

# Chapter 11

## Is the Swiss Constitution Really Constitutional? Testing the “Veil of Ignorance” Hypothesis over Time

Karin Ingold and Frédéric Varone

### 1 Introduction

In this chapter, we suggest an empirical analysis of the power distribution outlined in the current Swiss constitution. We furthermore concentrate on the historical evolution of the constitutional text. We compare three points in time: the original Federal constitution of 1874, its complete revision in 1999, and finally the text in force in 2011.

Switzerland can be considered as some kind of a special case. While we can confirm the first hypothesis outlined in the “veil of ignorance” research program, namely that political power relations dominate over economic and perceptual power, we obviously have to reject the second and third hypotheses. Empirical results confirm that direct democratic instruments—where Swiss citizens through their voting right (i.e., mandatory vote for all constitutional amendment) also become the constitution drafters and adopters—seem to reduce drafting uncertainties. This might explain why the Swiss constitution is dominated by instrumental over social power relations (hypothesis 2) and why it rather ascribes than limits power (hypothesis 3).

After outlining the historical background from the Federal constitution’s genesis and adoption in 1874 until today, we present the content analysis of the 2011 constitutional text. In the fourth section, we then systematically test the three overall hypotheses and show the evolution of power relations in the Swiss constitution. In the last section, we compare results from the versions of 1874, 1999, and 2011. Finally, we conclude highlighting the major results and explanations that make Switzerland and its constitutional text a special case.

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K. Ingold (✉)  
University of Bern, Bern, Switzerland  
e-mail: karin.ingold@ipw.unibe.ch

F. Varone  
University of Geneva, Geneva, Switzerland  
e-mail: Frederic.Varone@unige.ch

K. Ingold  
The Swiss Federal Institute of Aquatic Science & Technology,  
Eawag, Dübendorf, Switzerland

## 2 Historical Background: The Constitutions of 1848 and 1874

Modern Switzerland is created with the promulgation of the constitution of September 12, 1848. The constitution lays the foundation stone for the new Federal nation-state which emerged from a very loose confederation of 25 independent cantons considering themselves Sovereign states. Since 1815, a conference of cantons' delegates—called the “*Diet*”—was empowered to implement the “*Federal Pact*,” a treaty guaranteeing the independence of each canton and, at the same time, their mutual assistance. However, the *Diet* was not a real Parliament and the *Federal Pact* could not be regarded as a formal constitution either (Kölz 2006: 167). Furthermore, no Federal Government was elected at that time to exercise executive powers (Linder 1994: 5).

The constitution of 1848 marked thus a paradigmatic institutional change. It was adopted in response to the “*Sonderbundkrieg*,” a quick civil war opposing Protestants (or Progressives) to Catholics (or Conservatives) in November 1847. The conflict between a majority of protestant and industrializing cantons, on one side, and a minority of catholic and rural cantons, on the other side, crystallized around the traditional role devoted to the Catholic Church in public affairs, and the strengthening of the central power within the cantons' confederation. Protestants were in favor of a laic State and power centralization; they tried unsuccessfully to overthrow the Government of Lucerne by force when, in 1844, the Jesuits took over the secondary education in this canton. In reaction, seven conservative cantons—namely Schwyz, Uri, Unterwalden, Lucerne, Zug, Fribourg, and Valais—formed the so-called *Sonderbund* (i.e., literally the “separate league”) and negotiated a separate treaty to protect their common interests and rights. They wanted to preserve the traditional role of the Church, and they were also skeptical about any centralization process which could lead to the formation of a Federal Government. The progressive cantons demanded the dissolution of the *Sonderbund*, but it was only in 1847 that the *Diet* declared this “separate league” to be a violation of the *Federal Pact*. The conflict then escalated into a 27-day—but almost bloodless—civil war. Finally, the *Sonderbund* was ended after a major battle taking place in Lucerne: The Catholic *Sonderbund* members surrendered after their defeat against the Federal troops. The various cantons, which had been engaged in this religious conflict, then united to form a single nation-state (i.e., a real Federation replacing the confederation of cantons in place between 1815 and 1848; see Linder 1994: 6).

The victorious Progressives were logically the leading drafters of the Federal constitution of 1848. Their proposal provided (1) for Federal authorities including a Parliament (*Federal Assembly*), a Government (*Federal Council*), and a judicial power (*Federal Supreme Court*); (2) a federalist structure of the Swiss State with three levels of power (i.e., Federal, cantonal, and municipal), with subsidiarity as guiding principle and, consequently, with the necessity to have an explicit constitutional base for every new policy competency delegated by the cantons to the

Federal power; and (3) a mandatory vote by the people and by the cantons to introduce, or to refuse, any new constitutional amendment. This constitution's draft was submitted to a popular vote in the various cantons. In September 1848, the *Diet* declared the constitution adopted as a large majority of people and cantons had accepted it.

The Swiss constitution of 1848 is directly influenced by its counterpart in the United States (US). As a matter of fact, several claims of the Catholic cantons against power centralization were similar to the grievances expressed by anti-federalist forces in the USA a few decades before (Linder 1994: 6). As a compromise solution between Progressives and Conservatives, the 1848 Swiss constitution finally combines the democratic principle (i.e., one person, one vote) with the federalist principle (i.e., one canton, one vote) (Linder 1994: 16–18). For example, the *Federal Assembly* is organized as a two-chamber system based on the American model: The *National Council* represents the people, while the *Council of States* represents the cantons. Furthermore, this parliamentary bicameralism is perfect insofar as both chambers are equal: The *Federal Assembly* can only exercise its powers through the agreement of both chambers. The strong power of the “upper chamber” should thus protect the Catholic minority from unilateral decisions taken by the Protestant majority. The same institutional balance between democracy and federalism is also at work when it comes to changing the Federal constitution. In order to be adopted, a constitutional amendment that is submitted to citizens in the form of compulsory referenda always requires a “double majority” of both the people (majority exceeding 50 % of the voters) and the cantons (i.e., majority of 13 cantons at least).

The constitution of 1848 was then revised at several occasions, either partially (1866, 1891, 1921, etc.) or entirely (in 1874 and 1999 only). The global revision of 1874 did not change the structure of the Swiss Federation per se but extended the direct democracy beyond the existing mandatory popular vote that had to be organized on every constitutional amendment proposed by the *Federal Assembly* and *Federal Council*: “The system was extended in 1874 with the introduction of the optional referendum for laws (1874), with the popular initiative (1891) and the referendum for international treaties (1921). (The year 1977) brought a first extension of direct democracy in foreign policy, and in 2003, a second reform opened the optional referendum for all substantial international treaties” (Linder 2009: 66–67).

Of particular interest here is the *popular initiative* that allows for a total or partial revision of the Federal constitution<sup>1</sup> and generally takes the form of a formu-

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<sup>1</sup> Note that Swiss citizens may *not* propose a new law or to modify an existing law through a popular initiative. But 50,000 citizens or eight cantons may launch an *optional referendum* against federal laws, urgent statutes exceeding one year of validity, or, under certain conditions, international treaties. This optional referendum requires only a simple majority of the people in order to succeed (i.e., to prevent the entry into force of the tackled law). Approximately 7 % of the legislative production that is eligible for an optional referendum is effectively challenged in the ballot via this direct democratic instrument.

lated draft (i.e., concrete proposal of a constitutional amendment). Launching a popular initiative requires 100,000 signatures. To be accepted (i.e., to modify the constitution), the initiatives require a “double majority” of both the people and the 26 cantons forming today the Swiss Federal system. Note that the *Federal Assembly* can propose a counterproposal to the popular initiative on which the citizens also vote at the same time. In the case of an initiative and a counterproposal, a third question is added, asking citizens which of the two they prefer.

Owing to popular initiatives, on one side, and to the proposals directly formulated by the *Federal Assembly* and *Federal Council*, on the other side, the Swiss constitution was subject to continual changes over time. In a nutshell, no less than 140 constitutional amendments were accepted since 1874. From a historical perspective, we observe an increased use of popular initiatives (i.e., proposals formulated by citizens) and mandatory referendum (i.e., proposals formulated by the Federal Parliament and Government) since World War II. In particular, the more frequent activation of direct democracy has been related to the growth of the Federal “welfare state” (see Linder 2009 for a detailed account of this long-term evolution). As every new policy competency gained by the Federal authorities needs a formal constitutional base (see the compromise negotiated in 1848 and presented above), there were several popular votes on specific policy issues. These partial revisions of the Federal constitution concerned, for example, the guarantee of private property rights and land use planning, the development of public infrastructures (i.e., transportation, energy, and communications), education and research, health care, the consolidation of social insurances, economic and labor market regulation, the adjustment of fiscal policies, environmental protection, defense and external affairs, and morality issues such as abortion and biomedicine. The gradual addition of more than one hundred ad hoc amendments unsurprisingly led to a patchwork and to internal incoherencies of the Federal constitution of 1874. The Federal authorities thus decided to revise it completely in the mid-1960s. This revision process took more than four decades to eventually translate into a new fundamental text in 1999. Even if this new constitution is a global revision of the former text of 1874, it does not, however, change the institutional structure of the Swiss Federal nation-state. It shall be considered as an update of the 1874 constitution without changing it in substance. The new version of the Federal constitution was approved by popular and cantonal vote on April 18, 1999, and it came into force on January 1, 2000. The following section recapitulates the milestones and outputs of this long decision-making process.

### 3 Genesis of the Constitution of 1999

We first address the historical context of the new constitution’s genesis and then present the interests of its drafters and adopters. Section 4 will discuss its core elements in terms of power relations, as conceptualized in the theoretical chapter of this volume (Imbeau and Jacob 2015).

### 3.1 *Drafting and Adopting the Constitution of 1999*<sup>2</sup>

Several attempts completely to revise the Federal constitution failed before the 1960s. In September 1935, for example, 72 % of voters and 22 cantons rejected a popular initiative calling for a new constitution. In 1966, the *Federal Assembly* finally accepted two parliamentary motions asking for a major constitutional revision. Two expert groups, directed by a *Federal Councillor* (i.e., an elected member of the Federal Government), were designated to elaborate a first draft of the new constitution. The so-called *Furgler commission*<sup>3</sup> presented its proposal in November 1977. This draft was submitted by the Government to an open public consultation procedure. About 885 reactions coming from the cantons, political parties, interest groups, trade unions, private firms, NGOs, associations, etc., were collected, analyzed, and weighted. This external consultation helped identify five main conflictual issues, namely (1) the limitation of private property rights and economic freedom, (2) the institutional relations between the Federation and the cantons, (3) the people's right to launch a popular initiative, (4) the constitutional review of Federal laws by the *Federal Supreme Court*, as well as (4) new social goals and rights. The latter corresponded mainly to unwritten fundamental human rights that were recognized by the *Federal Supreme Court's* extensive case law and that were already guaranteed in the European Convention on Human Rights (ECHR), which Switzerland ratified in 1974.

Notwithstanding this impressive preparatory work, the revision process was strongly delayed when Rudolf Friedrich was elected as successor to Kurt Furgler in the *Federal Council*. But 1986–1987 brought a new start: The *Federal Assembly* urged the Government to pursue the formal update of the constitution, and Elisabeth Kopp took over the head of the Ministry for Justice and Police. Great expectations accompanied this personal change in the Federal Government.

However, the whole revision enterprise was soon frozen, once again, when the Government decided to change its strategy toward the European integration. Concretely, the *Federal Council* decided to participate in the European Economic Area (EEA) and, furthermore, to apply for full accession to the European Union (EU). In accordance with the Federal constitution, entry to the EEA required a mandatory referendum. On December 6, 1992, a day which became to be known as the “Black Sunday,” the Swiss citizens rejected a popular vote, and in contradiction to their Government's position, joining the EEA. Through this refusal, Switzerland found itself with a disadvantageous access to the single European market. Since membership to the EU had proved to be unviable due to domestic opposition, the Government pursued a strategy of “sectoral bilateral agreements

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<sup>2</sup> This historical sketch is mainly based on the yearly accounts of Swiss politics exposed in the “*Année Politique Suisse*” since 1976.

<sup>3</sup> Kurt Furgler was President of the *Federal Council* in 1977 and at the head of the Justice and Police Ministry.

with EU” with the aim to counter economic isolation. In parallel to this European policy, the revision of the Federal constitution was relaunched to stimulate an internal reform of Swiss institutions and their anchorage in the Federal constitution.

In June 1994, the *Federal Council*—with Arnold Koller as new Minister in charge of the Justice and Police Ministry—proposed a revised draft of the Federal constitution. This new governmental proposal suggested (1) doubling the number of signatures required for a popular initiative and an optional referendum, (2) strengthening the role played by the cantons in foreign affairs, (3) implementing the freedom of information and transparency principles in public administration, and, last but not least, (4) guaranteeing social goals and human rights. Note that the constitutional review of Federal laws by the *Federal Supreme Court* was abandoned in this new proposal.

After a second public consultation procedure organized in 1995, the draft went to the parliamentary commissions of the *Federal Assembly* in 1996. The MPs did not change dramatically the content of the text that had been elaborated by the *Federal Council* and integrated the remarks formulated during the public consultation procedure, with the notable exception of direct democratic rights: The MPs preferred to keep the *status quo ante* (i.e., lower number of signatures necessary for validating a popular initiative or an optional referendum). So, exactly 150 years after the birth of modern Switzerland, the Parliament approved the new constitution on December 11, 1998, with a very large majority in the *National Council* (i.e., 134 Yes, 14 No, and 31 abstentions) and unanimity in the *Council of States* (i.e., 44 Yes). This constitutional text was then submitted to a popular vote. On April 18, 1999, 59.2 % of the voters and 13 cantons accepted the new Federal constitution, which came into force on January 1, 2000.

### 3.2 Interest of Drafters–Adopters

In the Swiss context, it is quite difficult—if not simply impossible—to clearly distinguish between the drafters and the adopters of the Federal constitution of April 1999. Much preparatory “drafting” work was realized by successive expert groups directed by a member of the Federal Government (1977–1995) and then discussed by specialized parliamentary commissions in both chambers of the *Federal Assembly* (1996–1998). However, these rather “closed” and internal institutional venues were complemented by two very open and external consultation procedures (1977–1980 and 1994–1996), during which all political and non-political actors had the opportunity to articulate their opposition to the drafted text and, furthermore, to propose alternative contents and formulations.

These extensive public consultation procedures are essential in the Swiss political system, which is often interpreted as an emblematic case of “consensus democracy” (Lijphart 1999). Specifically, actors opposing a constitutional change

may use direct democratic voting campaigns to challenge the new constitutional provisions proposed by the political elites. Voters may overturn formal decisions made by the Government and the parliamentary majority through a negative vote at the *mandatory referendum*. Uncertainty for the dominant political coalition is thus introduced to the constitutional decision-making process through the use of direct democracy. The threat of being defeated at the ballot box, and thus of blocking any change to the constitutional *status quo*, acts like a Damocles' sword pending over the whole constitution's revision process. As a general consequence, direct democracy has led to power-sharing institutions and to a large governmental coalition (according to the seminal hypothesis formulated by Neidhart in 1970; see also Papadopoulos 2001 and Vatter 2009).

There are also tangible impacts of direct democracy on the particular decision-making process investigated here: The constitutional considerations and specific positions of all political and non-political actors, which might otherwise (successfully) oppose any constitutional change during a referendum campaign, are already integrated at the pre-parliamentary phase of the decision-making process—where the initial constitutional proposals are elaborated—in order to avoid an *ex post* defeat in the popular vote. The mandatory referendum is thus a key institutionalized veto point that can be used by opponents to any constitutional change and can be labeled as a “veto player referendum” (Tsebelis 2002: 125).

All in all, it does *not* make sense, when analyzing the Swiss case, to undertake a separate analysis of the interests promoted by the constitution's drafters on the one hand and by its adopters on the other hand. Instead of such a double analysis, we proceed hereafter to the identification of the main cleavages between the actors who supported, versus those who opposed, the Federal constitution submitted to popular vote. This empirical analysis is based on an *ex post* survey of 1,203 Swiss citizens that was realized in April and May 1999. This empirical sample is representative of the different linguistic regions and cantons of Switzerland, as well as of the education level, professional occupation, age category, and gender distribution within the whole population (see Delgrande and Linder 1999). Five results of this statistical analysis are relevant for our interpretation of actors' interests:

1. First, the French- and Italian-speaking cantons were stronger supporters of the new constitution (with approval rates of 79 and 74 %, respectively) than the German-speaking cantons (61 %). Furthermore, the rural municipalities within the German-speaking part of Switzerland were the most reluctant to accept the new constitutional provisions (54 %).
2. Two socioeconomic factors are important to understand the final outcome of the vote: Younger citizens who had benefited from a higher education level (i.e., higher preceptoral power) and who earned a higher revenue (i.e., higher economic power) showed the highest approval rates. It is also noteworthy that other socioeconomic characteristics of the survey respondents (i.e., gender, religion, and civil status) have no explanatory power.
3. Voters who are affiliated to or sympathizers of the political left (i.e., Social Democrats) or the center right parties (i.e., Christian Democrats and Liberals)

supported the constitutional revision. On the contrary, 83 % of the voters belonging to the radical right end of the partisan spectrum (i.e., Swiss People's party) opposed the global revision of the Federal constitution. This major cleavage between all political parties, on one side, and the extreme right, on the other side, is also reflected by the values defended by the opponents to the constitution's revision: They neither support the political and cultural openness of Switzerland (i.e., no integration in the EU) nor do they accept equal opportunities between Swiss citizens and foreigners.

4. Apparently, the federalist structures and processes of the Swiss political system were not a decisive issue at stake. The statistical analysis shows no significant difference in the voting behavior of centralists and federalists.
5. Last but not least, citizens who do not trust the Federal Government and who are not satisfied with the present functioning of the Swiss democracy casted a NO-vote.

In summary, the authors of this study concluded that opponents to the constitutional revision were those who were attached to fundamental national myths formulated in the past: They were proud of their nationality and very much attached to the traditional political institutions. Their NO-vote translated an obsession with issues of identity: They were afraid of a dissolution of their country and the citizenship. Their decision was therefore not an expression of dissatisfaction with the constitution's content, but more a symbolic vote. It is why specific points or paragraphs outlined in the amended text were rarely explicitly criticized (Delgrande et al. 1999: 24).

## 4 Content of Today's Constitution

Here, we present the general architecture of the new Federal constitution and we proceed to an in-depth analysis and test of the three major hypotheses guiding this research.

- Hypothesis 1 There are more concerns for political power than for economic or preceptoral power in a constitution
- Hypothesis 2 There are more concerns for social power than instrumental power in a constitution
- Hypothesis 3 There are more concerns for negative than positive power relations in a constitution

In Sect. 5, those results are then compared to the power relations of 1874 and 1999. This allows us then to gain more knowledge on how the Swiss constitution evolved.

## 4.1 Description of the Constitutional Text

Today's Federal constitution contains approximately 24,654 words (in the French version that was coded here) and 197 articles, and it is structured in 6 sections. The Preamble and Title 1 (articles 1–6) define the characteristic traits of the *Swiss State* on its three levels of Government, namely Federal, cantonal, and municipal. Title 2 (articles 7–41) is entitled “Fundamental Rights, Civil Rights and Social Goals.” These articles establish a comprehensive and directly enforceable *Bill of rights* (e.g., right to life and personal freedom, right to privacy, freedom of religion and conscience, freedom of assembly, guarantee of ownership, exercise of political rights, and acquisition and deprivation of citizenship). Furthermore, this second section also defines a set of social goals, such as access to social security, to health care, to a suitable accommodation on reasonable terms, and to education and protection against the economic consequences of old age, invalidity, unemployment, and maternity. Title 3 (articles 42–135) presents the general principles for the *allocation and fulfillment of State tasks* by the Federation, the cantons, and the municipalities. This third section stipulates which authorities are—exclusively or jointly—competent for the main policy domains: security and defense, education and culture, environment and spatial planning, public works and transport, energy and communications, economy and employment, social security and public health, finance, etc. Title 4 (articles 136–142) is dedicated to political rights in general and to the instruments of *direct democracy* in particular (i.e., popular initiative and mandatory or optional referendum). Title 5 (articles 143–191) presents the composition, prerogatives, and standard operating procedures of the Parliament (*Federal Assembly*), the Government (*Federal Council*), and judicial authorities (*Federal Supreme Court*). Finally, Title 6 (articles 192–195) contains transitional provisions as well as the rules of the game for any upcoming partial or total revision of the Federal constitution.

## 4.2 Statistical Results from the Content Analysis

We found 931 power relations defined in the current Federal constitution. Two-third of these relations concern political power; only 10 % relate to economic power relations and 5.7 % to preceptoral power relations (see Table 1). The dominant source of power is thus authority; wealth and knowledge sources are by far less prominently defined and considered.

Furthermore, the constitution drafters emphasized instrumental (62.9 %) rather than social power relations (36.8 %). That means concretely that agents are given or taken the competence to act on things or events, rather than the competence to act over other actors or people.

**Table 1** Characteristics of power relations in the Swiss constitution of 2011 (percentage)

<i>Resource of influencing party</i>	
Authority	62.4
Wealth	10.1
Knowledge	5.7
Indeterminate	21.8
Total (N)	100.0 (931)
<i>Type of power</i>	
Instrumental	62.9
Social	36.8
Indeterminate	0.2
Total (N)	99.9 (931)
<i>Direction of power relation</i>	
Positive	98.5
Negative	1.5
Total (N)	100.0 (931)

And interestingly, only a negligible amount of power relations limits the competence of agents (1.5 %). A large majority of power relations (98.5 %) give agents the capacity to act over events or people. The Swiss constitution generally assigns, rather than limits, the capacity of agents. This fact will be explored more in detail in the following sections.

### ***4.3 Which Agents Are Identified in the Constitution?***

We will outline hereafter the agents who are mostly engaged in power relations as defined in the current Swiss constitution. In the federalist context of Switzerland, it makes furthermore sense to identify the institutional level (Federal, cantonal, and municipal) those actors belong to.

As outlined in Table 2, at 34.4 %, the Swiss confederation is the agent most often engaged in power relations. Furthermore, the confederation is always linked to other agents (social power), but never to events or things (instrumental power). At the national level, the other two most active agents are the Swiss Government (i.e., the Federal Council) and the Swiss Parliament (i.e., the *Federal Assembly*), engaged in 7.4 and 6.3 % of power relations.

The cantons are the second most involved agents in the constitution with 12.4 % of the power relations. Municipalities are only mentioned three times (0.3 % of power relations).

Obviously, another very important agent is the Sovereign, namely the people (who may be called to the ballot box to vote on a popular initiative or referendum). Different expressions exist in the constitution to name the Sovereign. We outline

**Table 2** Most important agents involved in positive and negative power relations (percentage)

	Positive	Negative	Total
Federal level			
Confederation	34.4	0	34.4
Federal Council	7.2	14.3	7.4
Parliament	6.2	7.1	6.3
Cantonal level			
The cantons	12	28.6	12.4
Municipal level			
Municipalities	0.3	0	0.3
The Sovereign			
The people	2.7	7.1	2.8
Every person	2.9	0	2.9
Citizen	1.8	0	1.8
Others	32.5	42.9	32.7
Total (N)	100.0 (917)	100.1 (14)	100.0 (931)

in Table 2 the most common ones: People are mentioned 2.8 %, «Anyone» 2.9, and the citizen 1.8 % when it comes to define the power distribution in the Swiss constitution.

#### 4.4 Which Capacities Do These Agents Have?

Overall, Table 3 provides us with three important insights. First, for all power sources, instrumental power always dominates both social and negative power relations. Second, the percentage of social power within each power source (authority, wealth, and knowledge) gets smaller as we go from authority to wealth to knowledge: In political power relations, 43.2 % are social relations and therefore concern at least two agents, a source and a target; for economic and preceptoral power, only 35.9 and 32.1 %, respectively, is social relations. Third, no social relation is formulated negatively: All limiting power relations are expressed when an agent is in relation with a thing or an event.

Of the power relations that express the capacity to act over other agents (*positive social power*), 71.72 % concern political, 9.62 % economic, and 4.96 % preceptoral power relations. Therefore, we observe the same split between dominant authority, and a minority of wealth and knowledge power sources.

But the question here is not only who the “sources” of power relations are, e.g., the actors who exercise power over other actors, but also who are the “targets” of power relations. As illustrated in Table 2, the confederation is engaged in 34.4 % of all power relations. But whose power is enhanced? Upon a closer look at the current Federal constitution, one notices that more than half of all positive

**Table 3** Positive and negative power directions per source of power

	Positive	Negative
Authority		
Instrumental	321 (56.4 %)	12 (100 %)
Social	246 (43.2 %)	0
Wealth		
Instrumental	59 (64.1 %)	2 (100 %)
Social	33 (35.9 %)	0
Knowledge		
Instrumental	36 (67.9 %)	0
Social	17 (32.1 %)	0

relations that are coming from the confederation target the power of the cantons. The cantons on their side mostly target the power of the communes (around one-fourth of their power relations) and the confederation (again around one-fourth of their power relations). These relationships reflect both the Swiss “functional federalism” (i.e., the confederation formulates the public laws, while the cantons implement them) and the principle of subsidiarity (i.e., explicit delegation of powers from the cantons to the confederation for every policy sector newly regulated by the Federal level of power).

The Government and the Parliament target each other in most of their power relations. The Parliament furthermore often ascribes power to the Sovereign (one-fourth of its relations).

#### 4.5 Which Capacities Does the Text Take from These Agents?

To answer this question, we need to consider only negative power relations. Generally, and as outlined in Table 1, negative power relations are very rare and therefore the exception. And very interestingly, social power is never defined in a negative way (see Table 3). This means that no power relation is restricting in the current Swiss constitution when it comes to acting over other people. Furthermore, no negative power relation at all is defined within the category of preceptorial power (see Table 3).

From all relations where an agent is restricted in his/her capacity to act over an event or thing (*instrumental power*), 85.7 % concern political and 14.3 % economic power relations. The very few negative power relations (14 in total) are thus dominantly present within the category «authority» as the source of power. Table 4 illustrates who is limited in its instrumental power.

It is not a surprise that the cantons competences are—even though rarely—overall the most frequently limited. Article 3 of the Swiss constitution gives the

**Table 4** Limiting power relations (only instrumental)

	Article	Number of negative relations
Federal level		
Federal Council	144/162	2
Parliament	162	1
Cantonal level		
The cantons	39/127/134	4
The Sovereign		
The people	138	1
Others		
Foreigners	121	3
Judge	144	1
Chancellery	162	2
Total		14

overall sovereignty to the cantons if this sovereignty is not explicitly limited within the constitution as this is the case four times. Furthermore, it is interesting to see that also foreigners are limited in their action and that this is made explicit in the constitution. Overall, foreigners are mentioned 10 times, while three times their freedom of action is limited (Article 121).

## 5 Hypothesis Testing and Evolution Over Time

### 5.1 Power Distribution in Today's Constitution

The results presented above clearly show that the Swiss constitution contains a large amount of political power relations, and much less economic or preceptoral power relations. We can thus clearly confirm the first research hypothesis. Swiss constitution drafters–adopters seemed to be a more uncertain about the distribution of authority than of wealth or knowledge. Expressed differently, they were more certain about their future economic or preceptoral positions, than their political roles in the society.

Further, we have to reject the second and third hypotheses for the Swiss case. Constitution drafters–adopters tend to enhance instrumental rather than social power (hypothesis 2) and tend to ascribe rather than to limit power over events or people (hypothesis 3). We identified 63 % of instrumental and only 37 % of social power relations. But most strikingly, 98.5 % of the power relations enhance agents' power over others or on events/things. This leads us also to the conclusion that the theoretically deduced hypothesis 3 (for the overall research project), stating that the constitution tends to limit rather than to ascribe power, has to be definitely rejected for the Swiss case. Note that this generic hypothesis is also falsified in other countries, in Canada for instance (as demonstrated by Imbeau and Jacob 2011).

## 5.2 Power Distribution Over Time

Based on the above-outlined results and the developments during the last century that led to the successive revisions of the constitution, we suggest here a comparative investigation of three versions of the constitutional text: the original Federal constitution of 1874, the amended constitution of 1999, and today's version (2011). When doing that, it makes much sense to consider—besides the degree of uncertainty of the *constitution drafters*—also that of *Swiss citizens*. As all amendments to the Federal constitution have to be accepted by the people (i.e., mandatory popular vote with double majority of the people and the cantons), Swiss citizens' degree of uncertainty seems to be crucial too when investigating constitutional power relations.

We still assume that constitution drafters *and* the Swiss citizens were, at the moment of adoption of the constitution, under a certain “veil of ignorance.” But the pure fact that citizens intervene in constitution drafting and that we do not have a clear-cut in Switzerland between drafters on one side and adopters on the other leads us to the assumption that *over time* uncertainty was reduced.

Overall, and as outlined in Table 5, Swiss constitution drafters tend to be in general more uncertain about their future political positions rather than their economic or preceptoral positions in society. We therefore can confirm hypothesis 1 over the whole period of analysis. However, a slight reduction of uncertainty can be observed, as the difference between the three power resource types gets lower. Furthermore, those results confirm the major changes to the constitution outlined above (Sect. 3). They concern mostly authority issues such as institutional and procedural definitions of competences, of direct democratic and citizens' rights, and of Federal laws. Only few amendments concerned property or social rights redefinitions.

The reduction of uncertainty over time is further confirmed by the fact that instrumental power—even though always dominant in the Swiss constitution (see again Table 5 and the rejection of hypothesis 2)—gets more important over time and in relation to social power relations.

**Table 5** Comparison over time (in percentage)

	1874	1999	2011
Resource of influencing party			
Authority	83	72	62
Wealth	6	14	10
Knowledge	7	4	6
Type of power			
Instrumental	53	54	63
Social	47	46	37
Direction of power			
Positive	90	96	98
Negative	10	4	2

It seems that the Swiss constitution was not changed in the view of the least privileged individual in society (as suggested by the overall hypothesis 3). On the contrary, changes seem to go in the direction of ascribing rather than limiting the power of people. This fact got more accentuated over time until the stage where, today, almost all power relations are positively formulated in the constitutional text. We have three major arguments for explaining this diachronic evolution. First, and as outlined in Sect. 3, better educated citizens with higher revenues voted in favor of the new constitution; less privileged people mostly voted against. Second, direct democratic instruments strongly reduce uncertainty: During the extensive public (pre-parliamentary) consultation phase, not only the constitution drafters, but also diverse private and public representatives of economic and civil society interests were invited to comment on the constitution project. Together with the popular vote, this leads to the situation where a majority of people are defending their own interests rather than the ones of the less privileged people. And third, the Swiss constitution is subject to continual changes over time, as 100,000 Swiss citizens may launch a popular initiative to amend partially the Federal constitution. The mere existence of this direct democratic instrument also means that the long-term perspective of constitutional choices (underlying the Buchanan and Tullock hypothesis) is not perfectly given in the Swiss case. As a matter of fact, more than 140 constitutional amendments were accepted since the first constitution of 1874. Furthermore, the Swiss citizens may only modify the constitutional text through a popular initiative, but they may not propose a new law or modify an existing law through a popular initiative (see footnote 1 above). In a nutshell, the distinction between constitutional choices (choice of rules), on the one hand, and “in-period” choices (choices within rules), on the other hand, is not clear-cut in Switzerland. All in all and confirmed by our longitudinal analysis, we conclude that power in general, and political power in particular, is rather ascribed than limited in the Swiss constitution.

## 6 Conclusion

What did we learn about the Swiss case? Swiss constitution drafters—adopters—including the Swiss citizens—seemed to be more certain about their economic and preceptoral power positions; this is why they emphasized political power relations. However, their uncertainty was generally limited: They did not adopt the preferences of the less privileged individual which resulted in the fact that they rather ascribed than limited power in general, and political power in particular.

We highlight the fact that our preliminary results are compatible with previous studies on partial revisions of the Swiss constitution. Dietmar Braun has studied in detail the new equalization scheme and revision of competences between the Federal Government and the cantons “Neuer Finanzausgleich” (NFA) that was accepted by the Swiss people in November 2004 (Braun 2009). This major change concerns seven articles of the Federal constitution and more than thirty laws

about the respective policy tasks of the Federation and the cantons, the intensified collaboration between the cantons, the horizontal and vertical fiscal equalization schemes, etc. Braun (2009) concluded that this constitutional debate over NFA remains a “mixed motive game” (Vanberg and Buchanan 1989): It combines a two-step procedure that was strategically crafted by the political elite. The first phase was a general discussion about the principles of the NFA reform. It was based on “arguing,” behind the veil of ignorance (that was “crafted” by the reform leaders) as the cantons could not know in detail and with certainty the concrete outcomes of the NFA. Rather, the second phase was a classical “bargaining” process, focusing on the distributive outcomes (in the respective cantons) of the concrete application of the NFA principles adopted during the first phase. In one word, Braun (2009) convincingly argued that the careful separation of arguing and bargaining was a key factor for the success of the NFA reform: “The veil of ignorance helps to raise the level of discussion to arguing, but it cannot transform selfish interests into common good interests. The constitutional debate remains a mixed motive game throughout the whole process” (Braun 2009: 331).

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