THE INSTITUTIONAL FOUNDATIONS OF SUPRANATIONALISM IN THE EUROPEAN UNION

George Tsebelis
UCLA

Geoffrey Garrett
Yale University

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1. Introduction

The claim that the European Union is increasingly supranational is a central theme tying together much contemporary scholarship on European integration. The Commission, the Court of Justice, and the European Parliament are clearly important institutions, and their roles constitute one of the two key dimensions that set the European Union apart from other international regimes.[1] Moreover, the power of these institutions has led to the reemergence in recent years of claims about the process of European integration that bear close resemblance to those of Ernst Haas's neofunctionalism of more than forty years ago.

This article does not take issue with the general claim that the importance of supranational institutions is a defining characteristic of European integration. Rather, our primary objective is precisely to delineate how, when and why each of Europe's supranational institutions is able significantly to influence the integration process. This attention to the details of supranationalism is important because most work in the genre is content with sweeping – and we will argue often erroneous – generalizations about the pervasiveness of the phenomenon. Having analyzed these "institutional equilibria", we then conclude our article by referring back to the issue of "equilibrium institutions" [Shepsle 1986] what explains the evolution of supranationalism in the European Union?

The institutional structure of the European Union has been carefully laid out in the Rome treaty and its subsequent revisions. This structure is quite similar in many respects to those in stable parliamentary federations such as Australia and Germany. Our goal is not to explain this outcome. But we do think that scholars of the historical evolution of the EU should pay more attention to explaining its constitutional architecture, rather than continuing to debate the general influence of domestic and transnational actors versus national governments on European integration.

The core of our article is a unified model of the EU polity with two distinctive features. First, we analyze the effects of the EU's changing treaty base, from Rome to Amsterdam, on the relations among Europe's three supranational institutions – the Commission, the Court of Justice and the Parliament – and between these actors and the intergovernmental Council of Ministers. Second, we conceive of all these institutions in terms of the roles they perform in the three core functions of the modern state – legislation

and the creation of policy (the legislative branch), administration and the implementation of policy (the executive branch), law and the adjudication of policy disputes (the judicial branch).

Our central argument is that variations over time and across issue areas in the EU's legislative procedures have not only affected the power of legislative institutions (the Commission, Council and Parliament). They have also had a profound impact on the discretion of the Commission in the implementation of policy and the Court of Justice in the adjudication of disputes over policy.[2] The logic is simple. The more difficult it is for new legislation to be passed (for example, by higher voting thresholds or more veto players [Tsebelis 1995]), the more bureaucracies and courts are able to exercise discretion to move policy outcomes to those they prefer over the legislative status quo. This general approach to linking the legislative, executive and judicial branches of government is not new.[3] But what is novel about our analysis is our explicit focus on its implications for the influence of supranational actors over European integration.

The power of the European Parliament stems primarily from its role in legislative politics, and this role has increased dramatically since the ratification of the Single European Act in 1987.[4] Before 1987, the Parliament had no effective influence over legislation. With the ratification of the Amsterdam treaty on May 1, 1999, the Parliament became a co-equal with the Council in what is effectively a bicameral EU legislature – for all policy areas covered by the reformed codecision procedure (Amsterdam, Art. 189b). Taken together, the three revisions of the Rome treaty in the past fifteen years (SEA, Maastricht and Amsterdam) have significantly reduced Europe's "democratic d
Parliament in the legislative arena.[5]

Turning to Europe's judicial branch, the Court of Justice's main source of influence stems from its role as the interpreter of the EU's treaty base in the arbitration of conflicts among EU institutions and among these institutions, member states and citizens. The Court's influence over European integration was substantial during the Luxembourg compromise period [Weiler 1991]. We argue that this was because the unanimity requirement in the Council gave the Court considerable discretion concerning its interpretations of the Rome treaty. We contend, however, that the Court's power declined appreciably with the increasing use of qualified majority voting (QMV) in the Council after 1987. This is something that

Court watchers have observed in passing without paying much attention to it [Mattli and Slaughter 1998: 205]. The reason the Court lost power is straightforward. The move from unanimity to legislative procedures that permit the Council to decide by QMV reduced the range of policy outcomes (including Court decisions) that were invulnerable to legislative override by the Council.[6]

We finally speculate that the power of the Court is now on the rise again, particularly after the ratification of the Amsterdam treaty. The reason is that the increased role of the Parliament in legislation has expanded the range of judicially generated policy outcomes (i.e. Court decisions) that are invulnerable to change through the passage of new legislation. The discretionary space afforded to the Court in terms of statutory interpretation by the reformed codecision procedure may be smaller in spatial terms than was the case under the Luxembourg compromise (assuming that the preferences of legislative actors have not changed). But this is at least partially offset by the fact that the range of issues over that the EU presides – and hence over which the Court can adjudicate – is considerably larger than was the case before the SEA.

Analyzing the impact of the Commission on European integration is more complicated. Unlike the (legislative) Parliament and the (judicial) Court, the Commission fulfills two discrete functions in the EU. It is both a legislator with a monopoly on the drafting of bills and the bureaucracy charged with the implementation of legislation.[7] The Commission had scant agenda setting power under the Luxembourg compromise period because of the de facto unanimity rule in the Council [Garrett 1995a]. Commission agenda setting increased considerably with the move to QMV in the SEA, although under some circumstances this power was shared with the Parliament in matters covered by the cooperation procedure (TEU 189c) [Tsebelis 1994]. With the advent of codecision at Maastricht and its subsequent revision at Amsterdam, however, the Commission's effective influence over legislation has shrunk appreciably as legislative authority has been concentrated in the hands of the Council and Parliament [Tsebelis and Garrett 2000].

The Commission's ability to exercise discretion in the implementation of policy has also changed considerably in the past forty years. All else equal, one would expect that the Commission's discretion

since bureaucratic and judicial discretion are both a function of the difficulty of passing new legislation. Unlike the Court, however, the Commission did not significantly

benefit from the unanimity rule of the Luxembourg compromise. Bureaucrats can only exercise discretion in the implementation of policy when there is a body of legislation to implement. This was not the case during the Luxembourg compromise when the legislative output of the Council was minimal. The lack of legislation did not adversely affect the Court, in contrast, because most of its important decisions concerned constitutional interpretation of the Rome treaty.

The passage of the SEA had two divergent effects on the Commission as policy implementer. Its discretionary space was reduced by the move to QMV, but the proliferation of secondary legislation after 1987 gave the Commission a broad range of issue areas over which it could exercise the discretion it still enjoyed. With the increased probability of legislative gridlock since the early 1990s, however, the administrative discretion of the Commission is now likely to be significantly greater than was the case in the SEA period (or under the Luxembourg compromise).

These arguments about the waxing and waning of authority in discrete supranational institutions can be integrated into the delineation of three different epochs of European integration. First, the Luxembourg compromise period was characterized by legislative gridlock in the Council.[8] The unanimity requirement in the Council greatly mitigated the effective influence of the Commission's formal agenda setting monopoly. But the Commission was doubly hamstrung because the small volume of legislation the Council produced did not give the Commission many opportunities to exercise bureaucratic discretion in policy implementation. But legislative gridlock facilitated great Court activism. The freedom of the Court of Justice to interpret the Rome treaty was thus the defining supranational characteristic of the Luxembourg compromise period.

The second epoch of European integration began with the ratification of the SEA. In this period, the judicial discretion of the Court with respect to statutory interpretation was curtailed by the move from unanimity to QMV in the Council. But the change in Council voting rules also empowered the Commission as an agenda setter (though this power was shared with the Parliament under the cooperation procedure). Moreover, the proliferation of EU's legislation associated with completing the internal market gave the Commission many more opportunities to affect outcomes through policy implementation. Thus, it is reasonable to conclude that the period immediately after the SEA was one in which the Commission

became the EU's leading supranational actor.

The origins of Europe's current epoch lie in the Maastricht treaty, and these foundations were cemented at Amsterdam. The Parliament is now a very powerful legislator. In contrast, the Commission's agenda setting powers are much more limited than they were in the immediate post-SEA era. But empowering the Parliament has increased the probability of legislative gridlock between it and the Council. As a result, the discretionary space available to the Commission in the implementation of policy and the Court in the adjudication of disputes has increased again. In this current epoch, all three of the EU's supranational institutions have important roles to play, roles that are reminiscent of those of legislatures, bureaucracies and legal systems in national polities with multiple veto players.

The remainder of the paper is divided into five sections. Section 2 outlines what we consider the strengths and weaknesses of current research into supranationalism in Europe. Section 3 offers a general model for understanding the relationship between legislation and policy implementation and legal adjudication. Section 4 develops more specific arguments legislative politics in the EU. Section 5 analyses their effects on the discretion of the Commission and Court. Section 6 discusses the implications of our paper for European integration research in general.

2. Supranationalism

Pinning down the analytic core of the diffuse supranationalism research program is not easy. It is clear, however, that two central themes are, first, that supranational institutions play a powerful role in the everyday operation of the EU and second that this process is self-reinforcing. Rather than trying to summarize the voluminous literature, we focus on three influential studies in the supranationalism genre. First, Alec Stone Sweet and Wayne Sandholtz [1997] analyze the dynamics of what they term "supranational governance" in the EU. Second, Anne-Marie Burley and Walter Mattli's [1993] provide a "neofunctionalist jurisprudence" of European integration. Finally, Gary Marks, Liesbet Hooghe and Kermit Blank [1996] discuss what they call "multilevel governance" in the EU.

Stone Sweet and Sandholtz (SSS) explicitly seek to distance themselves from classical

neofunctionalism. They "problematize the notion … that integration is the process by which the EC gradually but comprehensively replaces the nation state in all its functions" [SSS 1997: 299]. Nonetheless, the similarities between SSS and classical neofunctionalism are apparent when it comes to analyzing the integration dynamic (rather than predicting its endpoint):

> We view … decision-making as embedded in processes that are provoked and sustained by the expansion of transnational society, the pro-integrative activities of supranational organizations, and the growing density of supranational rules. … These processes gradually, but inevitably, reduce the capacity of the member states to control outcomes. [SSS 1997: 300]

What is the process by which this transfer of authority from the nation-state to the EU takes place? Here, SSS are quite vague. There appear to be two elements to their argument. The first part is purely functional: "(t)he expansion of transnational exchange, and the associated push to substitute supranational for national rules, generates pressure on the EC's organizations to act" [SSS 1997: 299]. It would be hard for anyone to disagree with this proposition. But as a result it is just as consistent with intergovernmentalism as supranationalism. For example, Moravcsik [1998] contends that the preferences of multinational firms and exporters for larger markets, pan-European regulation and exchange rate stability have been prime movers behind European integration since World War II.

The second facet of SSS's argument supplements this demand side logic with a claim about the self-reinforcing dynamic of supranational activity:

> As European rules emerge and are clarified and as European organizations become arenas for politics, what is specifically supranational shapes the context for subsequent interactions … This creates the 'loop' of institutionalization. Developments in EC rules delineate the contours of future policy debates as well as the normative and organizational terms in which they will be decided [SSS 1997: 311].

Unfortunately, SSS do not probe deeper into this "loop of institutionalization". This is where we believe our analysis can help make such plausible but vague intuitions more precise. Of course, this precision may come at a cost to SSS's agenda. Indeed, our analysis is not consistent with their fundamental claim that European integration has a self-reinforcing dynamic that is driven by pro-integration supranational actors. Rather we highlight the importance of the EU's treaty base to the way it operates on an everyday basis. And it seems that the treaty revisions the member governments have

undertaken have been motivated by a relatively clear and consistent set of principles about what the EU polity should look like.

Let us now turn to Burley and Mattli (BM). Unlike SSS, BM are happy to acknowledge their neofunctional heritage. Indeed, they claim that "the legal integration of the (European) community corresponds remarkably closely to the original neofunctionalist model developed by Ernst Haas" [BM 1993: 43]. According to BM, the ECJ has been able to promote European integration agenda throughout its existence by insisting that it is only implementing the law, as opposed to playing politics. This "mask" of formal legalism allows the ECJ to "shield" its judgments from political retaliation, even when governments disapprove of these rulings:

> The margin of insulation necessary to promote integration depends on a minimal degree of fidelity to both substantive law and the methodological constraints imposed by legal reasoning. In a word, the staunch insistence on legal realities as distinct from political realities may in fact be a potent political tool. (44)

BM also consider the Commission to be an important partner for the ECJ when it comes to furthering European legal integration. Their reasoning is quite similar to the mask and shield metaphor for the Court. BM believe that the Commission is a powerful actor precisely because it has a reputation of being an impartial provider of information and expertise that is above the political fray:

> From the Court's … perspective … the chief advantage of following the Commission is the "advantage of objectivity" … In neofunctionalist terms, the Court's reliance on what Pescatore characterizes as "well-founded information and balanced legal evaluations", as "source material for the Court's decisions" allows it to cast itself as nonpolitical by contrasting the neutrality and objectivity of its decision-making process with the partisan political agendas of the parties before it [BM 1993: 71].

There is a thus a clear analytic difference between BM and SSS. There are no microfoundations to SSS; they are content with macro-level assertions about the loop of institutionalization as the mechanism by which supranational actors promote European integration. BM, in contrast, do have a micro-logic – the Court (and the Commission) can deflect criticism from member governments that they are acting "politically" by asserting that they are only impartially doing their jobs.

But there is a tension at the core of BM's argument. The Court and Commission are able to further the integration agenda because they can always credibly claim that they are only doing their jobs,

impartially and apolitically. In essence, BM's argument requires that member governments cannot discriminate between actions by the Court and Commission that are consistent with their mandates as understood by the member governments and those that are not. We consider this to be a heroic assumption.

BM (and most other observers) confidently claim that is patently clear that both the Commission and the Court are pro-integration supranational entrepreneurs that stretch their authority as far as they can to further their own agendas. What is readily apparent to these scholars, however, is at the same time supposed to elude the member governments – even though they presumably have a greater interest in monitoring the Commission and the Court than do academics!

A more prudent strategy would be to assume that the EU's member government understand quite well (at least most of the time) what the Commission and Court's preferences are, and what the consequences of these preferences are for their willingness to carry out their mandates (as written in the EU's treaties or its secondary legislation). Given that the governments have strong efficiency incentives to delegate authority for the implementation and adjudication of policy, it might still be the case that this delegation gives the Commission and the Court real influence over the course of European integration. This is the standard principal-agent approach we adopt in subsequent sections.

The final example of supranationalism scholarship we wish to consider is Marks, Hooghe and Blank [1996]. For our purposes, the distinctive feature of MHB is their attention to the details of the interrelationships among the EU's supranational institutions.[9] Rather than proposing a parsimonious theory of supranationalism like SSS's loop of institutionalization or BM's mask and shield, MBH's primary concern is to describe how the EU operates on an everyday basis.

MBH recognize that the Commission's effective agenda setting power is shaped by its formal interactions with other EU institutions:

> The European Council, the Council, and the European Parliament have each succeeded in circumscribing the Commission's formal monopoly of initiative more narrowly … Agenda-setting is now a shared and contested competence among the four European institutions, rather than monopolized by one actor [MHB 1996: 358].

But rather than analyzing in detail the changing location of agenda setting under the EU's

different legislative procedures, MBH simply note that "the Council is locked in a complex relationship of cooperation and contestation with the two other institutions (Commission and Parliament)." How, then, can one understand the Commission's legislative power in these complex relationships? At this key point, MBH eschew formal institutional analysis of the type we have used extensively to analyze legislative politics in the EU [Garrett 1995a, Garrett and Tsebelis 1996, 1997, Tsebelis 1994, Tsebelis 1997, Tsebelis and Garrett 2000]. They instead fall back on an approach that is neofunctionalist in inspiration:

> The Commission has considerable leverage, but it is conditional, not absolute. It depends on its capacity to nurture and use diverse contacts, its ability to anticipate and mediate demands, its decisional efficiency, and the unique expertise it derives from its role as think-tank of the European Union [MHB 1996: 359].

Indeed, MHB [1996: 366] conclude that "(t)he Commission's power is predominantly soft in that is exercised by subtle influence rather than sanction". Our approach is more straightforward. We assess the (changing) legislative role of the Commission. Where its formal powers are strong, there is no need for subtle influence. Where it is formally weak, subtle influence may be all the Commission has. Surely the first step should be to delineate precisely the Commission's formal position?

Our reaction to MHB is similar with respect to their analyses of the discretion afforded to the Commission as policy implementer. They point to the limitations of the "comitology" rules that are designed to allow the Council and Parliament to oversee how the Commission implements legislation:

> At first sight, comitology seems to give state executives control over the Commission's actions in genuine principal-agent fashion. But the relationship between state actors and European institutions is more complex. Comitology is weakest in precisely those areas where the Commission has extensive executive powers, e.g. in competition policy, state aids, agriculture, commercial policy and the internal market. Here, the Commission has significant space for autonomous action [MHB 1996: 367].

Our analysis is different. We explain how the rules that govern the passage of legislation not only affect the laws the Commission implements, but more importantly, they also influence the discretion in implementation available to the Commission. Rather than viewing implementation and legislation as separate facets of the EU polity, we integrate them.

Finally, MBH also address the role of the Court of Justice in the following way:

> Court rulings have been pivotal in shaping European integration. However, the ECJ depends on other actors to force issues on the European political agenda and condone its interpretations. Legislators … may always reverse the course set by the Court by changing the law or by altering the Treaties. In other words, the ECJ is no different from the Council, Commission or European Parliament in that it is locked in mutual dependence with other actors [MBH 1996: 370].

We do not disagree with this statement. The notion that the Court's behavior is affected by the reactions it anticipates from the EU's legislative branch is at the core of our understanding of legal politics in the EU [Garrett 1992, 1995b, Garrett, Kelemen and Schulz 1998]. Indeed, it the last piece in our integrated model of the EU's political system as a whole.

More broadly, we view MBH's description of Europe's multi-level polity as a stimulus for further analysis. Can we delineate precisely the interactions among the Commission, Council, Court and Parliament that characterize European supranationalism? Can we propose an integrated framework for unifying study of the European Union? The remainder of the paper takes up these challenges.

3. Legislation, Implementation and Adjudication

This section provides a framework for analyzing the ability of supranational actors to influence the course of European integration. The model is very simple; we add the empirically relevant institutional details of the contemporary EU in the next section. The core of our analysis concerns the impact of legislative rules on the discretion of bureaucrats to implement policy or judges to adjudicate statutory disputes in ways that further their own preferences.

Our model of the political system has three institutional components. The legislature writes laws but delegates authority over their implementation. The "bureaucracy" writes detailed regulations designed to implement legislation and monitors compliance with them. The "judiciary" adjudicates disputes over legislation and compliance.[10] In our model, the bureaucracy or the judiciary move first: they select how to translate existing legislation into political outcomes. If the legislature disagrees with this choice, they overrule the bureaucracy or the ECJ.

For clarity of exposition, this section uses the simplifying – but empirically inaccurate – assumptions that the Council of Ministers is the EU's sole legislator and that the Commis

is to implement legislation. Using this simple model, the EU's political system is one in which the member governments have delegated implementation and adjudication powers on the Commission and the Court, respectively, because this is more efficient than trying to carry out legislation themselves [Garrett and Weingast 1993]. But as is the case in all principal-agent relationships, this delegation of power creates a problem for the legislative branch: its agents may not carry out the intent of the legislation. In fact, these agents have a significant level of autonomy in their decisions (in Majone's words, they have "a fiduciary relationship" with their principals (Majone (1999)). [11]

How will this complicated relationship, in which the principal delegates significant autonomy to its agents, play out? How can the principal be confident that the agents are not going to overstep their mandate, and how can the agents know that the principal will not interfere with decisions delegated to them? That is, how do the relevant actors resolve the joint problems of scope and of credibility of commitment of delegation? Our answer to all these questions is the same: by the appropriate structuring of institutions governing the various relationships.

In what follows we assume that the Council can monitor at low cost the behavior of its agents – the Commission and the Court – and that it can also cheaply pass new legislation if it is unhappy with the behavior of these agents.[12] The Commission and the Court both prefer that the legislative branch not overturn their actions because this would harm their reputations for acting (more or less) impartially. Under these conditions, the rules by which legislation is generated will have a marked impact on how legislation is implemented by the Commission and the Court.

Consider the following setup in Figure 1. There are 7 governments in the Council whose preferences can be arrayed on a straight line from less to more European integration. The governments in the Council select Commissioners and Justices, but they cannot remove them from office when they behave in ways of which the Council disapproves.[13] The Council can, however, react to Commission and Court behavior by passing new legislation. The preferences of the Commission and the Court may be different from those of any member of the Council. All actors have Euclidean preferences and know each other's ideal points and the structure of the legislation-discretion game.

Figure 1 about here

Let us begin with the case where the Council's legislative decision rule is unanimity (i.e. when the legislation is a treaty, when the Luxembourg compromise operated, or for a policy domain where unanimity still applies in the EU today). The Council can act unanimously to pass new legislation to alter any status quo – which we will interpret here as the relevant piece of legislative implementation by the Commission or judicial interpretation by the Court – so as to bring it within the Pareto set of the Council (i.e. the interval 1-7). Conversely, the unanimity requirement will render any policy outcome within the Pareto set (including policy as implemented by the Commission or adjudicated by the Court) invulnerable to being overturned by any new legislation.

Thus, under a unanimous legislative rule, the Commission and Court have considerable policy discretion. If, as is the common assumption in the supranational literature, the Commission and Court were both more integrationist than any government in the Council, we would expect these actors to implement outcomes just to the left of government 7.

Things would change considerably, however, if the threshold required for the passage of new legislation were reduced. The EU's QMV rules can be best approximated as a 5/7ths majority rule. In this case, governments 3 and 5 are the legislative pivots in the Council. No legislation can pass of which either disapproves. Thus, any status quo (bureaucratic or judicial decision) that is outside the 3-5 interval would be overturned QMV by the Council, but any outcome within this interval would be invulnerable. Under QMV, therefore, pro-integration entrepreneurs in the Commission and Court could still use their discretion to generate outcomes at the right hand end of the interval, but any such outcome would be less integrationist than under unanimity.

Indeed, if the Council were to alter its decision rule from QMV to simple majority (4/7ths in this case), the supranational actors would have no discretion – if the policy space were truly one-dimensional. This is the median voter theorem. The Council would choose policy at the ideal point of government 4 and any effort by the Commission and Court to move this outcome would be defeated by the passage of new legislation reaffirming the preferences of the median voter.

There are two potential criticisms of our model that merit further consideration. The first is that the Council will *ex ante* restrict the discretion of bureaucrats [McNollgast 1987, Moe 1990]. The second

criticism is that Council members would not alter policies even outside their decisionmaking "core" (i.e. legislation that cannot be overturned), because they would run the risk of having them moved close to the ideal point of the Commission in the implementation phase.[14] Note that both objections concern only the restrictions on bureaucratic discretion, not that of judges.

With respect to the first criticism, it seems to us plausible that the Council would want to restrict the discretion of the Commission in implementation. However, it is equally likely that the Council would have a harder time agreeing on such restrictions unanimously than by QMV, or by simple majority. The decision making rule thus affects the discretion of the Commission in the manner we describe irrespective of whether it is directly (through legislation about policy) or indirectly (through legislation governing how policy is to be implemented). Whether the Council can overcome internal disagreements and impose restrictions on the implementation behavior of the Commission is an empirical matter, not a theoretical one.

The second criticism concerns extreme behavior by Council members that may not always be available to them: not passing legislation because bureaucrats may subsequently exercise discretion in its implementation. It is not always an available strategy because legislation on the subject may already exist – in which case bureaucrats will be able to implement it (and therefore exercise whatever discretion they have). It is an extreme strategy because legislators create laws that they anticipate will be in effect for a relatively long time, and hence will likely be implemented by different bureaucrats with different ideal points. Not producing legislation that may be implemented exactly as intended by some bureaucrats because it may also be abused by others seems as an overreaction.

Having clarified these points, we now want to discuss the implications of our model for three classes of activity in the EU. The first concerns treaty revisions. Given that the EU's treaty base can only be modified by the unanimous agreement of the member governments, we would expect that the ECJ would have considerable latitude in interpreting "constitutional issues" (aided and abetted by the Commission's bringing cases to the Court). This would be all the more true were we to introduce more realism into the model by acknowledging that there are significant costs (time and money, at a minimum) to convening IGCs.

The member governments, however, have an alternative to passing new legislation when they disapprove of Court decisions – they can simply not abide by these decisions [Garrett, Kelemen and Schulz 1998]. Indeed, Bernadette Kilroy [1999] argues that the Court's decision making is very sensitive to the expressed positions of coalitions of member states and to their voting weights in the Council. She both provides aggregate evidence that Court decisions tend not to go against the expressed opinion of certain coalitions of member states and uses cases to show where the Court altered its jurisprudence as a response to public statements by government leaders from the member states.

The second implication of our model concerns the Luxembourg compromise period. The Commission and the Court should have been able to exercise considerable discretion over the translation of secondary legislation into political outcomes because of the de facto unanimity rule in the Council. This is consistent with much scholarship on the Court, but there is little evidence of Commission activism in policy implementation during the Luxembourg compromise. We believe that the reason for this asymmetry is that the Council did not produce much secondary legislation under the Luxembourg compromise, and as a result the preconditions for Commission activism were not present. Note that this was not the case for the Court – the existence of the Treaty of Rome was a sufficient condition to facilitate the Court's activism.

The final implication of our model is that the discretionary power of the Commission and the Court should have declined with the increasingly widespread use of QMV since the mid 1980s. Joseph Weiler's [1991] seminal analysis of the history of European legal integration posits a clear inverse relationship between the Court's activism and legislative activism. For Weiler, the Court carried the burden of furthering integration when the governments were shackled by the Luxembourg compromise, but that the Council picked up the ball after the SEA. There seems to be some sentiment among EU-watchers that the power of the Commission declined in the 1990s (long before the ouster of the Santer Commission). But the reasons given for this decline tend to focus on the completion of the internal market (there is nothing left to do!) or the fact that Delors left office. Our argument would suggest that the Court’s declining activism, the apparent weakening of the Commission, and perhaps even the fact that a strong replacement for Delors could not be found, all can be explained in terms of the move to QMV in

the Council.

This last point, however, shows the limitation of the model presented in this section. The move to QMV has not been the only important change to the EU's legislative environment since the mid 1980s. The SEA, the TEU and the Amsterdam treaty successively enhanced the legislative role of the European Parliament. Moreover, the Commission is not only the EU's bureaucracy charged with the policy implementation; it also possesses important legislative functions. Let us now analyze this more complex reality.

4. Legislative Politics in the post-SEA Period

The previous section discussed legislation-discretion dynamics in the EU in terms of the difference made by the reaffirmation of QMV in Council in the mid 1980s. The move to QMV, however, has been accompanied by another set of institutional reforms that have increased the legislative role of the Parliament. These reforms also have important implications for the Commission – both as legislator and as bureaucracy – and for the judicial discretion available to the Court of Justice. This section describes the EU's changing legislative environment in the past decade and discusses their implications for the legislative power of the Parliament and the Commission. We then move on to analyze the impact of the legislative environment on the policy discretion available to the Commission in the implementation of legislation and the Court in statutory interpretation.

The Procedures

The SEA radically changed the EU's legislative procedures. Much of the EU's day-to-day legislative agenda was "un-blocked" by the application of QMV in the Council both to the issues originally intended in the Rome Treaty and to additional policy areas. The ambit of QMV was subsequently expanded further at Maastricht and at Amsterdam. The broader institutional environment in which QMV is embedded, however, varies significantly by policy areas.

Under the "consultation" procedure (which was written into the Rome treaty), Commission proposals become law if they are accepted by a qualified majority of Council members. A unanimous

Council can amend Commission proposals (this is also the case with the other QMV-based procedures).[15] The "cooperation" procedure (Article 189c) was introduced in the SEA to govern the “1992” agenda, but the internal market was subsequently moved under codecision at Maastricht. Today, cooperation applies to areas such as social policy, implementation of regional funds, research and technological development, and some environmental issues.

The most important institutional feature of cooperation was to give the Parliament its first substantive legislative role. The Parliament may amend Commission proposals. If the Commission accepts these amendments they are then presented to the Council, which can accept them under QMV or amend them unanimously. The Parliament can also reject proposals that can only be overridden by an agreement between the Commission and a unanimous Council.

The “codecision” procedure was added to the EU’s legislative arsenal at Maastricht (Article 189b), covering not only the internal markets but also new policy domains such as education, culture, public health and consumer protection. This initial version of codecision differed from cooperation in two ways. First, the Council could not reject EP amendments accepted by the Commission, but had to request a Conciliation Committee (comprising all members of the Council and numerically equal representation from the Parliament) to discuss such amendments. Second, if this Committee could not agree to a joint text, the Council could then reaffirm its prior common position, possibly with amendments proposed by the EP. This Council proposal became law unless an absolute majority of MEPs vetoed it.

The codecision procedure was modified in the Amsterdam treaty (Art. 189b as amended). Additional policy areas were brought under its aegis,[16] but the procedure itself was also modified. Under the reformed codecision, the Conciliation Committee is the last stage of the legislative game. The proposed legislation lapses if the representatives of the Council and Parliament cannot agree to a joint text (Amsterdam Treaty, Art. 189b(6)). That is, the member governments decided to remove the last two stages of the original codecision – the Council’s final proposal to the Parliament, and Parliament’s decision whether to reject it.

The Parliament

Two statements about the legislative powers of the Parliament under the EU's QMV-based decision-making procedures are not controversial. First, prior to the passage of the SEA and the creation of the cooperation procedure, the Parliament had scant legislative influence, even after its direct election in 1979 and the ECJ's isoglucose decision that the Parliament had to be consulted before new laws could be passed. When the Council decides by unanimity or when the consultation procedure applies, the Parliament's influence is limited to the threat of delaying legislation, not unlike the House of Lords in the UK[17].

Second, that the other end of the spectrum, the Parliament is a true co-equal legislator with the Council for policies governed by the reformed codecision. In this case, new legislation can only be passed if a qualified majority in the Council and an absolute majority of MEPs present support it. We cannot be more precise about where legislation will be passed on the Council-Parliament contract curve because there are no institutional constraints on bargaining in the Conciliation Committee. Nonetheless, using any of the standard models (Nash, Rubinstein, Baron and Ferejohn), one would expect outcomes to "split the difference". This is a long way from the pre-cooperation environment. As a result, the empowering of the Parliament as a legislator is a key institutional development in the modern history of European integation

Things are more complicated and contentious with respect to the intermediate cases of Parliamentary influence – cooperation and the Maastricht version of codecision. Under the cooperation procedure, the Parliament is a "conditional agenda setter" [Tsebelis 1994]. The initial codecision procedure took away this power of the Parliament, but replaced it with an unconditional veto – new legislation could not be passed over the Parliament's opposition. The conventional wisdom is that this was a good trade for the Parliament [Corbett 1995, Crombez 1996, Scully 1997]. We have argued, however, that the Parliament is more influential over integration policies when equipped with conditional agenda setting than when it has veto powers [Garrett and Tsebelis 1996, Tsebelis and Garrett 1999]. Let us briefly present our argument.

Conditional agenda setting power exists only under certain conditions – if there is a proposal that makes a qualified majority of the Council better off than any unanimous decision, if there is an absolute

majority in the Parliament to support it, and if the Commission adopts it. But when these conditions are met, conditional agenda setting gives the Parliament more influence over legislation because it permits it to select among different alternatives the one it likes the most, while veto power simply enables it to reject the options it does not like. Consequently, the impact of the exchange of conditional agenda setting (cooperation) for unconditional veto (codecision, Maastricht-style) varies with the relationship between the Parliament's preferences and those of members of the Commission and the Council. When the EP and the Commission are more integrationist than any member of the Council, and when the members of the Council do not have identical positions the Parliament can exercise more influence over EU integration policies under cooperation than the initial version of codecision.

Tsebelis et. al. [1999] examine the contending positions on the legislative politics of cooperation and Maastricht codecision with reference to legislation in the 1989-1994 period to which the Parliament added amendments (over 5000 cases). They conclude by making three points. First, that the overall acceptance rate of EP amendments is higher under codecision than under cooperation. This finding is consistent with the EP data and the expectations of EU observers. Second, that if one controls for one of the conditions of conditional agenda setting under cooperation (acceptance by the Commission) the Parliament's influence over subsequent Council decisions (the rate at which it accepted EP amendments) the acceptance rate of EP amendments is higher than the overall acceptance rate under codecision. This finding is consistent with the Garrett and Tsebelis [1996] and Tsebelis and Garrett [2000] arguments. Third, if one controls for acceptance of EP amendments by the Commission in both procedures, there is no difference in acceptance rates. This finding is novel and leaves the policy expectations of Garrett and Tsebelis untested, because one would have subtract form the data that present no difference between procedures the cases of institutional decisions where the Council is expected to have unanimous opinions.

While the empirical analyses of unconditional and conditional (upon acceptance by the Commission) results present different pictures of cooperation and the initial rendering of codecision we should not lose sight of the more general point of this subsection. Comparing the oldest legislative procedure using QMV – consultation in which the Parliament had no role other than an advisory one – to the version of codecision written into the Amsterdam treaty – in which the Parliament is a coequal

legislator with the Council – the trajectory of European integration is clear. The member states have collective chosen in successive revisions of the Rome treaty to upgrade the legislative power of the Parliament to the point where today the EU looks very much like a traditional national bicameral legislature.

The Commission

In important respects, the recent history of the Commission as a legislative actor in the EU is a mirror image of that for the Parliament. Under the consultation procedure, the Commission had considerable influence over legislative outcomes because its right to make proposals allowed it to set the Council's agenda. That is, the Commission could choose from all the potential outcomes that would generate QMV support in the Council that proposal the Commission most preferred (or more precisely, that which also made the pivotal member of the Council indifferent to what could be achieved unanimously).

Under cooperation the Commission had to share agenda setting power with the EP. While it could still initiate legislation, it was the EP that could amend it, and these amendments had to be reviewed by the Commission again before being introduced to the Council. The Council would continue to review the Commission proposals under the same rules: QMV to accept, and unanimity to amend. This gave a coalition of the Commission and the EP (where it existed) the power to select among the different proposals that would generate a QMV support in the Council. In marked contrast, under both versions of codecision the Commission's role is effectively limited to that played by traditional national bureaucracies. The Commission writes the initial drafts of bills, but in the final stage a coalition between a qualified majority in the Council and an absolute majority in the Parliament and Council can overrule the Commission and amend a bill.

Not all observers agree with this analysis. The conventional view of cooperation is that even though the Commission formally was forced to share its agenda setting powers with the Parliament, in fact the Commission's influence over legislation was identical to that under consultation [Crombez 1996, Moser 1996]. Tsebelis et. al. [1999] have tested this proposition empirically and shown that the power of

the Commission was, ceteris paribus, higher under cooperation than under the first version of codecision. Under cooperation, the Commission's opinion was respected (i.e. included in the final legislation) 85% of the time (88% when it rejected an EP amendment, 83% when it supported it), while under Maastricht codecision this figure dropped to 70% (67% when it rejected an EP amendment and 73% when it supported it). It should be noted, however, that these percentages vary greatly over time. With respect to cooperation, the Commission became more influential over time, reaching a zenith during the period when most internal market measures were adopted. In contrast, the Commission's influence over Maastricht codecision deteriorated over time.

In sum, this section has made two simple points concerning the legislative power of supranational actors in the EU. First, the Parliament's powers have been upgraded since its first direct election in 1979, first in the SEA and finally in the treaty of Amsterdam. The latter placed it on an equal footing with the Council with respect to legislation governed by the codecision procedure. Second, the Commission's legislative role has been reduced over the same period. In this important sense, the EU has become a more democratic institution since the passage of the SEA.

5. Bureaucratic Implementation and Statutory Interpretation

Let us now change gears to analyze the ability of the Commission and the Court of Justice to exercise discretion in how they implement and interpret legislation. Section 3 demonstrated that discretion is positively associated with the range of outcomes that are invulnerable to re-legislation. In this section, we elaborate this insight in the context of the EU's different QMV-based procedures.

The Model

In order to analyze the effects of these procedures on the discretionary power of the Commission and Court, we use a model that is more complex than that in Figure 1 but that is a more realistic representation of policy dynamics in the EU. We use a two-dimensional policy space (see Figure 2) for at least two reasons. On the one hand, many results from one-dimensional spatial models do not hold in policy spaces of higher dimensions. For example, there is almost never a median voter in the Council

when preferences are arrayed on two dimensions.[18] On the other hand, many important policy disputes in the contemporary EU appear to take place in a two dimensional issue space – one dimension describes their preferences for more regional integration; the other is more akin to a traditional left-right cleavage (most notably on regulatory matters) [Kreppel and Tsebelis 1999].

Figure 2 about here

The locations of the actors in Figure 2 represent plausible general preference configurations in these two dimensions.[19] In both cases the Council and the Parliament are likely to be the more "extreme" actors, whereas the Commission is likely to be positioned somewhere in between them. On the left-right dimension the Commission is more likely to be closer to the national Governments that appoint the Commissioners; on the integration dimension, however, the Commission and the EP are likely to be allied as pro-Europe actors.[20] What emerges from these assumptions is that the locations of the three actors represent the corners of a triangle. Theoretically, this is the most general representation of all cases in which the three actors can have any position with respect to each other – except where two of them have identical positions, or where one of them is located exactly on a straight line connecting the central points of the other two. It should be emphasized, therefore, that the analytic thrust of our analysis would hold so long as the preferences of no two of the three legislative actors had identical preferences in two (or more) dimensions.

Figure 3 about here

Let us now rotate Figure 2 by 45 degrees,[21] and make the above scenario more realistic by incorporating the fact that the all three actors are multimember groups deciding by simple or qualified majorities, rather than individuals (Figure 3). We array the preferences of a Parliament made up of 9 members to characterize what we consider to be the de facto super-majority threshold for voting in the Parliament. In the second reading of legislative bills, the Parliament votes by absolute – not simple – majority. Moreover, absenteeism is very high by national standards. Assuming a 75% attendance rate [Brzinski, 1995, Kreppel and Tsebelis 1999], the de facto threshold for passage in the Parliament is 50/75, or 6 of the 9 members of our hypothetical Parliament. We use a seven member Council where five of its members represent the required qualified majority for decisionmaking. Finally, we use a three member

Commission deciding by majority of its members (two out of the three) since this is the formal decision rule for the College of Commissioners.

The central feature of Figure 3 is its description of the "core" of the EU's legislative institutions under the various QMV-based legislative procedures. The core of a legislative rule is the set of outcomes that cannot be overruled by the application of that rule. For our purposes, the concept of the core has a vital role in the legislation-discretion game. The core of the EU's different legislative procedure describes the discretionary space available to the Commission in the implementation of legislation and the Court in statutory interpretation. The propositions we derive generalize to more than two dimensions, so long as the core exists.[22]

There are two reasons that we are interested in the core and, unlike Figure 1, we do not incorporate the position of a hypothetical status quo. First, the position of the legislative status quo is not relevant in a two move game where the bureaucrats or the Courts make the first move (and implement or adjudicate the law) and then the legislative institutions decide whether to overrule (unless there are legally binding constraints reducing the choice set of the first moving actor (the bureaucracy or the Court).[23] Second, we assume that legislative institutions – in the long run – will select points inside the core. Indeed, no matter what the decision making rule is, some point inside the core can always defeat any point outside the core. Thus, in equilibrium, we would expect the legislative status quo to be inside the core, even if at particular times the actors cannot agree to such a Pareto-improving move.

Let us begin by reinterpreting the Luxembourg compromise. In this period, a unanimous decision by the Council was required for a change of the legislative status quo. Any point inside the C1 … C7 heptagon (the singly hatched area) cannot be modified by unanimity because at least one member of the Council would object to any change in the status quo. The hatched area is thus the core of the Luxembourg compromise. Turning to discretion, the Commission and the Court could therefore effectively implement or interpret a given piece of legislation (the status quo) in any way they wish – so long as the ensuing policy outcome remains within the core. This would be true even if the Commission's implementation or the Court's interpretation were inconsistent with the Council's intent when it passed the legislation.

The final observation we should make by way of introduction concerns ceteris paribus qualifications. It is obvious that convergence in the preferences of actors (e.g. if C1-C7 were clustered more tightly) would reduce the core and hence the scope of discretion in implementation and adjudication as well. Increasing heterogeneity could have the opposite effect. In the context of the EU, there are at least three factors that might change the spatial location of preferences. First, adding new members to the EU might be expected to increase heterogeneity in some cases (the southern accessions and, in the future, those from eastern Europe [Bednar, Ferejohn and Garrett 1996]), but decrease it in others (Austria, Finland and Sweden, on many issues). Second, some argue that the preferences of existing actors have converged over time [Moravcsik 1998]. Finally, changes in the actors that participate in the legislative game will also affect the size of the core (in concert with changes in the procedures that aggregate their preferences). It is the last point to which we devote most attention.

Cooperation

Legislation can pass under the cooperation procedure in two ways. A decision can be taken with an agreement of an absolute majority of the EP (decisions by the EP require an absolute majority of its members in the second round), the Commission (strictly speaking, a majority of the Commissioners), and a qualified majority of the Council. Alternatively, a unanimous Council can overrule the other actors. We have already calculated the unanimity core of the Council. What constraints does the alternative rule (agreement of three actors) impose on policy discretion?

Recall that we are assuming that the combination of the absolute majority requirement and high rates of absenteeism in the Parliament creates a de factor supermajority threshold of about 2/3rds. In Figure 3, the 6/9ths core of the EP can be identified by connecting each EP member with another so that 3 other members are on one side of the line and the other 4 members on the other side. Such lines are the pairs E1E5, E1E6, E2E6, E2E7 etc. Each one of these lines has a 2/3rds majority on one side of it. These lines define a nine-sided polygon inside E1…E9. This is the Parliament's core under absolute majority. We will call this specific intra-institutional core the 2/3s EP core. It is obvious that the EP cannot modify anything located in that core – even if it decides alone. The reason is that there is a 2/3rds majority against moving away from any particular point of this nine-sided polygon. Similarly there is an intra-

institutional core for the Council when it decides by 5/7 QMV. As Figure 3 indicates (and for similar reasons as for the Parliament) this core is a heptagon located inside C1...C7.

The lightly shaded area of Figure 3 – connecting what turns out to be the decisive Commissioner (#1) with the extreme points of the EP's 2/3rds core and the Council's 5/7ths core is thus the core of legislation requiring a qualified majority in the Council, an absolute majority in the EP (assuming 25% absentee rate) and the Commission. This is an inter-institutional core and obviously its size depends on the difference of the preferences among the three actors. Reducing these differences in Figure 3 will produce a smaller inter-institutional core. But this is not the core of the cooperation procedure because a unanimous Council can also pass legislation. The core of cooperation is thus defined as the intersection of the unanimity core of the Council (the hatched area) and the inter-institutional core (the shaded area). In the figure, the crosshatched area denotes this cooperation core. Note that this area is always smaller than the Council's unanimity core (defining the room for policy discretion under the Luxembourg compromise).

If the Commission or the Court wants to make a decision that will not be overruled under the cooperation procedure, they can implement and interpret legislation anywhere within the crosshatched area. How big this area is, of course, depends on the relative position of the Commission and the EP with respect to the Council. If, for example, the Commission were located close to E3, the core would shrink. The core would expand, however, if the Council were located between the Commission and the EP this area is going to increase.

Codecision before and After Amsterdam

The major characteristic of both versions of codecision is that at the end of the legislative game, an agreement by a qualified majority of the Council and an absolute majority of the EP (which, we remind, in our examples is a de facto qualified majority of 2/3) can overrule other actors. In particular, they can bypass the Commission. Recall that we have argued that the legislative influence of the Council and Parliament is different under the original and reformed versions of the procedure. Under the Maasstricht rules, the Council had effective agenda setting power, whereas the Parliament is the Council's true co-equal under the post-Amsterdam rules. This should influence where in the codecision core

legislation is passed, but it is irrelevant to the discretion available to the Commission and the Court.

The heavily shaded area of Figure 3 that connects the 2/3rds EP core and the 5/7ths Council core thus represents the core of both versions of the codecision procedures. The greater are the policy differences between the Council and the EP, the greater the size of the core, and hence the greater the discretion available to the Commission in policy implementation and the Court in statutory interpretation. Up until the present, most analysts have assumed that the distance between Council members and MEPs is significant. But this may change over time, either because European citizens come to hold their MEPs more accountable or because party organizations linking both institutions become more pronounced [Tsebelis and Garrett 2000]. If and when either of these changes takes place, the codecision core would shrink – and with it so too would the policy discretion of the Commission and Court.

Figure 3 shows that the core of the codecision procedure is likely to be larger than the cooperation core. This is not, however, necessarily always the case. It is possible that the 2/3s core of the EP is located inside the 5/7s core of the Council (the EP and the Council have very similar positions). This would result in similarly sized cores of the cooperation and codecision procedures. But in general it is reasonable to describe the discretion available to the Commission and Court has been a concertina in the history of the EU. Under the Luxembourg compromise, the discretionary space was large (the unanimity set of the Council). The core shrank appreciably with the introduction of cooperation, and has (most likely) expanded again since the innovation of codecision.

Differences between the Commission and Court

Up until now, we have characterized the discretion of the Commission and Court as being identical – and purely a function of legislative procedures. But there is an important distinction between the two institutions concerning the sources of discretion. The Commission's discretionary authority is wholly contingent upon the existence of legislation to implement. While the Court also requires legislation to engage in statutory interpretation, it can nonetheless also exercise authority in the constitutional arena – that is interpreting the EU's treaty base and, most importantly, deciding whether national laws are consistent with it.

The Court is widely considered to have been a very important pro-integration agent in the

Luxembourg compromise period, whereas little attention is focused on the Commission in this period. One simple reason for this is that the corpus of EU legislation in this period was very limited. This did not constrain the Court from taking advantage – with great pro-integration activism – of the unanimity needed both for treaty revisions and new secondary legislation. But the Commission was less able to use its available discretion because unanimity meant that not much legislation was being passed.

Turning to the late 1980s and early 1990s, the Commission is considered to have been resurgent in this period. Here, the fact that a great new raft of legislation was passed under the internal market agenda was a boon for the Commission as policy implementer – particularly given that the internal market was passed under cooperation, the core of which is relatively large.

We believe that the Court's power likely received a new boost in the Maastricht treaty, and that this may be reflected in more active constitutional jurisprudence into the near future. In addition to the codecision procedure, the Maastricht treaty also introduced the principle of subsidiarity as the one that should govern all activity in the EU. But the treaty did nothing more than state the criterion that decisions should be taken at the most appropriate level. What this level is will vary on a case-by-case basis, and it will be up to the Court to determine whether legislation in member states and at the EU level satisfy this criterion.

6. Linking Institutional Consequences to Institutional Choices

Explaining Supranational Discretion

The supranationalism literature is too vague to give us much leverage over how the EU's supranational institutions can promote their integration agenda. In its place, we have proposed a simple framework for analyzing legislation-discretion dynamics that generates four clear propositions about supranationalism and European integration.

First, the Court of Justice was the prime mover behind European integration in the Luxembourg compromise period. The reason is that the member governments were gridlocked. It was extremely hard to pass any new secondary legislation unanimously. Political conditions made treaty revisions unlikely. In

this environment, the Court could act to further legal integration in full knowledge that political efforts to rein in this activism were unlikely. The Commission, however, was a less effective pro-integration entrepreneur under the Luxembourg compromise. Even though unanimity voting potentially gave it considerable discretion in policy implementation, there were few pieces of secondary legislation to implement. In contrast, the combination of the signing of the Rome treaty with the Luxembourg compromise created fertile ground for the Court to interpret the EU's treaty base as it wanted.

Second, the move to QMV in Council decisionmaking in the latter 1980s reduced the discretionary implementation space available to supranational entrepreneurs. The lower threshold in the Council of passing new legislation, ceteris paribus, should have resulted in less pro-integration activism by the Commission and the Court. Prominent international lawyers have suggested that this hypothesis is correct with respect to the Court [Mattli and Slaughter 1998], but it is harder to find research arguing that the Commission's power declined. Our analysis suggests one reason why the effects of QMV were not as strong on the Commission as they were on the Court. Although the discretionary space available to both supranational actors decreased, the proliferation of secondary legislation in this period increased the number of issue areas in which the Commission could exercise its (spatially reduced) discretion. But the reason most neofunctionalists assert a resurgent Commission after the mid 1980s has to do with its agenda setting powers. We take issue with this assertion.

Third, the Commission's agenda setting power under QMV-based procedures has declined in the past decade as the legislative role of the Parliament has increased. The Commission can significantly influence the course of legislation under the consultation procedure (in which the Parliament plays no effective role). But its agenda setting power was shared with the Parliament under cooperation, further eroded by the initiation of codecision at Maastricht, and lessened by the decision to make ever more issue areas under the jurisdication of these procedures.

Finally, if (as seems likely) Amsterdam's revised version of codecision becomes the legislative norm in the EU, the discretionary space available to the Commission and Court for pro-integration activism will increase again in coming years. Under this truly bicameral procedure, the effective constraint on supranational activism will be the continued support of pivotal MEPs for more integration

than the pivotal governments in the Council prefer. As citizens come to realize the Parliament's powers, however, they may demand that their MEPs act as their delegates rather than as pro-integrationists. If and when this happens, the Commission and Court's discretionary powers under codecision will decrease. But this is for the future.[24]

Institutionalism, Intergovernmentalism and Supranationalism Compared

We wish to conclude by comparing our institutional analysis not only with supranationalism but with intergovernmentalism as well. Is our analysis distinct from these approaches that have dominated recent research on European integration? After all, we share strong assumptions about strategic behavior by the EU's member governments with intergovernmentalism, and our analysis focuses on the everyday politics of European integration, as supranationalism does. What is distinct about focusing on formal institutions rather than informal ones (such as Stone-Sweet and Sandholtz's "transnational society")?

Table 1 about here

In our view these three major streams of research can be distinguished along two dimensions (see Table 1). The first is whether ones focuses alone on interactions among member governments as defining the integration process. Here, our institutional approach is closer to supranationalism than intergovernmentalism. It avoids the – inappropriately – myopic focus of intergovernmental analyses ontreaty revisions, rather than the multitude of clearly important directives, regulations and Court decisions that influence the course of European integration from day to day.

The second dimension concerns the question of whether the course of European integration is the product of intentional choices by (and strategic interactions among) the relevant actors. For supranationalists influenced by Haas, the law of unintended consequences is an article of faith – it is what spillovers are all about. For intergovernmentalists, in marked constrast, the governments that sign treaties are not only in the driver's seat, they also know exactly where they are going.

Our position on this issue is more qualified. If actors operate under complete information (i.e. they know all relevant information about each other), they will design institutions that best promote their preferences – subject to the constraint that every other actor will behave similarly. Nonetheless, even

under conditions of complete information, our institutional analysis suggests a different type of research on treaty bargaining than is typical in intergovernmentalism.

Intergovernmentalism treats the EU's institutional structure as a dependent variable; it is the product of treaty bargaining. This paper has demonstrated, however, that it is simply impossible to analyze institutional choice without first understanding institutional consequences. The fact that intergovernmentalists typically eschew "institutions as independent variables" analysis significantly lessens their ability to understand institutional choice. Consider two examples.

First, most analyses of the reinvigoration of European integration in the mid 1980s debate where the impetus for completing the internal market came from. To us, this focus on the objective of policy – the 300 directives in the Commission's White Paper – neglects the fact that the commitment to complete the internal market, in the form of the four freedoms, was already written into the Rome treaty.[25] What was new about the mid 1980s was the collective decision of the governments to end the Luxembourg compromise. Moreover, the member states decided in the SEA that the general objective of completing the internal market be translated into detailed legislation using a new procedure, cooperation, in which the European Parliament was an active participant. As we have shown, the use of cooperation not only affected the types of legislation that could be passed, but also the discretion available to the Commission and the Court in implementing and interpreting this legislation.

The second example is the Maastricht treaty. Perhaps not surprisingly, most attention has been focused on the decision to move towards monetary union. But this has deflected attention from what we consider to be the most important political reform in the TEU – the creation of the codecision procedure (to govern internal market legislation among other things). We have spent a good deal of time in this paper analyzing the significant and far-reaching implications of codecision for legislation, administration and legal adjudication in the EU.

The point of both examples is straightforward but important. The study of institutional consequences is logically prior to the study of institutional choice. Institutions determine how policy objectives will be translated into political outcomes. Even if intergovernmentalists are right to assume that treaty bargaining takes place under complete information, the fact that they pay more attention to the

stated objectives of treaties rather than the institutions they create to further them is a serious weakness in this mode of analysis.

But how appropriate is the complete information assumption for treaty bargaining? Our position is in between the black and white of the supranationalism-intergovernmentalism divide. The complete information assumption is a strict one. In our analyses of legislative politics, for example, we believe the assumption is only appropriate in the final stages of the EU's complex procedures [Tsebelis and Garrett 2000]. With respect to implementation and adjudication, we cited the example of the Barber Protocol as a case where the ECJ did not accurately predict the reactions of member governments (see fn. 7).

In the case of treaty bargaining, the threshold for complete information is considerably higher – because the governments are making decisions that will have long chains of effects into the future. If they do not know all relevant information about each other, or if they operate under cognitive pressures that restrict their ability to behave perfectly rationally, or if they expect with some probability that shocks in the political environment will change the endowments of other actors, the complete information assumption is not valid.

Above and beyond these methodological considerations, there is an important empirical question to address. How much of the evolution of the EU since the mid 1980s has been consciously chosen by member governments in treaty revisions, and how much has been unintended? If one was to focus on debates about reducing the democratic deficit, the balance seems to fall in favor of the complete information assumption. By and large, the institutional modifications introduced by the SEA, Maastricht and Amsterdam had the intended results of reducing the Commission's role and increasing that of the Parliament.

On the other hand, we cannot say that every constitutional device introduced was completely understood by all players at the moment of its introduction. For example, Tsebelis and Kreppel [1997] trace the history of conditional agenda setting, and find that not all the participants in the Rome treaty understood its significance (although the major actors certainly did. By Amsterdam, however, they had enough information that in order to make the Parliament a co-equal legislator with the Council – which may have been their intention all along – it was necessary to modify the details of codecision [Tsebelis and

Garrett 2000]. But in the SEA case, it should be clear that the power of "unintended consequences" is less than is the case in neofunctionalism.

Why Privilege Institutions?

Why do institutions take such a preeminent role in our analysis as opposed, for example, to ideas, identities, national interests, spillovers, or other concepts that with currency in the European integration literatures? Let us start from the simplest possible understanding of human interaction. In such an understanding, there are three necessary concepts: the players (individual or collective) involved in the interaction, their strategies (which jointly determine the outcome), and the payoffs that they receive at the end of their interaction. In fact, in game theory these three concepts are sufficient for the description of any game.

If we look closer at the concept of “strategies” we will see that it depends on the sequence of moves that define the game, on the set of choices and information that each player has at the moment that is called upon to move. These parameters are determined by the institutional structure of the situation. Formal EU institutions specify that legislation starts with the introduction of a draft of a directive or a regulation by the Commission to the Parliament, and ends with the approval by the Council. Formal institutions specify what is permitted and what is not: for example, the treaties specify that environmental issues are today (but not in the sixties) within the jurisdiction of the EU. Formal institutions also specify the available choices of actors: for example if the EP wants to move a paragraph from one point of a bill to another, it has to introduce two amendments (one deleting the original text, and the second reintroducing it in the new position).

Since institutions determine the choices of actors, the sequence of moves, as well as the information they control, different institutional structures will produce different strategies of the actors, and different outcomes of their interactions. Consequently, one can study institutions as independent variables (as we did in this article) in order to see how they are systematically associated with specific outcomes. But in addition, one can use the previous analysis in order to study institutions as dependent variables, that is, the choice of particular institutions.

At the risk of over-simplifying, for intergovernmentalists who focus on treaty bargaining, the EU's institutional structure is clearly the dependent variable. For supranationalists, in contrast, the EU's institutions are independent variables – they affect the direction that European integration takes. Viewed in this light, it is not surprising that the debate between the two paradigms seems no closer to resolution today than it was when Stanley Hoffmann [1966] famously criticized Ernst Haas more than 30 years ago. Supranationalism and intergovernmentalism not only differ in terms of the importance they attach to member governments in the process of integration, they place the EU's institutions at very different places in their research.

Our institutional approach is not aimed primarily at introducing yet another research program into the study of the EU, although the reader can verify with a glance at Table 1 that it cannot be reduced to either of them. Rather it aims at being a bridge to existing traditions, explaining under what conditions they are likely to be more successful: the laser like focus of intergovernmentalism on treaties requires a prior study of everyday EU realities that are generated (or likely to be generated) by these treaties. The study of everyday realities by supranationalists requires microfoundations and structure. Our approach can provide both, as well as generate a series of empirically testable propositions for investigation.

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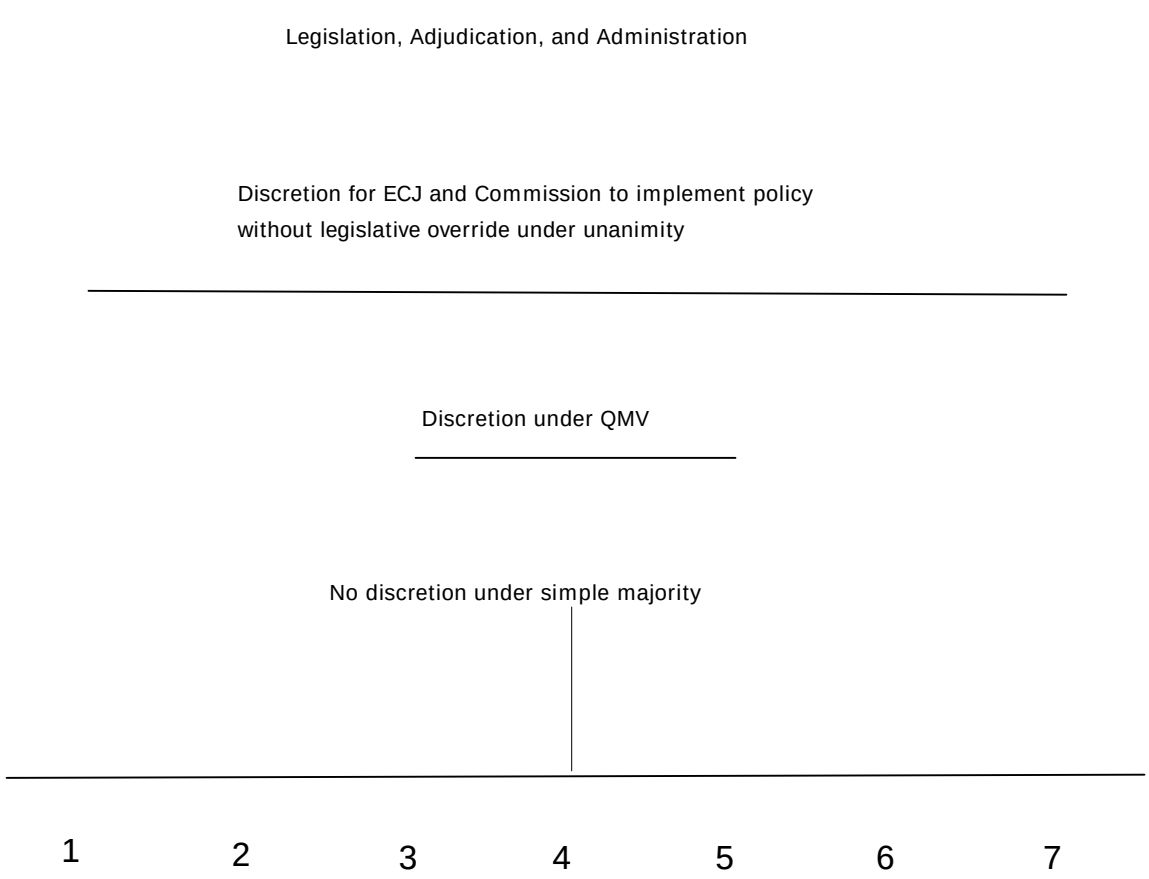
FIGURE 1



Council Members: 1,2,...,7

FIGURE 2

EU Institutions in two dimensions

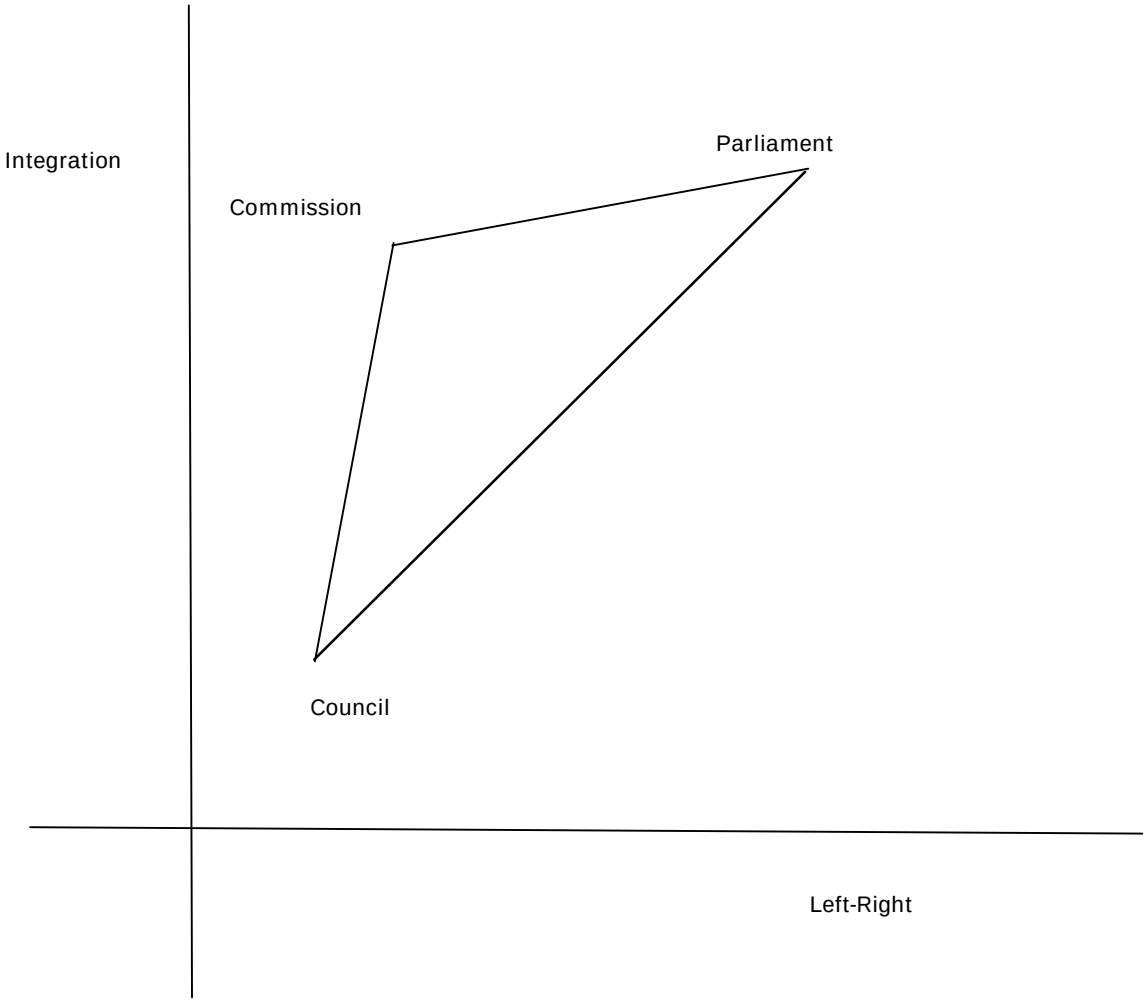


FIGURE 3

The core of EU legislative procedures

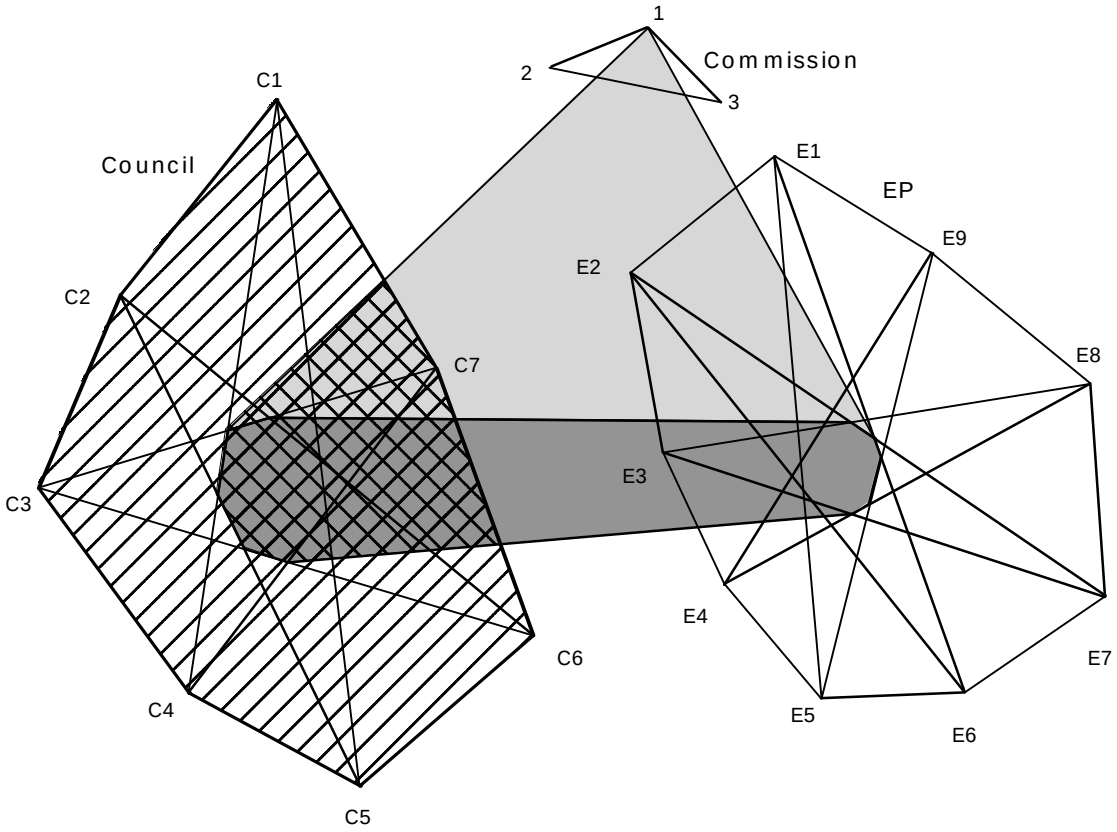


Table 1. Three Approaches to European Integration

	Intergovernmentalism	Neofunctionalism	Institutionalism
Are governments the only (important) actors?	YES	NO	NO
Unintended consequences?	NO	YES	NO (under complete information)

Endnotes

[1] The prevalence of qualified majority voting – rather than national vetoes – in the Council of Ministers is the other distinctive feature of the EU..
[2] Pollack [1997] examines both legislation and policy implementation, but he does not discuss the interdependencies between the two processes.
[3] The argument can be found in Hammond [1996[, Hammond and Knott [1999] and McNollgast [1989]. As far as we know the point has not been disputed with respect to courts (see Cooter and Ginsburg [1996] and Alivizatos [1995] for comparative corroboration). Cooter and Drexl [1994] and Bednar, Ferejohn and Garrett [1996] are preliminary attempts to apply the framework to the EU. With respect to bureaucracies, some of the literature makes the point that in order to avoid bureaucratic autonomy legislatures will try to write more restrictive laws, or threaten to use the courts, or apply other restrictions [Ferejohn and Shipan 1990, Moe 1990, McNollgast 1987]. Of course, disagreeing legislators may or may not be able to write such laws to restrict bureaucrats. We do not address this question here.
[4] See Tsebelis and Garrett [2000] for a detailed presentation of this argument and a general analysis of legislative politics in the EU.
[5] This is not, of course, to ignore other areas of increasing EP authority, such as the power to block the appointment of new Commissions.
[6] This is a simplification that applies directly only to the consultation procedure. Things are more complicated where the Parliament is also involved in legislation. Moreover, our characterization does not apply to cases in which effective override of the Court requires unanimity among the governments – most importantly constitutional issues. As the Barber Protocol to the Maastricht treaty showed, however, this is not impossible [Garrett, Kelemen and Schulz 1998].
[7] The Commission does not have gatekeeping power. It must make legislative proposals when requested to do so by the Council and, since Maastricht, by the Parliament as well.
[8] In this period, of course, the European Parliament had no substantive legislative role.
[9] They also pay great attention to the effects of European integration on sub-national politics.
[10] This is a description of all parliamentary regimes. A fourth actor, the presidency, would have to be introduced for cases such as the US.
[11] In this paper, we assume that national governments are bound to follow ECJ decisions unless they are overturned by new legislation. For a discussion of the conditions under which this is likely, see Garrett, Kelemen and Schulz [1998].
[12] In reality, monitoring of the Commission is subject to "comitology" rules designed to stop the Commission, ex ante, from acting in ways of which the member governments (and the Parliament) disapprove [Pollack 1997, Steunenberg, Schmidtchen and Koboldt 1996]. But the very nature of monitoring is that it can only be known after the fact how an agent has acted. Thus, we consider ex ante legislative responses rather than ex ante comitology oversight to be more effective and important. This assessment would change if the costs of oversight were sufficiently lower than those of legislating to offset the effectiveness advantage of ex post legislation.
[13] In reality, of course, the appointments of Commissioners and Justices are for renewable fixed periods (four and six years respectively). But the threat of not being reappointed seems not to act as a powerful constraint on their behavior.
[14] This is an objection that was brought to our attention by one of the anonymous referees of this article.
[15] Today, consultation applies to areas such as the free movement of capital, competition policy and industrial subsidies. For a detailed description of the policy areas subject to the different QMV-based procedures (except codecision 2), see Tsebelis [1997], Table 1.
[16] These include equal treatment of the sexes (Art. 119), administration of the European Social Fund (Art. 125), health and safety (Arts. 129 & 129a), some aspects of environmental policy (various sections of Art. 130), and fraud (Art. 209a). The treaty brought many other issues under codecision, but subject to unanimity in the Council.
[17] For an analysis of why second chambers in bicameral legislatures may have influence over legislation even when they do not have formal veto powers, see Tsebelis and Money [1997]

[18] The exception to this rule is when preferences are perfectly symmetrical around a single point.
[19] In the graphic the first dimension is left-right, and the second is integration.
[20] The justification for these preferences is elaborated in more detail in Tsebelis and Garrett [2000].
[21] The reasons for this decision are to produce a better graphic.
[22] It can be demonstrated, that if one increases sufficiently the underlying policy dimensions the core ceases to exist, that is, policy becomes so complicated that it is always possible to find a new coalition to upset any status quo. In the case the core does not exist, Tsebelis (1995) has demonstrated propositions similar to the ones presented here on the basis of "veto players" (concept and operationalization defined in the article).
[23] As we have said the legislative institutions may or may not be able to agree on such restrictions. This is an empirical question that we do not invetigate in this paper. What we want to underline here is that even if they do impose restrictions, the bureaucrats or the Court will select from the set of permissible outcomes the point that is closest to their own preferences.
[24] This scenario is analyzed in Tsebelis and Garrett [2000].
[25] It is true, of course, that Delors chose to emphasize internal market reforms over, say monetary or political union, because he thought it was more likely to be supported by all governments.