne (eds.) (1991), *Political Choice. Institutions, Rules and the Limits of Rationality*. Frankfurt and New York: Campus and Westview Press.
- Elster, Jon (1991), *Arguing and bargaining in the Federal Convention and the Assemblée Constituante*, Working Paper No. 4. University of Chicago: Center for the Study of Constitutionalism in Eastern Europe.
- Elster, Jon (1993), Constitution-Making in Eastern Europe. Rebuilding the Boat in the Open Sea, *Public Administration*, Vol. 71, No. 2, pp.169-217.
- Elster, Jon (ed.) (1998), *Deliberative Democracy*. Cambridge: Cambridge University Press.
- Elster, Jon and Offe, Claus and Preuss, Ulrich K. (1998), *Institutional Design in Post-Communist Societies. Rebuilding the Ship at Sea*. Cambridge: Cambridge University Press.
- Ferejohn, John (1991), Rationality and Interpretation: Parliamentary Elections in Early Stuart England, in Kristen Renwick Monroe (ed.), *The Economic Approach to Politics: A Critical Reassessment of the Theory of Rational Action*. New York: Harper Collins, pp. 279-305.
- Ganghof, Steffen (2003), Promises and Pitfalls of Veto Player Analysis, *Swiss Political Science Review*, Vol. 9, pp.1–25.
- Gigerenzer, Gerd and Selten, Reinhard (2002), Rethinking Rationality, in: Gerd Gigerenzer and Reinhard Selten (eds.), *Bounded Rationality. The Adaptive Toolbox*. Cambridge and London: MIT Press, 1-12.
- Goldstein, Daniel G. and Gigerenzer, Gerd (2002), Models of Ecological Rationality: The Recognition Heuristic, *Psychological Review*, Vol. 109, No. 1, pp.75-90.
- Joerges, Christian and Neyer, Jürgen (1997), Transforming Strategic Interaction into Deliberative Problem Solving. European Comitology in the Foodstuffs Sectors, *Journal of European Public Policy*, Vol. 4, pp.609-625.
- Kingdon, John W. (1995), *Agendas, Alternatives, and Public Policies*. New York: HarperCollins.
- Landwehr, Claudia (2005), Rational Choice, Deliberative Democracy, and Preference Transformation, *Studies in Social and Political Thought*, Vol. 11, pp.40-68.
- Lau, Richard R. and Redlawsk, David P. (2001), Advantages and Disadvantages of Cognitive Heuristics in Political Decision Making, *American Journal of Political Science*, Vol. 45, No. 4, pp.951-971.
- Livingston, William S. (1956), *Federalism and Constitutional Change*. Oxford: Clarendon Press.
- Lorenz, Astrid (2008), Verfassungsänderungen in etablierten Demokratien. Motivlagen und Aushandlungsmuster. Wiesbaden: VS Verlag für Sozialwissenschaften.
- Lorenz, Astrid and Seemann, Wenke (2009), Verfassungspolitische Konjunkturzyklen? Überlegungen zur Wirkungsweise konstitutioneller Rigidität, in Thomas Bräuninger and Joachim Behnke and Susumo Shikano (eds.), *Jahrbuch für Handlungs- und Entscheidungstheorie*, Vol. 5. Wiesbaden: VS Verlag für Sozialwissenschaften, pp.55-86.
- Lutz, Donald S. (1994), Toward a Theory of Constitutional Amendment, *American Political Science Review*, Vol. 88, No. 2, pp.355-370.
- Maddex, Robert L. (1996), *Constitutions of the World*. London: Routledge.
- Maki, Judith E. and Thorngate, Warren B. and McClintock, Charles G. (1979), Prediction and perception of social motives, *Journal of Personality and Social Psychology*, Vol. 37, pp.203-220.
- North, Douglass C. (1990), *Institutions, Institutional Change, and Economic Performance*. Cambridge: Cambridge University Press.
- Pierson, Paul (2000), Not Just What, but When: Timing and Sequence in Political Processes, *Studies in American Political Development*, Vol. 14, No. 1, pp.72-92.
- Prittitz, Volker von (2007), *Vergleichende Politikanalyse*. Stuttgart: Lucius & Lucius.
- Przeworski, Adam and Teune, Henry (1970), *The Logic of Comparative Social Inquiry*. New York: Wiley-Interscience.
- Ragin, Charles C. (1987), *The Comparative Method. Moving Beyond Qualitative and Quantitative Strategies*. Berkeley and Los Angeles and London: University of California Press.
- Rasch, Bjorn E., & Congleton, Roger D. (2006), Constitutional Amendment Procedures and Constitutional Stability, in Roger D. Congleton & Birgitta Swedenborg (Eds.), *Democratic Constitutional Design and Public Policy: Analysis and Evidence*. Cambridge/Massachusetts & London: MIT Press, pp. 319–342.

- Rescher, Nicholas (1990), *A Useful Inheritance: Evolutionary Aspects of the Theory of Knowledge*. Savage, Maryland: Rowman & Littlefield.
- Rueschemeyer, Dietrich and Stephens, John D. (1997), Comparing Historical Sequences: A Powerful Tool for Causal Analysis, *Comparative Social Research*, Vol. 16, pp.55-72.
- Scharpf, Fritz W. (1988), The Joint Decision Trap. Lessons from German Federalism and European Integration. *Public Administration*, Vol. 66, pp.239-278.
- Scharpf, Fritz W. (1997), *Games Real Actors Play. Actor-Centered Institutionalism in Policy Research*. Boulder, CO: Westview.
- Scharpf, Fritz W. (1999), *Governing in Europe. Effective and Democratic?* Oxford: Oxford University Press.
- Scharpf, Fritz W. (2003), *Problem-Solving Effectiveness and Democratic Accountability in the EU*. MPIfG Working Paper 03/1. <<http://www.mpifg.de/pu/workpap/wp03-1/wp03-1.html>>
- Schönlau, Justus (2003), Time was of the essence: timing and framing Europe's constitutional convention, in: Carlos Closa and John E. Fossum (eds.), *Deliberative Constitutional Politics in the EU*. Oslo: Arena Report 5, pp.245-272.
- Schultze, Rainer-Olaf (2000), Constitutional Reform as Process, in: Rainer-Olaf Schultze and Roland Sturm (eds.), *The Politics of Constitutional Reform in North America. Coping with New Challenges*. Opladen: Leske + Budrich, pp.11-31.
- Shepsle, Kenneth A. and Bonchek, Mark S. (1997), *Analyzing Politics. Rationality, Behavior, and Institutions*. New York and London: W. W. Norton & Company.
- Silvestre, Joaquim (1987), Economies and diseconomies of scale, in: John Eatwell, Murray Milgate, and Peter Newman (eds.), *The New Palgrave: A Dictionary of Economics*. London and New York: Macmillan and Stockton, Vol. 2, pp.80-84.
- Taylor, Michael (1992), *The Possibility of Cooperation. Studies in Rationality and Social Change*. Cambridge: Cambridge University Press.
- Thelen, Kathleen (1999), Historical Institutionalism in Comparative Politics, *Annual Reviews Political Science*, Vol. 2, pp.369-404.
- 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.
- Weaver, R. Kent (2000), The Politics of Institutional Reform in the United States and Canada, in Rainer-Olaf Schultze and Roland Sturm (eds.), *The Politics of Constitutional Reform in North-America. Coping with New Challenges*. Opladen: Leske + Budrich, pp.47-81.