



A 2004/10529

Christoph Engel / Adrienne Héritier (eds.)

Linking Politics and Law



Nomos Verlagsgesellschaft
Baden-Baden

Linking Political Science and Law

Table of Contents

1. Introduction	8
2. The Science/Law Divide	9
a) Science/Practice.....	9
b) Normative/Explanatory	11
c) Access to Facts	12
d) Disciplinary Norms	12
e) Different Legal Orders	13
f) Different Paradigms in Political Science.....	13
g) Zeitgeist	13
h) Specific Doctrinal Features	13
3. The Political Science/Law Divide in Particular	14
4. Legal Policy.....	15
5. Legal Studies	16
6. Pragmatic Solutions.....	17
a) Approaches	17
b) Topics	17
7. Outlook: The Opposite Perspective.....	18
References	20

Lawyers and Political Scientists: How much Common Ground?

Table of Contents

I.	Internal and External Perspectives of the Law.....	26
II.	An (Inclusive) External Perspective on Legal Formalism and Political Economy	36
III.	Exploring the joint space between law and political science.....	53
	a. Adelman and Morris	55
	b. Przeworski and Limongi	58
	c. Avritzer	62
	d. Trubek and Galanter.....	65
	e. Tamanaha	68
	f. Olson.....	71

Thomas Risse

Center for Transatlantic Foreign and Security Policy
Department of Political and Social Science
Free University of Berlin

**Law and Politics Beyond the Nation-State:
Areas of Conversation and Common Ground**

Table of Contents

Introduction: International Relations Theory Discovers the Law 82

“Internal” and “External” Perspectives of the Law: Where Can Lawyers and
Political Scientists Meet? 84

Institutionalism and Governance Beyond the Nation-State 86

 Three Logics to Studying Institutional Arrangements 86

 Rationalist Institutionalism and the Functional Analysis of Legal Arrangements..... 88

 Sociological institutionalism and the Internalization of (Legal) Norms 91

 “Deliberative” Institutionalism and Legal Reasoning 94

Instead of Conclusions: Areas of Further Conversation between Law and Politics
Beyond the Nation-State..... 97

References 99

**Rational Choice, Rational Agenda-Setting, and Constitutional Law:
Does the Constitution Require Basic or Strengthened Public
Rationality?***

Table of Contents

Introduction	110
I. Preliminary Issues	112
II. Legal Objections to a Constitutional Rationality Requirement?	117
III. Conceptual Objections to a Constitutional Rationality Requirement?	124
A. Defining Basic Rationality.....	124
B. Defining Strengthened Rationality.....	131
C. Minimal Rationality as a Solution?.....	138
IV. Pragmatic Objections to a Constitutional Rationality Requirement?	142
Conclusion.....	144
References	146

* Many thanks for their help and comments to Larry Alexander, Jonathan Baron, Steve Croley, Mike Dorf, Bill Ewald, Nate Persily, Eric Posner, Lawrence Solum and the participants in the Max Planck Institute, “Common Goods” Project Group, conference on law and political science; and to Christoph Engel and Adrienne Heritier for their generous invitation to participate in the conference. All errors are my own.

Politics and Adjudication: Problem Definition and Conflict Solution in European Electricity Policy

Table of Contents

I. Introduction	152
II. Problem Selection and Definition	152
1. Selection and Definition of Problems in the Political Arena	152
2. Legal Aspects of Selecting and Defining Problems	154
III. Legitimate Conflict Solution	156
1. Political Aspects	156
2. Solving Legal Conflicts	161
Conclusion: When Differences Constitute Links	166
References	167

Solving Conflicts and Securing Democratic Legitimation in the Energy Sector – A Legal Perspective on Associations’ Agreements as a Conflict Solving Mechanism –

Table of Contents

A. The role of associations’ agreements in the liberalisation process of German energy markets.....	169
B. Associations’ agreements as an efficient conflict solving mechanism?.....	175
I. All-inclusive contracts or contractual unbundling	175
II. Calculation of access charges and investments in data processing tools	176
III. Conclusion.....	176
C. Associations’ agreements and democratic legitimation	181
D. Changes and continuities in the Energy Bill from December 2002	183

**Institutional Dynamics in Environmental Corporatism:
The Impact of Market and Technological Change on the Dutch Polder
Model**

Table of Contents

1. Introduction	188
2. The Corporatist Structure of the Packaging Covenant: How does the ‘Polder Model’ Work?.....	190
2.1. Defining a Functionalist Research Perspective on Corporatist Governance.....	194
2.2. The Administration and Implementation of the Packaging Covenant	195
2.3. Evaluating the Results of the Packaging Covenant: Going Beyond Common Implementation Analysis of Policy Failure	198
3. Market Expansion and Horizontal Integration in the Waste Management Sector	202
4. The Impact of Environmental Management Systems on Government Licensing	208
5. The Impact of Market Expansion and Cooperative Licensing on Corporatist Governance.....	213

I would like to thank Tanja Börzel, Christoph Engel, Tom Heller and Wolfgang Streeck for helpful comments on earlier versions of this paper.

**Organising Co-Existence in Cyberspace
Content Regulation and Privacy Compared***

Table of Contents

I. From Cyberspace to Choice of Law — The Evolution of the Legal Debate 221

 1. First Generation, Fundamentalist Debate 222

 2. Second Generation, More Nuanced Debate 224

II. Privacy and Content Regulation – Stories of Precarious Success and
of Provisional Failure 229

 1. The Safe Harbour Compromise in Privacy 229

 2. Provisional Failure in Content Regulation 231

III. A Rational Choice Model of Content Regulation 232

 1. The Issue 233

 2. Limitations of the Model 233

 3. Empirical Validation 235

 4. The Core Argument 236

IV. National Preferences Before the Advent of the Internet 236

 1. Introduction 236

 2. Degree of Protection 237

 3. Evaluation 238

 4. Opportunity Cost 240

 5. Evaluation 240

 6. Taxonomy of Values 241

 7. Complications 243

V. The Impact of the Internet on National Preferences 246

 1. Degree of Protection 246

 a) Introduction 246

 b) Impact on Old Governmental Protection Technology 246

c) Impact on Problem Solving Capacity of Nation-States	249
d) Impact on Governance Externalities	249
2. Evaluation	250
3. Opportunity Cost	250
a) Higher Opportunity Cost of Old Protection Technology	251
b) Opportunity Cost of New Protection Technologies	252
4. Concomitant Goods	253
VI. Coordination of National Behaviour in General	256
1. Win-Win Situations	256
2. Strategic Interaction Over Agreement	258
a) Nuisance Value	259
b) Multilateral Protection	260
c) Dynamic Element	261
3. Strategic Interaction over Implementation	261
VII. Organizing Co-Existence in Particular	262
1. Defining Co-Existence	262
2. Protection Technologies	263
a) Introduction	263
b) Re-Introducing Nationality Barriers	264
c) Mutual Enforcement	265
d) Re-Inventing the Nation-State	265
3. Win-Win Solutions	266
4. Strategic Interaction over Agreement	268
5. Strategic Interaction over Implementation	268
VIII. How is Privacy Different?	269
1. The Issue	269
2. National Preferences before the Advent of the Internet	269
3. Impact of the Internet on National Preferences	270
4. Coordination of National Behaviour in General	271
5. Organizing Co-Existence in Particular	272
IX. Conclusions	273
References	275

* Henry Farrell and myself originally planned a joint paper. It turned out that our convictions about the appropriate explanation for the differences between content regulation and data protection fell too far apart. Henry Farrell, however, had already written section I of this paper, which he generously agreed to leave as part of what now is my individual paper. I also am grateful to Adrienne Héritier and Katharina Holzinger for their helpful comments on an earlier version, and to Darrell Arnold for the linguistic trimming of the paper.

**The Constitutional Court – Applying the Proportionality Principle –
as a Subsidiary Authority for the Assessment of Political Outcomes***

Table of Contents

I. The Simplistic Hypothesis.....	287
II. Qualifications from the Political Sciences	289
1. The Limited Role of Rationality for Analysis.....	289
2. The Limited Role of Rational Problem Solving in Politics.....	291
3. Evaluation is Political Action.....	292
4. Normative Counter Arguments	293
III. Qualifications from the Law.....	295
1. Dogmatic Limitations.....	295
2. Underlying Rationale	296
IV. Modest Expectations	297
1. Modest Rationalization of Politics	297
2. The Constitutional Court as a Subsidiary Assessment Authority	300
V. The Proper Role of the Constitutional Court in Assessing Political Outcomes....	302
VI. Dogmatic Consequences	307
1. Legitimate Aim.....	307
2. Conduciveness.....	311
3. Least Intrusiveness	312
4. Not Overly Onerous	312
VII. Conclusions	314

* Most valuable research assistance by Christian Schmies is gratefully acknowledged. Thanks also go to Michael Bauer, Melanie Bitter and Adrienne Héritier for their helpful comments, and to Darrell Arnold for the linguistic trimming of the paper.