

Procedural Politics in the European Union

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*Paper prepared for the Sixth Biennial Conference of the European Community
Studies Association (ECSA), Pittsburgh, PA, 2-5 June 1999.*

Introduction¹

Analysts widely agree that institutions, defined here simply as "the rules of the game in a society ... or the humanly devised constraints that shape human interaction" (North 1990, 3), *matter* in politics, if only to the extent that they constrain behavior and shape outcomes.² It is also widely recognized that to the extent that rules shape outcomes, and to the extent that different actors value those outcomes differently, actors have preferences over rules and should seek to influence them (Goldberg 1974; Riker 1980; Majone 1989; Bawn 1993). Yet, to date, scholars have incompletely explained the conditions under which, the ways in which, and the effects with which this occurs. We should seek to explain both power and policymaking *under* rules and power and politics *over* rules. This applies as much to the European Union (EU) as to any other institutionalized system.

In this paper, I take initial steps toward a fuller account of the "dual nature" of institutions, whereby they simultaneously constitute objects of human choice and sources of human constraint (Grafstein 1988). In the following five sections I develop and empirically probe three basic claims: 1) institutions matter; 2) actors have derived preferences over rules as a function of their preferences over outcomes; and 3) actors seek to ensure the usage of rules that favor them in the political process. The first section very briefly surveys current institutional analyses of the EU. The second section analyzes nine EU legislative procedures to assess their impacts on the influence of the Commission, Council, and Parliament as well as on policy outcomes. The third section builds on these findings to generate these actors' preference rankings over existing procedures. The fourth section conducts a preliminary empirical assessment of the extent to which they act on these procedural preferences.

The conclusion sets out an agenda for future research that theorizes the conditions under which, the ways in which, and the effects with which actors manipulate rules for political gain.

Prevailing Approaches

Two bodies of work dominate rationalist institutional analysis of the EU.³

A large literature emphasizes (or assumes) *institutional constraint* and explains the ways in which EU rules influence actors' power and policy outcomes. Most notably, following important initial work by Tsebelis (1994) and Steunenberg (1994), among others, formal analysis of EU legislative procedures has become a veritable growth industry. Tsebelis (1995) deepened his influential 1994 analysis of the Single European Act's cooperation procedure, and others have challenged it on various grounds (Moser 1996, 1997a; Hubschmid and Moser 1997; for overviews see Tsebelis 1996; Kreppel 1997). Garrett, Tsebelis, and others have extended the basic framework to the Maastricht Treaty's codecision procedure and to other EU legislative procedures (Garrett 1995; Crombez 1996, 1997; Tsebelis 1997). While considerable controversy remains (Scully 1997a, 1997b; Garrett and Tsebelis 1998; Tsebelis and Garrett 1997; Moser 1997b), this literature contributes importantly to our understanding of EU politics and integration and firmly establishes those procedural rules influence actors' power and day-to-day political outcomes.

A second literature, smaller but at least equally important, explains the dynamics of EU *institutional design* (see generally Goodin 1996). Triggered in particular by the signing of the Single European Act (SEA) in the mid-1980s (Sandholtz and Zysman 1989; Moravcsik 1991; Garrett 1992), these approaches seek

to identify the conditions underpinning institutional reform and the determinants of institutional bargaining outcomes. The dominant strand argues that institutional choices mix distributive and efficiency concerns and mitigate any of several transaction problems to which cooperation can fall prey (Garrett 1992; Garrett and Weingast 1993; Martin 1992). Moravcsik (1993, 1998) argues that EU institutional design concerns two issues: the delegation of authority to supranational agents and the pooling of sovereignty through qualified majority voting (QMV). Member states design institutions so as to minimize opportunities for *ex post* renegeing, which permits them credibly to commit to their substantive bargains. While controversies remain,⁴ theories of EU institutional design place institutions firmly in the realm of choice and demonstrate that actors choose institutions as a function of their anticipated effects on substantive political outcomes.

These powerful and important bodies of work deeply influence understandings and explanations of European politics and integration. Yet, they collectively exhibit what might be called a "levels of analysis" problem (Kiser and Ostrom 1982; Ostrom 1990, 1995a). In particular, they assume constraint and explain choice in precisely the settings in which each is least intuitively likely. It is generally, and perhaps definitionally, true that "meta institutions" such as constitutions, treaties, and organizational charters are more difficult to change than lower level institutions such as day-to-day rules and procedures. Large scale changes must overcome resistance from vested interests, cumbersome supermajority decisionmaking procedures, high uncertainty about the effects of potential changes, and considerable sunk and transaction costs (Krasner 1984; Mann 1984; Shepsle 1989; Pierson 1996). Yet it is precisely to large-scale EU institutional changes

(treaty revisions through intergovernmental conferences) that theories of choice have been applied. Lower-level rules might be more fluid, yet to date we analyze them as day-to-day constraints rather than day-to-day choices.⁵

Fusing the insights of both approaches leads us to consider everyday institutional choices. To the extent that such choices generate conflict, we are in the realm of "procedural politics." Somewhat regrettably, developing arguments about procedural politics requires some rather mechanical preliminary analysis, and it is to this "spade work" that I devote the bulk of this paper.

Procedures, Power, and Political Outcomes

In this section I analyze nine EU legislative procedures for the power they afford the three main political actors and the policy outcomes that they generate. I will try to minimize the complexity of the presentation, and in any case my intention here is not to contribute directly to any of the current debates on how best to model (or *a fortiori* to understand) legislative procedures in the EU. Instead, I seek to use the excellent work that has been done as a prelude to extending it from the realm of constraint to the realm of choice.

Three preliminary points bear mentioning. First, I only examine legislative procedures that involve a Commission proposal and a binding secondary act of the Council (or, for codecision, Council and Parliament). Even with this limitation, I cover only a fraction of the more than twenty legislative procedures and procedural variants in use in the EU (CEC 1995, Annex 8). Second, according to the terms of the Treaty, under all procedures member states must unanimously amend Commission proposals, subject only to a poorly defined germaneness rule. Third, the

Commission enjoys monopoly proposal (gatekeeping) power and the right to withdraw its proposals at any time. It thus enjoys *ex ante* and, for my purposes, *ex post* vetoes on changes to the status quo.⁶

Simple Procedures: AVFQ, AVFS, AVFU, CNSQ, CNSU, AVCU

I subjectively characterize everything but cooperation and codecision as simple procedures, and I model them together.

Avis Facultatif

Facultative consultation (*avis facultatif*) represents the simplest procedure because it wholly excludes the Parliament unless the Council decides otherwise. Its qualified majority variant (AVFQ) finds most frequent use in the context of the common commercial policy (article 113). Its unanimity variant (AVFU) arises most frequently in the Euratom Treaty, although some secondary acts require it for the adoption of subsequent implementing legislation.

A rarely-used simple majority variant (AVFS) arises when treaty provisions do not specify a voting rule in the Council (as, for example, in article 128 of the original treaty, dealing with vocational training policy, and article 213, pertaining to statistics legislation). Article 148(1) of the treaty establishes that in such situations (i.e., "save as otherwise provided in th[e] treaty"), "the Council shall act by a majority of its members." The key feature of this rule is that agreement by eight of the fifteen states permits a change to the status quo. Compare this with QMV under current (EU15) rules: out of 87 total weighted votes, 62 suffice to pass legislation, making 26 the blocking minority. With current weightings, and even under the most extreme large-small split, agreement by at least eight states is required to pass

legislation. Absent such a stark split, change requires agreement by more than eight states. Accordingly, it is at least as easy to pass legislation under simple majority as compared to QMV, and it can never be harder.

Under any of the AVF procedures, the Commission proposes legislation and the Council amends it (by unanimity) or adopts it (by simple majority, QMV or unanimity). They thus best represent the old maxim that "the Commission proposes and the Council disposes."

Consultation

Holding Council voting rules constant, *avis facultatif* and consultation are formally indistinguishable. In terms of the spare models developed here, Parliament cannot affect policy outcomes in either case. More informally and realistically, Parliament has parlayed its rights under the consultation procedure into some measure of influence, exercised by failing to send reports out of committee and thus threatening the Commission and/or Council with delay (Nicoll 1988; Earnshaw and Judge 1993; Boyron 1996).

The consultation procedure enjoys a long and distinguished pedigree. Its qualified majority variant (CNSQ) arises most frequently for legislation under the common agricultural policy (article 43), and it was used under the SEA for most transport legislation (articles 75 and 84). Its unanimity variant (CNSU) finds use, among others, in the areas of indirect taxation (article 99) and approximation of the laws (article 100), and for measure not specifically provided for in the treaty (article 235). The SEA also established CNSU for environmental legislation (article 130s), although Maastricht changed this. Again, whatever the voting rule, I model both

AVF and CNS as two stage games in which the Commission proposes and the Council disposes (amends and/or adopts).

Assent

Consider, finally, the assent procedure (*avis conforme*, AVC). The Single European Act introduced this procedure for association agreements (article 238) and enlargement (article 237). Maastricht extended it to citizenship provisions (Article 8a(2)), aspects of the cohesion funds (article 130d), the establishment of a uniform electoral procedure for the EP (article 138(3)(2)), and certain international agreements (article 228(3)(2)). Assent constitutes a three stage game: the Commission proposes, the Council decides by unanimity (thus, AVCU), and the European Parliament can reject or accept (assent to) the act by voting "up or down," i.e., with no right of amendment. In the last stage of the game, the European Parliament will assent to any measure that it prefers to the status quo. Knowing this, in the second stage the Council agrees to a policy by unanimity that is acceptable to the Parliament. Acting first, the Commission simply calculates and proposes the policy closest to its own ideal point that is acceptable to all member states and the Parliament.

I model these procedures in Figure 1, using the following assumptions and parameters.⁷ (Although I use quite simple techniques, non-technical readers may prefer to skip to the summary that follows this exposition.) I assume a one-dimensional choice space, including a status quo (Q) that precedes legislative activity and is the default outcome in the absence of agreement. Actors have Euclidean preferences over the space, meaning that they have an ideal point (most-preferred policy outcome) and that their utility declines consistently in the distance from that

ideal point in either direction. They enjoy complete and perfect information about the rules of the game, the location of the status quo, and others' ideal points, and they behave strategically within these one-shot games. I portray the Commission (C) and Parliament (P) as unitary actors, although since both are voting bodies their positions will reflect the ideal points of their pivotal (usually median) members.⁸ I disaggregate the Council into member states, one of which is most reluctant and is pivotal under unanimity (M_u) and at least one of which is pivotal under qualified majority voting (M_q). I also include the median member state (M_m) and the member state most interested in policy change (M_r). For simplicity, I generally assume that member states have equal voting weights. I denote player i 's point of indifference to the status quo as $i(Q)$, and I also include a point x' such that $x'(Q)$ (not illustrated) lies barely to the left of the most reluctant Council member, M_u . Finally, all of these parameters remain constant during the legislative process.

Figure 1 about here

The bold line in Figure 1 maps equilibrium outcomes, X , for different locations of the Commission's ideal point, C . Consider first the procedures that require unanimity in the Council. Here, the Council can only adopt proposals in the M_u to $M_u(Q)$ range. If the Commission lies to the left of x' , it makes no proposal because it prefers the status quo to anything that the Council can adopt. Where the Commission lies between x' and M_u , it can propose M_u and this will be the outcome, because member states unanimously prefer that point to the status quo, but cannot agree unanimously to amend it. If the Commission prefers policies in the M_u to

$M_u(Q)$ range, it can propose and obtain its ideal point. While the most reluctant Council member prefers to move to the left, at least one member state prefers to move to the right. As they cannot achieve the unanimity required to amend the proposal, but since they all prefer it to the status quo, they adopt it unanimously. If the Commission lies to the right of the unanimity pivot's status quo indifference point, its best proposal is $M_u(Q)$, which it obtains.

The assent procedure qualifies these conclusions only slightly. In particular, if the Parliament (not illustrated) lies to the left of x' , it will veto the legislation because it prefers the status quo to anything that the Council can adopt. With complete information, the Commission knows this and makes no proposal. In this (restricted) situation, the Parliament can enforce the status quo against the wishes of the Commission and the Council.

Analysis of the QMV procedures (AVFQ, CNSQ) follows the same logic. Here, the pivotal Council member is M_q . If the Commission holds conservative preferences in the sense of lying close to the status quo, QMV changes nothing. Until the Commission's ideal point reaches $M_u(Q)$, the outcomes of QMV and unanimity variants remain identical. If the Commission has more centrist preferences, it can propose and obtain its ideal point across a broad spectrum, which now extends past $M_u(Q)$ and all the way out to $M_q(Q)$. As before, in that range the Commission can propose its ideal point, member states cannot amend it (some prefer to move left, others right), but they can adopt it by qualified majority vote. With revisionist preferences, the best outcome that the Commission can obtain is $M_q(Q)$.

Summary

Three comparative conclusions bear noting. First, with unanimity in the Council, the Commission and all member states must prefer change in the same direction away from the status quo. Under QMV, by contrast, the Commission and a qualified majority of the Council can overcome resistance by some member states. QMV can make some member states absolutely worse than they would have been under the status quo.

Second, the Parliament cannot formally affect policies under any of these procedures except when it prefers the status quo to any achievable outcome and the AVCU procedure is in use. Under any other simple procedure, the EP can be made absolutely worse off.

Third, the range of winning proposals (and the extent of Commission agenda setting power) is inversely related to the number of players whose agreement is needed to change the status quo. Under unanimity, all fifteen member states must agree to a change, and the ideal point of the most reluctant Council member limits the range of feasible outcomes. Under QMV, at least eight and as many as thirteen states must agree to any change in the status quo, and the ideal point of a more centrist state establishes the range of feasible outcomes. Simple majority voting in the Council, in which agreement by eight states is necessary and sufficient to adopt a policy, almost always amplifies, and never attenuates, these effects. The different height the bold line achieves for the different procedures graphically illustrates that the range of feasible outcomes (and Commission agenda power) relates inversely to the number of players whose agreement is need to change the status quo.

Complex Procedures: SYNQ, CODQ, CODU

Cooperation

The Single European Act introduced the famous cooperation procedure (SYNQ) into several articles of the treaty, dealing with the internal market (article 100a), worker health and safety (article 118a), and the free movement of labor and services (articles 49, 54(2), 56(2)(2), 57(1), 57(2)(3)). Maastricht removed it from some of these areas but extended it to various aspects of transport (articles 75(1) and 84), EMU, social policy (such as the European Social Fund [article 125] and professional training [article 127 (4)], research, environmental policy (article 130s(1), and development cooperation (article 130w). It also introduced cooperation in article 2(2) of the social protocol, modified to account for the UK opt-out in this area.

The cooperation procedure has given rise to controversial and productive theorizing (see Moser 1996; Tsebelis 1996; Tsebelis and Kalandrakis 1997; Jensen 1997; Kreppel 1997). I model the cooperation procedure as a five stage complete information game. The first two steps resemble the QMV consultation procedure: the Commission proposes, Parliament considers the legislation and gives its opinion, and the Council amends/and or adopts a policy, which in this procedure is its common position. The Parliament then considers the common position in its second reading. It faces three options. If it accepts the common position, it returns the legislation to the Council, which adopts the act. If it rejects the common position, the Council can unanimously override this "veto;" if the Council fails to do so, the measure lapses. If the EP offers amendments to the common position, the Commission decides whether or not to accept them. Those that it accepts can be adopted by QMV in the Council or rejected by unanimity. Those EP amendments that the Commission does not

accept can be unanimously taken up by the Council and included in the final legislation.

Again generally following Steunenberg (1994), I model the cooperation procedure in Figure 2. In many situations, the equilibrium outcome under cooperation remains unaffected by the EP and resembles that of the other QMV procedures (see also Tsebelis and Garrett 1996, 354-355). Consider an EP ideal point (P) to the right of the pivotal member of the Council, which means that $P(Q)$ lies to the right of $M_q(Q)$. As in the diagram, outcomes map Commission preferences precisely as they did in the QMV procedures examined in Figure 2. Any amendments the EP might offer can gain neither a) Commission acceptance and QMV passage nor b) unanimity passage against the Commission proposal.

Figure 2 about here

However, the EP can usually affect outcomes when it lies to the left of the Commission and the Council pivot. All of these situations reflect the intuition that the threat of an EP veto may sometimes limit the range of proposals that a rational Commission can offer. Most generally, as in the lower line in Figure 2, the Parliament's indifference point to the status quo, here $P'(Q)$, can generally replace $M_q(Q)$ as the limiting outcome if it lies to the left of the Commission and the pivotal member of the Council. In other situations (not illustrated), if the EP is reluctant ($P < x'$) and the Council is split over the direction of changes in the status quo (at least $M_u < Q$) the threat of an EP veto can enforce the status quo, which it could not do under any of the QMV procedures dealt with so far. While there are exceptions if the

Commission and Parliament are relatively close to the status quo, the EP can influence outcomes under a considerable number of preference configurations.

In sum, the cooperation procedure can afford the Parliament meaningful influence in the legislative process. Unlike other QMV procedures, it can sometimes prevent a situation in which it is made worse off by changes to the status quo. More constructively, the EP can sometimes obtain its own most preferred policy. The Commission will, over many preference configurations, anticipate EP power and modify its proposals accordingly. Overall, then, cooperation "leads to a shift in power in favor of the European Parliament. Parliament may limit, at least in some cases, the agenda-setting power of the Commission", which "to some extent reduces the influence of the Commission on the final outcome" (Steunenberg 1994, 654).

Codecision

The codecision procedure, also much analyzed, came about with Maastricht and has been simplified and extended in the Amsterdam Treaty.⁹ Codecision with QMV in the Council (CODQ) replaced the cooperation procedure for internal market and free movement provisions. Maastricht applied it for the first time to certain areas of vocational training (article 126(4)(1), public health (article 129(4)(1)), consumer protection (129a(1), trans-European networks (129d(1)), environmental action programs (130s(3)). Two articles, one dealing with culture (128(5)(1)) and another dealing with the multi-annual research program (130i(1)), established a variant of the procedure in which the Council must act by unanimity throughout (CODU).

The QMV codecision procedure resembles cooperation in its early stages: Commission proposal, EP opinion, modified Commission proposal, Council common position, and EP second reading. (I will not address CODU here, but the reader can

simply substitute unanimity for Council QMV throughout the procedure.) Again, the EP faces three options at second reading: to approve, amend, or reject the common position. If it approves the common position, a qualified majority of the Council can then pass it into law. If Parliament amends the common position, and the Commission and a qualified majority of the Council approve of those amendments, the common position so amended becomes law. Amendments that the Commission does not approve require unanimity for adoption in the Council. If achieved, the measure (common position plus EP amendments) passes. If the Council fails to adopt at least one EP amendment, or if the EP exercises its third option and rejects the common position, a conciliation committee is convened.

In conciliation, the Commission plays a mediating role while an equal number of representatives of the Parliament and Council bargain bilaterally in the search for a compromise. Conciliation might take one of two paths. If a qualified majority of the Council delegation and a simple majority of the EP delegation approve a joint text, it returns to both houses for consideration. If a qualified majority of the Council and an absolute majority of the EP approve the joint text, it becomes law. If both bodies do not approve the joint text, the measure dies. If, by contrast, conciliation fails and no joint text is approved, a third reading commences and proposal power reverts to the Council. It can propose its earlier common position plus any EP amendments to the Parliament, which can either veto the proposal (the bill thereby lapsing) or fail to veto it, in which case this last Council proposal becomes law.

To simplify, I will follow Steunenberg (1997, 213-217) and analyze a stylized version of codecision for a specific preference configuration. Steunenberg begins with an exogenously determined common position, x , and analyzes codecision as a

four stage game.¹⁰ In the first stage, Parliament offers a joint text to the conciliation committee. The Council considers the proposal in the second stage. If a qualified majority agrees, the proposal becomes law. If it does not agree, it offers the common position to the Parliament. In the third and fourth stages the EP and a qualified majority of the Council respectively, accept or reject the common position. Assume that the Commission seeks a relatively small change to the status quo and that its ideal point lies outside of the unanimity win-set but to the left of the QMV pivot in the Council. Assume further that the EP prefers substantial changes to the status quo. The top panel of Figure 3 includes the Commission. This preference configuration generates a common position, x , which is equivalent to the outcome under other QMV procedures and is illustrated in the bottom panel.

Figure 3 about here

The bottom panel shows that with this preference configuration under codecision, the EP and a qualified majority in the Council can improve on this outcome. The logic is straightforward. The EP must offer a proposal that is at least as good or better for a qualified majority in the Council than point x . Because M_q remains the Council pivot, anything between x and the Council pivot's point of indifference to x ($M_q(x)$) constitutes a feasible outcome. The EP thus makes the proposal that is closest to its ideal point and that a qualified majority in the Council prefers to x . In short, the best proposal the EP can offer is precisely at $M_q(x)$, which becomes the outcome (y) of the codecision procedure. Not surprisingly, CODU (not illustrated) would greatly restrict the range of feasible outcomes and, with this

preference configuration, would make the most reluctant member state's indifference point to the status quo the locus of political activity.

How does codecision affect power and outcomes? All analysts agree that the EP's absolute veto under codecision increases its power relative to cooperation (Scully 1997a, 1997b; Moser 1997; Tsebelis 1997). They also generally agree that the Commission enjoys less influence under codecision than it does under cooperation. Two related disagreements, both of which concern bargaining in the Council, seem to remain. First, Tsebelis and Garrett grant the QMV pivot greater power in intra-Council bargaining than do Moser, Scully, and others, and they emphasize the importance of unanimously achievable alternatives to Commission proposals.¹¹ The second point of disagreement revolves around the Council's rights under the vaguely-drafted article 189b(6) of the Maastricht Treaty.¹² While all agree that the Council makes a "take-it-or-leave-it" offer to the Parliament when conciliation fails, they disagree on what this offer can look like. Some interpret Council discretion under this article expansively and suggest that a qualified majority of the Council can offer any of an infinite number of proposals to the EP (Tsebelis 1997; Garrett and Tsebelis 1998). Others read the article more restrictively, and suggest that the Council can only re-offer its earlier common position (which would have been influenced by EP/Commission agenda power earlier in the game) or offer the common position plus at least some whole EP amendments (Moser 1997). Under this latter interpretation, which I share, the EP can never do worse under codecision than under cooperation, and it can sometimes do better.

Procedural Preferences

In this section I use the foregoing to construct procedural preference rankings for each legislative actor in the EU. The expectation that actors seek to maximize their influence in the policymaking process, and prefer procedures giving them more influence to those giving them less, drives this exercise. However, because the spare models generate similar predictions about power and outcomes across many procedures and preference configurations, I deploy several interconnected auxiliary assumptions to generate strict procedural preference orderings for each actor. I believe that all of these assumptions reasonably approximate the reality of EU politics and policymaking, and I present them in decreasing order of importance.

1. *Participation.* Holding influence constant, the Parliament prefers to participate more rather than less in the legislative process.
2. *Indirect influence.* Holding their own influence and participation constant, the Parliament and Council prefer procedures favoring the Commission to procedures favoring each other.
3. *Economy.* Without prejudice to the indirect influence assumption, and holding their own influence and participation constant, actors prefer the most direct route to achieving desired outcomes. Subject to the above conditions, they thus prefer procedures that involve the fewest steps and the least influence for others.

These auxiliary assumptions do not rid the ranking exercise of all subjectivity, but I note subjective judgments where they arise. Notwithstanding this, here I deploy the spatial models and the auxiliary assumptions to specify procedural preference rankings for each actor.

European Commission

AVFS (1) and AVFQ (2) represent the best and second-best procedures from the Commission's point of view because it enjoys broad agenda-setting power without having to worry about, or risk delay by, the Parliament. CNSQ (3) follows quite closely, inviting some Parliamentary involvement but retaining all of the

Commission's agenda powers. SYNQ (4) limits its agenda power somewhat and introduces additional legislative stages, so it is somewhat less desirable than the other QMV procedures. CODQ (5) is the least desirable of the QMV procedures because it limits Commission agenda power even further and complicates its legislative task considerably. Unanimity procedures consistently reduce Commission influence. Of these, AVFU (6) is the most economical, followed closely by CNSU (7). AVCU (8) is both less economical and introduces the possibility of a Parliamentary veto, which further truncates the range of feasible proposals. CODU (9) is the worst procedure for the Commission, doubly reducing the range of feasible proposals and reducing Commission participation in the later stages of the procedure.

European Parliament

CODQ (1) represents the EP's most preferred procedure. Assessing the relative desirability of SYNQ and CODU poses problems. While SYNQ increases the range of outcomes that the EP can effect, CODU grants it an airtight veto over undesirable changes to the status quo. I subjectively conclude in favor of broader influence and conditional veto (SYNQ, 2) over narrower influence and firmer veto (CODU, 3). AVCU (4) resembles CODU but limits the participation of the EP. Moving down the list, the EP should favor CNSQ (5) to CNSU (6), which allow it to participate but differ in the degree of indirect influence they allow. AVFS (7), AVFQ (8), and AVFU (9) bring up the rear, differentiated only by the indirect influence assumption.

Council

Deriving preference rankings for the Council poses considerable problems because numerous member states with potentially divergent substantive (and thus

procedural) preferences compose it. As a general matter, existing theory suggests that reluctant member states should favor unanimity procedures and median or revisionist states should favor QMV. This suggests that procedural preferences need to be analyzed on a case-by-case basis for each member state. Political economy approaches suggest a fruitful way of tackling this problem (Garrett 1992; Lange 1993; Sprinz and Vaahtoranta 1994; Moravcsik 1997, 1998). While I intend to employ these insights in future case studies, for current purposes they prove unwieldy.

I therefore rely on softer generalizations and one analytical condition to cut into this question. The softer generalizations boil down to the following: the Council prefers, wherever it can, to act by unanimity. Member states exhibit extreme reluctance to "minoritize" (i.e., outvote) their fellows, perhaps out of deference to a consensus culture but also, more strongly, because Council interactions are infinitely iterated and tit-for-tat strategies may be in effect. In short, they realize that in the course of Council interactions over myriad issues, they may find themselves potentially outvoted in the future, and so they avoid outvoting reluctant partners in the hopes of receiving reciprocal deference. This is, admittedly, a weak argument, for it fails adequately to explain the many cases in which member states do outvote each other, even on tremendously sensitive issues.

Analytically, however, the Council will tend to *reveal* a preference for unanimity over QMV procedures. Suppose that the Commission proposes a QMV procedure. Where member state preferences are even moderately heterogeneous, such that at least one member state lies to the right of the range that the most reluctant member state prefers to the status quo, the Council cannot effect a change of

procedure. Knowing that such a change to unanimity would lead to outcomes further away from its ideal point, the right-most member would not support such a change. However, if member state preferences are homogeneous, they may be able to obtain the unanimity necessary to change the procedure proposed by the Commission. Intuitively, when this necessary condition is met they will tend to change from QMV to unanimity procedures. Whatever its true preferences, then, the Council will generally reveal a preference for unanimity over QMV procedures.

With the above in mind, the Council should reveal a preference first for AVFU, which protects individual member states, limits strategic manipulation by the Commission through its agenda power, and economizes on interactions with the Parliament. CNSU (2) follows closely. Given its limitation of supranational agenda powers, relative simplicity, and the stringent conditions for a successful EP veto, AVCU (3) ranks third. CODU (4) complicates matters but is otherwise quite favorable to the Council. In terms of majority procedures, the failure to weight various objectives (influence, indirect influence, participation, economy) creates some ambiguities where these are in conflict. In deciding between AVFQ (5), CNSQ (6), SYNQ (7), and CODQ (8), I emphasize that equilibrium outcomes are often similar across the four procedures. What differentiates them is the transfer of power and participation from the Commission, which the Council can indirectly influence, to the Parliament, over which it has little indirect influence. AVFS (9), I subjectively conclude, so deprives the Council of influence that it must rank last.

Summary

Table 1 summarizes the procedural preference rankings generated in this section. Comparison of these rankings suggests that the prevailing image of

supranational versus national power may only be partly correct. Divergent preferences over CNSU or AVFU, for example, might approximate this pattern. Other procedures, such as AVFS or AVFQ, would tend to pit the Commission against the Parliament (which cannot express any opinion, let alone a procedural one, under the procedure) and the Council. I expect future data and case analysis to highlight many instances in which procedural politics makes strange bedfellows.

Table 1 about here

Procedural Politics

In order to begin assessing the expectations developed above, I examine legal basis disputes in the EU. The legal basis of proposed EU legislation determines the legislative procedure used in making policy. Disputes over the legal basis therefore proxy for procedural political disputes (Bradley 1988; Barents 1993; Chalmers 1998, 213-220). Of the approximately 6,000 binding secondary acts adopted from 1 July 1987 (entry into force of the SEA) through 31 December 1997, at least 400 have given rise to a legal basis dispute of greater or less seriousness. The Court has judged twenty-eight legal basis cases through January 1999. Here I restrict my attention to these cases (see Appendix), which have been called by one eminent jurist "the pivot on which the balance of federalism within the European Community turns" (Lenaerts 1992, 28).

Several caveats and clarifications with respect to the data, and my use of them, suggest themselves. First, the sample does not well represent the body of EU legislation, and the cases arguably are those most likely to confirm the procedural

politics view. However, I make no pretense to testing theory. Rather, my goal is to conduct a plausibility probe -- a much abused convention!-- as a prelude to more extended and rigorous testing. If the findings confirm expectations, the door to further work has, at a minimum, not been shut.

Second, coding the relevant revealed procedural preferences presents numerous operational difficulties, and I use this small data set to work out coding procedures that can be applied to larger and more representative samples. Institutional (treaty) changes present one such difficulty, because the same legal basis might call for different procedures under different periods, or the same subject might come under a new (and procedurally different) legal basis, and the sequence of legislating and litigating might bridge these periods. Where such a change has intervened, I consider the legal basis and procedure that would apply at the time that an actor is stating an opinion in the Court case at hand. This captures the fundamentally strategic and forward-looking nature of litigation. As a second point on coding, I only include preferences expressed as a party or an intervenor to a dispute, and do not consider procedural preferences expressed prior to litigation. Finally, where parties supported multiple procedures or where their alternatives are ambiguous, I code their revealed preferences in the way that is least supportive of my expectations.

Table 2 summarizes these cases by displaying the frequency with which each class of actor promoted or defended each legislative procedure. The first number in each cell represents the number of interventions for each procedure, while the second (bold) number calculates this revealed procedural preference as a percentage of all of the actor's interventions before the Court. The bottom row calculates the percentage

of interventions that support QMV (and simple majority) in the Council. The small number of cases and inherent selection bias limit the inferences that can be drawn, and the following does not immediately control for procedural alternatives. Overall, however, these data provide solid support for the expectations developed above.

Table 2 about here

The Commission, to start, has spread its support over a variety of procedures, but it has supported QMV in one hundred percent of its interventions before the Court. As the actor with the single clearest interest in QMV, due to the agenda power that it gains, this strongly confirms expectations. It also appears, as expected, to combine this support for QMV with relative disinterest in enhancing the role of the EP.

The Parliament intervenes far less frequently than the other actors because it enjoys limited rights to bring annulment actions. Until 1991, this right remained tenuous in the ECJ's jurisprudence, and since that time it can only intervene to defend its institutional prerogatives. This limits the number of EP interventions (although these are increasing) and determines that it will always be playing procedural politics when it does intervene. Not surprisingly, then, the EP does strongly confirm expectations. It supports one of its top two procedures (CODQ and SYNQ) in ten of twelve interventions (83%). (By comparison, the Court (39%) and the Commission (33%) trail by a considerable margin.) Its preference for these two procedures also overdetermines its support of QMV in the Council, which stands at eleven of twelve cases.

Member states and the Council support QMV far less than the other actors, at forty-three and fifty-four percent, respectively. In particular, both support CNSU (57% and 46%, respectively) far more than any other procedure, with the Court coming in a distant third at 10.7%. However, as detailed in the previous section, the Council holds an ambiguous position. The fact that it is always a defendant in these cases (because it always adopts the final acts that are attacked) exacerbates this problem. Member states attack the Council when it uses procedures that do not serve their interests (usually QMV), and the Council must defend those procedures. Recall that it might use QMV procedures only because it is institutionally unable to alter them. When attacked, it must defend this choice in Court. By contrast, the Commission and Parliament tend to attack the Council when it uses unanimity against their wishes, and it must defend unanimity. This tendency, and the logic underlying it, points up the difficulty of attempting to impute procedural preferences to the Council as such.

The same patterns play out when I introduce controls for procedural alternatives. For each actor, I used the rankings derived above to calculate the difference between the procedure it supported before the Court and the procedure supported by the other parties. All Commission and Parliament interventions tended in the expected direction. In other words, they always defended procedures that, according to the expectations developed above, increase their power relative to the alternative promoted by some other actor. More particularly, both tended to promote procedures that ranked about three places higher than the alternative (3.3 for the EP, 2.8 for the Commission). While this should not be terribly surprising, it does contradict claims, often given in interviews at the various EU institutions' legal

services, that the choice of legal basis centers on technical, rather than political considerations.

Again, the position of the Council is much more tenuous in this respect. In fully ten of twenty-eight interventions, the Council defended procedures that, according to the analysis above, were worse for it than the alternative. In nine of these ten cases, however, the Council had been attacked in Court by one of its own member states, and in eight of these cases the member state(s) in question sought the use of unanimity procedures. A fuller theory of member state procedural preferences, as I have argued, would suggest that reluctant states favor unanimity and revisionist states favor QMV. I suspect that the eight cases in which members argued for unanimity against the Council could be explained by such an approach, although I have neither a rigorous foundation nor any evidence in support of this speculation. This would leave two anomalies: one in which the Council used AVFS (its worst procedure) as against the CNSQ pushed by the EP (Case C-316/91), and one in which the Council supported AVFS as against the SYNQ pushed by Germany (Case C-426/93). I will not explain the special circumstances surrounding these cases, but simply take them as unresponsive to my arguments.

Finally, although I have offered no theoretical expectations about the ECJ's procedural preferences, several aspects of its judgments bear noting. First, the Court has worked in favor of the Commission's preferences in all but two cases. Second, the Court exhibits greater ambivalence toward the Parliament, supporting it, by my rankings, in fifteen of twenty-eight cases. Of course, many of its most important early judgments were primarily Commission-Council disputes that dealt more with voting in the Council than with the role of the EP. When forced to choose, however,

the Court has consistently supported QMV procedures that exclude Parliament against unanimity procedures that at least afford it a right to consultation.

Contrary to the prevailing wisdom, then, the Court does not appear unambiguously to favor "supranational" solutions, if these are understood as maximizing Parliamentary influence. By consistently supporting QMV in the Council, furthermore, the Court acts contrary to expectations generated by existing formal theories (Cooter and Drexler 1994). Combined, these findings suggest the need more fully and clearly to theorize the strategic role played by the Court in inter-institutional politics.

Conclusion

The paper is the first step in an ongoing project that seeks more fully to explain the role of rules in the European Union. I have explored in the most preliminary way three claims: first, that institutions matter; second, that actors have (divergent) preferences over rules; and third, that they seek to ensure the usage of rules that increase their influence in the political process. For two of the three main legislative actors, available evidence supports these claims. The third, the Council, reveals the limitations of the modeling strategy and will require more detailed and sophisticated analysis.

Gathering and coding additional and more representative data will be necessary to continue this line of research, but it is insufficient. Intuition suggests, and data show, that actors sometimes try to manipulate procedures in their favor, but that sometimes they do not do so. A general theory of procedural politics would be a conditional theory, one that predicts both instances of manipulation and instances of adherence to rules. Such a theory, were it offered, would directly address the "dual

nature" of institutions, whereby they simultaneously constitute (potential) objects of choice and sources of constraint (Grafstein 1988). This remains an urgent task (Calvert 1995) and in this final section I sketch the way that I intend to approach it.

Fights over rules in day-to-day EU politics --what I call procedural politics-- entail strategic interaction between four actors: the Commission, Council, Parliament, and Court. When deciding whether or not to try to manipulate rules, each actor must consider the procedural preferences, power, and anticipated reactions of the others. Early stages of these games will vary depending upon the procedural alternatives being considered. The following sequence will always characterize the final three stages of these games: Council procedural choice, Commission/Parliament/member state decision about whether or not to challenge this decision before the Court, and Court judgment on the validity of the Council choice as against the alternatives. While I do not formally develop these games here, I simply highlight their most salient feature: in the last stage, the Court must judge the validity of the Council's choice. I imagine this as an expected utility calculation, in which it must consider not just the options before it, but also the possibility that member states will react to an unfavorable judgment by modifying the treaty.¹³ All of the other actors, playing in earlier stages of the game, will work backward from their expectations about what the Court will do in deciding upon their own best choice between accepting (potentially unfavorable) rules or seeking to change them. The Court's importance only increases to the extent that it establishes precedents, dramatically increasing the stakes in procedural political disputes.

It seems to me that the driving force behind much of this activity will be the *institutional ambiguity* of policy issues, by which I mean the number of (procedurally

different) rules that might apply to a given issue. As the number of potentially applicable rules increases, so too does the opportunity for manipulation. Where ambiguity is low, manipulation stands almost no chance of being upheld by the Court. Where it is high, the Court may favorably judge one's procedurally-driven interpretation of an issue and set a precedent for future legislation in the area.

"Manipulation" will take two forms: strategic issue framing, in which actors will (predictably) frame issues in such a way as to promote the use of politically favorable rules; and coalition formation. To the extent that they strategically frame and amend legislative proposals in the pursuit of procedural advantage, procedural politics will affect the content of policy. And, in the longer term, I would expect procedural political disputes within a given treaty regime to feed back into the treaty through institutional change.

Such a theory, should it work, would serve several purposes. First, it might offer theoretical leverage on the thorny problem of the substantive policy preferences of the Commission, Council and Parliament, suggesting that these are sometimes procedurally conditioned.¹⁴ Second, it might contribute to recent efforts to theorize the importance of "issues" in EU politics, and it might help to explain the alternative issue frames promoted by different actors. Third, it builds two bridges between grand bargaining and day-to-day politics. On the one hand, constitutional bargains set parameters on, but do not uniquely determine, the rules used in day-to-day politics. On the other hand, day-to-day disputes over rules might feed back into future grand bargains by inciting reactions by member states, pointing up ambiguities in (and thus the incompleteness of) existing contracts, or facilitating learning and institutional adaptation to the emergence of new issues. Fourth, it would capture

institutional choice and institutional constraint within a single (strategic) logic, showing that it often makes sense to work within politically unfavorable rules, rather than devoting resources toward changing the rules. This might facilitate the integration of the disparate institutionalisms that currently prevail. Finally, drawing as it does upon very generic tools and methods, it might facilitate comparative institutional analysis of the EU and other rule-governed systems.¹⁵ The present represents the smallest of steps toward these goals.

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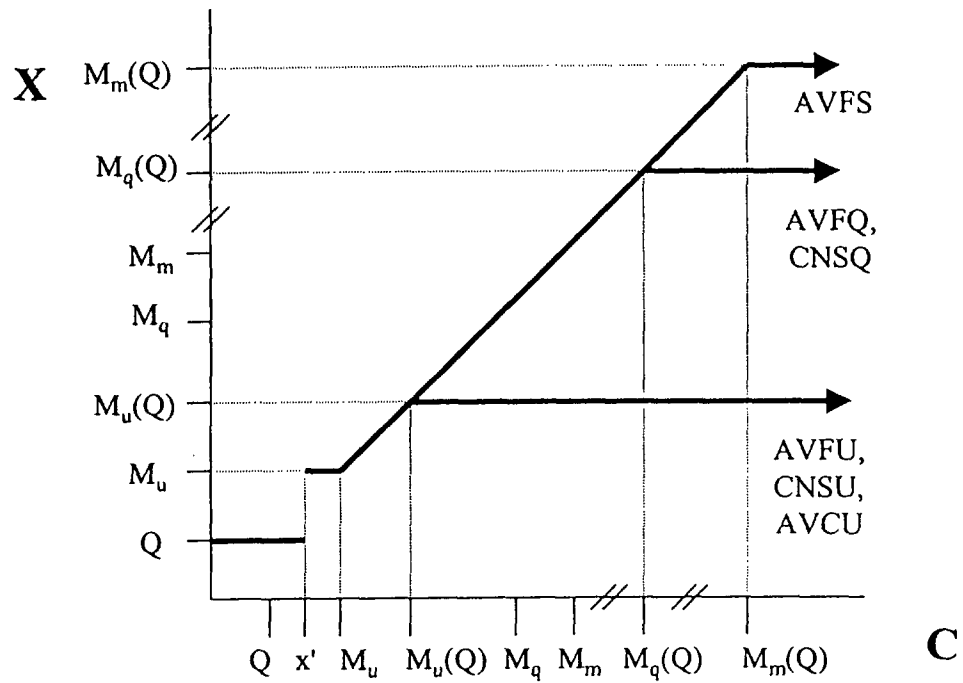


Figure 1: Simple Procedures

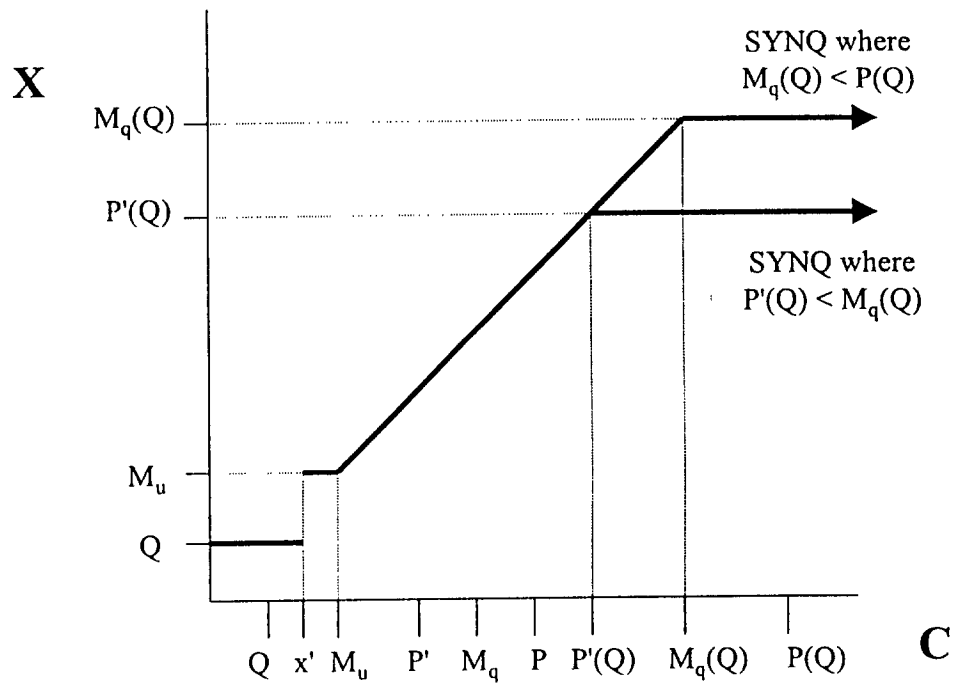


Figure 2: Cooperation Procedure

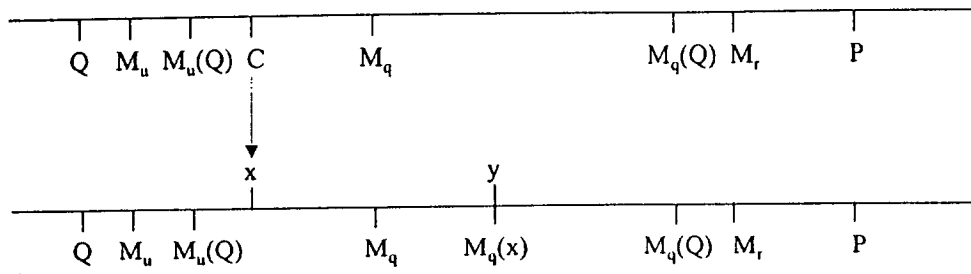


Figure 3: Codecision Procedure

Procedure	CEC	EP	CM
AVCU	8	4	3
AVFQ	2	8	5
AVFS	1	7	9
AVFU	6	9	1
CNSQ	3	5	6
CNSU	7	6	2
CODQ	5	1	8
CODU	9	3	4
SYNQ	4	2	7

Table 1: Procedural Preference Rankings

Table 2: Procedural Politics Before the Court		Actor				
		MB	ECJ	EP	CEC	
Procedure	CODU	0 0.0	0 0.0	0 0.0	1 8.3	0 0.0
	CODQ	1 2.9	2 7.1	3 10.7	3 25.0	3 12.5
	CNSU	20 57.1	13 46.4	2 7.1	0 0.0	0 0.0
	CNSQ	5 14.3	5 17.9	6 21.4	1 8.3	6 25.0
	AVFQ	3 8.6	2 7.1	6 21.4	0 0.0	6 25.0
	AVFS	2 5.7	4 14.3	3 10.7	0 0.0	4 16.7
	SYNQ	4 11.4	2 7.1	8 28.6	7 58.3	5 20.8
	Total	35	28	28	12	24
	<i>pro-QMV</i>	43	54	93	92	100

Appendix: Court Cases Analyzed

Case	Shorthand Name	ECR Reference
45/86	Generalized Trade Preferences	87-1493
68/86	Hormones	88-855
131/86	Battery Hens	88-905
165/87	Harmonized Commodity Descriptions	88-5545
51/87	Generalized Tariff Preferences	88-5459
275/87	Temporary admission of containers	89-259
242/87	Erasmus	89-1425
56/88	Vocational Training	89-1615
11/88	Undesirable substances & feedingstuffs	89-3799
131/87	Animal glands and organs	89-3743
C-62/88	Chernobyl	90I-1527
C-300/89	Titanium Dioxide	91I-2867
C-51, 90 & 94/89	COMETT II	91I-2757
C-70/88	Post-Chernobyl	91I-4529
C-295/90	Students' Rights	92I-4193
C-155/91	Waste Framework Directive	93I-939
C-316/91	Lomé Convention	94I-625
C-187/93	Waste Shipment Regulation	94I-2857
C-426/93	Business registers for statistical purposes	95I-3723
C-360/93	Marches Publics EU-USA	96I-1195
C-271/94	EDICOM	96I-1689
C-84/94	Working Time Directive	96I-5755
C-268/94	India Cooperation Agreement	96I-6177
C-350/92	Certificate for Medicinal Products	95I-1985
C-233/94	Deposit-Guarantee Schemes	97I-2405
C-22/96	IDA	98I-3231
C-42/97	Linguistic Diversity -- MLIS	99I-0000
C-164 & 165/97	Forests--Atmospheric Pollution and Fires	99I-0000

¹ I gratefully acknowledge support provided by the Council on European Studies (Pre-Dissertation Fellowship), the Social Science Research Council (International Dissertation Field Research Fellowship, with financial support from the Andrew Mellon Foundation), the U.S.-EU Fulbright program, the Institute for the Study of World Politics, and the European Union Center at the University of Washington.

² To the extent that they shape preferences, they would exert even more profound effects. While I do not consider this issue further here, Sandholtz (1996) lays out the basic argument that "membership matters."

³ See Jupille and Caporaso 1999 for a fuller account of institutional analyses of the EU.

⁴ These usually do not attack theories of institutional design directly, but concern the lesser issue of the relative importance of grand bargaining and day-to-day politics in the EU (Wincott 1995; Moravcsik 1995, 1999). For a direct discussion of Moravcsik's arguments about institutional choice, see Scharpf 1999, 165-166.

⁵ Dogan's (1997) analysis of comitology is the only study of which I am aware that examines procedural choice in the EU.

⁶ This is consistent with Steunenberg (1994) but different from Tsebelis and Garrett (1996, 351-352; Garrett 1995).

⁷ I replicate many features of the models developed by Bernard Steunenberg (1994).

⁸ Tsebelis (1995) considers this issue for the European Parliament and finds that relaxing this assumption exerts few analytical effects.

⁹ For excellent analyses of the reform of the codecision procedure during the 1996-1997 IGC see Steunenberg (1997, 1998) and Steunenberg and Dimitrova (1999).

¹⁰ See Steunenberg 1997, 213-215 for a discussion of this simplification.

¹¹ In particular, they model intra-Council bargaining as a two stage game in which amendments are offered in the first stage and voted against the status quo in the second. I believe that the Commission proposal remains "on the table" while member states are considering amendments, and is voted last against the status quo. In this latter game, using the standard preference configurations (Commission and at least one member state to the right of the QMV pivot's indifference point to the status quo), at least one member state (M_i) would reject all proposed amendments in favor of the Commission proposal, which a qualified majority could accept in a paired contest against the status quo.

¹² An article which is unlikely ever to come before the Court for interpretation, for the reasons given by Tsebelis (1997).

¹³ This highlights the infinitely iterated nature of these games. As Ferejohn and Weingast (1992) put it, "there is no last word in politics." However, truncating the game at this stage, and including anticipated member state reactions in the Court's expected utility calculation, facilitates the analysis while still capturing the strategic nature of the Court's choice. See Garrett, Kelemen, and Schulz (1998) for an excellent examination of these issues in the context of the EU.

¹⁴ See Pollack 1996, 3-5 for a discussion of this difficulty with respect to the Commission.

¹⁵ See generally Ostrom 1995b. Tsebelis and Money (1997) and Zito (1998) offer quite different but very promising applications of comparative institutional analysis to the EU.