

**Intergovernmental Contracting:  
Everyday Choice and Long-Run Change in EU Institutions**

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## I. Introduction

The possibility of endogenous institutional change –institutional change, that is, responding not to variations in underlying material or social conditions, but to the internal logic of the institutions themselves – remains poorly understood by political scientists. Changing exogenous factors enter like the proverbial *deus ex machina*, saving us the trouble of undertaking the sometimes messier work of working through inner dynamics. This is no less true for work on EU institutional change, but it is more troubling insofar as Europe's growing institutionalization represents one of the most astonishing occurrences of the postwar international system. To what extent does EU institutional development reflect changing exogenous parameters, such as patterns of production, interdependence and power, and to what extent, by contrast, does it respond to a developmental dynamic internal to EU institutions themselves?

This paper addresses itself to these questions, opening space for the claim that formal institutional change responds at least in part to endogenous institutional dynamics. While seemingly trivial on its face, working with and systematically testing this proposition has proven difficult in practice. This draft paper identifies a particular causal pathway (incomplete contracting) linking everyday institutional operation to long-run change, conducts a few empirical plausibility probes in the area of "procedural politics", and sets forth an agenda for more systematic tests. Pursuing this line of analysis will yield payoffs not only in terms of the crucial questions of EU institutional development, but also in thinking about institutional operation and change more generally.

The paper, a very rough draft, is organized conventionally, though each section remains a sketch of what it would eventually look like. Some literature and theory follow

in part II. Part III undertakes some simple empirical assessments aimed at probing the plausibility of the arguments developed. Part IV summarizes and concludes.

## **II. Explaining EU Institutional Development**

Interest in EU institutional change has mushroomed in the last ten years. This probably reflects both the maturation of the institutionalist research program, which increasingly seeks to build out from the consensus claim that "institutions matter", and the host of natural experiments provided by rapid and ongoing formal institutional change "on the ground" in the EU itself. Whatever the reasons, there is a huge literature that I just won't cover in this draft, but that should figure in a duly diligent review of existing work. Among works neglected are those focusing on informal dynamics (Farrell and Héritier 2003; Stacey and Rittberger 2003); etc. more cites. Instead, I will focus on the claims about institutional change made by intergovernmentalist theory, and specifically by Andrew Moravcsik. I don't do this to rehearse the same tired debates, less still to erect a straw man argument that can be easily pushed aside. Instead, I want to take seriously the logic of Moravcsik's theory of institutional change, to derive observable implications from it, and to test it alongside a more elaborated view of institutions emphasizing the possibilities for endogenous change.

As currently specified, intergovernmental theory leaves little room for endogenous institutional development. Moravcsik's leading statement (1998) argues that institutional choices (changes) reflect a logic of credible commitments, whereby institutional arrangements help to lock-in intergovernmental bargains, rather than ideological or technocratic motivations. These institutional bargains reflect state preferences (derived from structural changes in the international political economy) and

power (derived from resulting patterns of asymmetric interdependence). Both the pooling of sovereignty (qualified majority voting) and delegation (to the Commission, Court and possibly Parliament) are taken to be "discrete" choices and modeled as static "individual decisions" (Moravcsik 1998, 490, 494). Existing institutions shape institutional change in one quite limited way: they represent the status quo *ante* and reversion point of later grand institutional bargaining (Moravcsik 1995, 612; Moravcsik 1999MILL, 380).

In discussing stronger notions of endogenous institutional change (what he terms "political spillover") Moravcsik imputes three claims to historical institutionalism (HI). Involving, respectively, effective supranational entrepreneurship, unintended consequences, and shifting preferences, these find little purchase in his empirical analysis of grand institutional bargaining. Subsequent empirical analyses suggest that "There appears to be, at the very least, substantial autonomy from pre-existing institutions" (Moravcsik and Nicolaïdis 1999, 77; see also p. 79). While allowing that "HI theorists are correct to note that integration has politically significant consequences, notably shifts in the ... institutional environment in which future decisions are made," Moravcsik limits these sorts of effects to those that are foreseen and intentional (Moravcsik 1998, 494).

I want to suggest that liberal intergovernmentalist logic leaves room for endogenous institutional change, and that elaborations toward that end may well represent complements, or at most friendly amendments, to LI, rather than challenges to it. The general principle, following Moravcsik, is that each institutional bargain "is recursive, influenced by past bargains and influencing future ones" (Moravcsik 1995, 612). Three characteristics of EU institutional change point the way. First, as already

noted, after 1952 and certainly 1958, institutional changes represent departures from an already-institutionalized status quo, which also represents the reversion outcome should bargaining break down. The everyday operations to which they give rise also form part of the status quo *ante*. Second, EU treaties represent contracts among states, and like all such agreements they suffer from various shortcomings, most generically the impossibility of fully anticipating every contingency. Such incomplete contracting problems are perfectly consistent with LI's rationalist foundations and, while they depart from the logic of intentionality insisted upon by Moravcsik, including them stays close to LI's core all while improving its verisimilitude. Third, and given the foregoing, EU institutional changes might at least in part be characterized by learning dynamics, inclusion of which Moravcsik has identified as a potentially fruitful elaboration of LI's theoretical foundation (Moravcsik and Nicolaïdis 1999, 83; Moravcsik 2001).

Taking these as my cues, I develop an argument along the following lines. First, because they represent incomplete contracts, EU treaties will always to some extent operate in ways unforeseen by member states. Second, the greater the divergence between intention and operation, the greater the information available to member states about how treaties should be changed. Third to the extent that the divergence between operation and intention works to member states' disadvantage, the greater their incentives to change the treaties. In sum, everyday responses to incomplete contracting problems should both *inform* and *incite* long-run institutional change, at least partly endogenizing it to the prior operation of institutions. The next section elaborates these claims and provides a preliminary test in connection with the everyday operation and long run-change of EU legislative procedures.

### **III. Plausibility Probe: Procedural Politics and Procedural Change**

The EU's constitutional system is one of "attributed competences" in which the treaties specify the content, extent and limits of EU authority as well as the modalities by which it is to be exercised. This involves many considerations, among the most important of which is the design of legislative procedures that will subsequently govern the everyday making of EU law. Different treaty articles deal with different policy/issue areas, and each also entails usage of a specific legislative procedure defining how a legislative proposal makes its way through the process. In designing or changing the treaties, then, member states intend to create a correspondence between issues (policy problems) and institutions (legislative procedures).

There are a great many specific legislative procedures (more than two dozen under certain treaty regimes), but these can be analyzed generally in terms of three important dimensions. The first involves which actor(s) possess(es) proposal power, and the nature of that power. In the first (European Community) pillar of the EU, the executive European Commission generally enjoys a monopoly on legislative initiative and can withdraw its proposals at any time. In short, it enjoys gatekeeping power. The second dimension involves the voting rule in the Council of Ministers, which can take the form of either simple majority, qualified majority (QMV), or consensus/unanimity. The third dimension involves the role played by the European Parliament (EP), ranging from no role at all ("facultative consultation") to obligatory consultation to various combinations of amendment and veto power.

The logic of incomplete contracting implies that this attempt to map issues onto institutions will operate imperfectly, and increasingly so over time. Baumgartner and

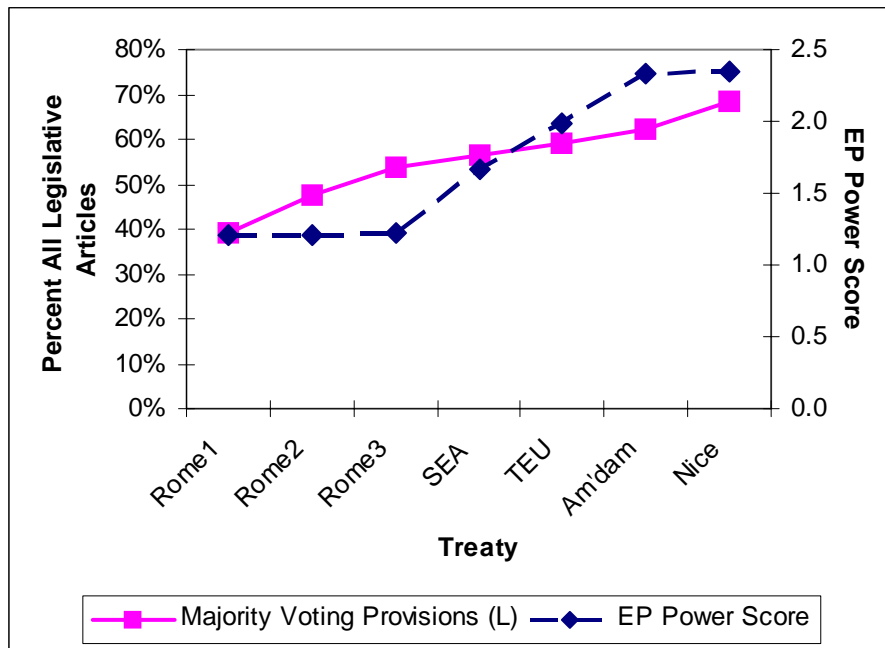
Jones (1993; Talbert, Jones, and Baumgartner 1995, 385-386; Baumgartner, Jones, and MacLeod 2000) and others have spelled out many of the reasons for this, but it is simplest just to suggest that institutions have "entropic tendencies" whereby they, as structures designed at a specific point in time to reflect a particular set of circumstances, but intended to endure through time and changing circumstances, inexorably fall out of alignment with the more fluid policy and political issues with which they are initially supposed to cohere. As a result (but also as a result of other factors), problems of "jurisdictional ambiguity" (King 1997) arise, whereby issues no longer map cleanly onto existing procedural jurisdictions. This would be an anodyne legal-technical problem but for one fact: which procedure operates can have extremely important consequences for actors' power and policy outcomes.

This lethal combination --issues that are jurisdictionally ambiguous with respect to consequentially different legislative procedures-- generates games of "procedural politics", in which actors (Commission, Council/member states, and Parliament) fight in the first instance not over the content of policy, but over the procedures under which policy will be made (Jupille 2004). They do so not directly, since they can't directly shape procedure, but indirectly by fighting over issue definitions and correspondingly appropriate legal bases (which entail procedures). In so doing, they waste tremendous time and resources. While there are no available measures of the resource costs associated with this form of rent-seeking, with respect to decisionmaking inefficiencies existing data show that during the 1987-1997 period procedural political fights increased the average adoption time for EU legislation from 175 to 391 days (Jupille 2004, 113).

What does all of this imply for long-run institutional change? An elaborated intergovernmentalist account of the sort sketched above, one emphasizing incomplete contracting (and hence unintended consequences) and learning, would suggest that these dynamics of everyday institutional choice ("procedural politics") should influence long-run institutional change. Two causal pathways suggest themselves. First, because procedural politics responds to jurisdictional ambiguity, and because jurisdictional ambiguity in turn reflects gaps and overlaps in the policy-institutional correspondence set up in existing treaties, procedural political disputes should *inform* member states about problematic areas of the treaty. Second, because procedural political disputes are costly, their prevalence should *incite* member states to change the treaties with a view toward their elimination. The operational hypothesis resulting from the foregoing is that as time T procedural political disputes increase, the likelihood of time T+1 institutional change also increases.

In specifying a few very simple tests of this proposition in the next sub-section, I focus on the way that the procedural menu changes over time in response to evolutions in legal basis and procedural political disputes. To simplify the analysis and to link it as tightly as possible with existing work on EU institutional choice, the focus will be on both the pooling of national sovereignty in the form of majority voting in the Council of Ministers and the delegation of national sovereignty in the form of empowerment of the European Parliament. The basic facts that I hope to help explain are illustrated in Figure 1, which traces the evolution of both majority voting rules in the Council (as a percentage of all treaty articles empowering it to adopt legislation, left-hand axis) and a simple

"power score" for the European Parliament.<sup>1</sup> From the Rome Treaty (with its three transition periods), through the Single European Act (SEA), Treaty on European Union (TEU, or Maastricht Treaty), and on through the Amsterdam and Nice Treaties, Council majoritarianism has steadily increased. At the same time, successive treaty modifications have consistently and substantially empowered the European Parliament.



**Figure 1. Changing Procedural Provisions of EU Treaties, 1957-2003<sup>2</sup>**

Aggregate testing of the claims advanced just above poses some significant methodological obstacles, which may be why it has not yet been attempted. These obstacles, and my relatively limited explanatory goals –does procedural politics feedback into long-run institutional change?—dictate that I proceed incrementally, keeping limitations and uncovered terrain firmly in mind. I begin with some very generic

<sup>1</sup> The EP "power score" assigns points to each procedure (AVF=1, CNS=2, AVC=3, SYN=4, COD=5, all defined in Jupille 2004), multiplies this times the frequency with which the procedure appears in the treaty, and divides that product by the total number of provisions specifying the EP's legislative role. It is intended simply to facilitate over-time comparison of the consecutive treaties.

<sup>2</sup> Based on the author's calculations, but inspired by and broadly consistent with data compiled by Andreas Maurer (2000; Maurer, Wessels, and Mittag 2000).

correlations between everyday rules disputes and the types of procedural changes just identified (portrayed slightly differently). Table 1 reports simple bivariate correlations between everyday rules disputes and two measures of the aggregate procedural content of the treaties, the degree of facultative (that is, non-compulsory) consultation of the EP and the degree of majoritarianism in the Council. I report yearly data for 1985-1998, though on the assumption that rules disputes take some time to find expression in treaty change, I assessed procedural change against everyday choice two years prior.<sup>3</sup> The coefficients are all statistically significant and demonstrate signs consistent with the idea that, by whatever causal logic, everyday disputes are informing/inciting procedural change so as to advance supranationalism in the EU. Specifically, the greater the number of fights over rules during a given treaty regime, the less will be the rate at which the subsequent treaty deprives the EP of any say, and the greater will be the fraction of legal bases allowing some form of majority voting in the Council.

**Correlations**

		MAJORITY LEGAL BASES (%)	FACULTATIVE CONSULTATION LEGAL BASES (%)	YEAR -2 LEGAL BASIS DISPUTES
MAJORITY LEGAL BASES (%)	Pearson Correlation	1.000	-.933**	.741**
	Sig. (2-tailed)	.	.000	.002
	N	14	14	14
FACULTATIVE CONSULTATION LEGAL BASES (%)	Pearson Correlation	-.933**	1.000	-.759**
	Sig. (2-tailed)	.000	.	.002
	N	14	14	14
YEAR -2 LEGAL BASIS DISPUTES	Pearson Correlation	.741**	-.759**	1.000
	Sig. (2-tailed)	.002	.002	.
	N	14	14	14

\*\* . Correlation is significant at the 0.01 level (2-tailed).

**Table 1. Everyday Choice and Procedural Change, 1985-1998**

<sup>3</sup> Same- and previous-year results are also statistically significant with the same signs, though the correlations are lower.

The foregoing is highly aggregated, and things can be considerably unpacked. In the plausibility probe that I develop here I will limit myself to explaining the impact of Single Act-era procedural politics on Maastricht Treaty procedural changes. For each first-pillar treaty article providing for the adoption of legislation, I coded two specifications of the dependent variable of procedural change. A first is dichotomous – did the procedure change, either in terms of EP role or Council voting rule, relative to the procedure in place under the old treaty? The second specification is simply one of the narrower categories (EP role), measured as rank-differences between the prior and the subsequent treaties.<sup>4</sup> Thus, I am asking about whether procedural change occurred, and to what extent it had certain specific properties associated with the role of the European Parliament.<sup>5</sup>

On the independent variable side, I focus on a number of factors. For every legal basis providing for the adoption of legislation, I coded the number of times the Parliament and Commission invoked that legal basis where a legal basis or procedural political dispute took place. I only included disputes that occurred between the July 1987 entry into force of the SEA and the December 1991 intergovernmental agreement on the later treaty.<sup>6</sup> On this basis, and using information generated from Celex on the number of acts adopted, I calculated a "dispute differential" capturing the difference between each treaty article's fraction of all disputes (of that type for that actor) and each treaty article's

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<sup>4</sup> I used the ordinal scale for EP role as above, in Figure 1. The rank difference measures subtract the later from the earlier period, using rankings deduced in Jupille 2004, ch. 3. Larger rank-difference numbers reflect moves in the direction of EP empowerment.

<sup>5</sup> Testing similar expectations about changes in voting rule proved impossible, since they were extremely rare: 3 of 103 articles from the SEA to Maastricht, 8 of 155 from Maastricht to Amsterdam. It turns out that most of the gains in majority voting come about through the creation of new articles and provisions, rather than through the modification of existing ones.

<sup>6</sup> There is usually a year or two delay between agreement on a treaty and its entry into force. It made little sense to include cases occurring after agreement but before entry into force, since the hypothesized effects (incorporation into treaty change) could never materialize, the new treaty having already been agreed.

share of all legal bases for legislation adopted during the period. The greater this dispute differential, the greater the susceptibility of the article to disputes.<sup>7</sup>

To control for Moravcsik's argument about credibility, I gave appropriate treaty articles a credibility score based on Franchino's (2002) study of credibility versus efficiency as drivers of member state executive delegation (in secondary legislation) to the European Commission. These measures have the key advantages that they are cross-sectoral, and so can presumably be used to help explain variation across legal bases, and that they are independent of the treaties themselves but get at the issue of credibility problems inherent in different issue-areas. They have a number of limitations, too. The nineteen sectors that Franchino examines only map onto some forty treaty articles, which limits the number of cases that can be included in the statistical analysis. Perhaps more importantly, some of these scores are based on very few legislative provisions, sometimes only one (as in the case of company law, which corresponds to post-Amsterdam article 52 of the treaty). This, in particular, demands caution in interpreting the analysis that follows. No member state preference measures were included, simply for lack of cross-national cross-sectoral data. Future extensions to the Amsterdam Treaty, though, may be able to employ preference measures derived from Hug and König's (2002) exemplary study of the Amsterdam intergovernmental conference. They code the number of member states preferring a supranational solution to 79 different issues arising at the Amsterdam IGC. For the Maastricht changes, such preference measures are unavailable.

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<sup>7</sup> This technique effectively normalizes the number of disputes for the number of legislative acts involved. Raw counts, for example, would grossly overemphasize agricultural legislation. By using the differential, we can see how many disputes occurred as compared to one might naturally expect based on the fraction of legislation based on the article in question.

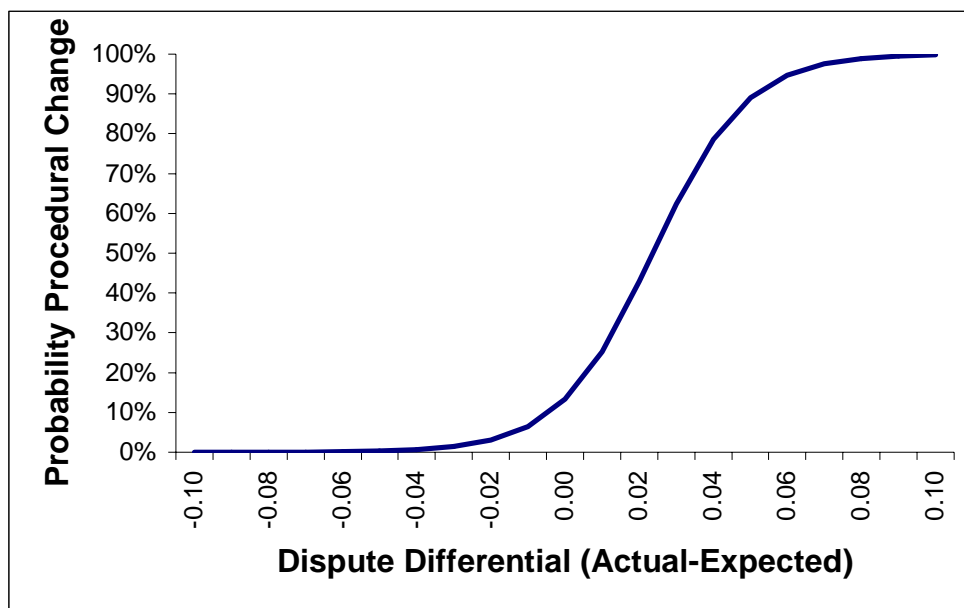
The analysis begins by testing for the effects of legal basis/procedural political disputes and credibility problems on procedural change (coded dichotomously: change = 1, no change = 0). With all variables specified as above, the results are presented in Table 2.

**Table 2. Logit Estimates: SEA-TEU Procedural Change**

<b>Dependent Variable:</b> <b>SEA-TEU Procedural Change</b>	<b>Coefficient</b> <b>(S.E.)</b>
Dispute Differential	79.514 * (37.295)
Credibility Score	2.065 (1.353)
(Constant)	-2.859 ** (1.039)
Likelihood ratio $\chi^2 = 8.55$	
$p > \chi^2 = .0139$	
pseudo- $R^2 = .185$	
N = 42	
* $p < .05$ , ** $p < .01$	

The coefficients of both dispute differentials and credibility are positive, as expected, but credibility fails to achieve statistical significance, and thus we cannot reject the null hypothesis that it stands unrelated to procedural change. Disputes, by contract, are positive and statistically significant at the .05 level. We can reject the null hypothesis of no relationship here, and infer that as disputes during the prior treaty regime with respect to a given legal basis increase, the likelihood of a procedural change to that legal basis (treaty article) also increases. The model chi-square statistic is also significant at the .05 level, allowing us to conclude that these variables do help in explaining procedural change. Perhaps more importantly (Menard 1995, 17), the model successfully predicts almost 79% of outcomes during this period.

How substantively important are these effects of prior-period disputes on subsequent treaty changes? I assess substantive impact by transforming the logit output into statements about the impact of changes in the value of independent variables of interest on the probability of the event of interest (here, procedural change) occurring. Figure 2 illustrates the effects of changes in the dispute differential on the probability of procedural change, holding credibility at its mean value.



**Figure 2. Prior-Period Disputes and Institutional Change: SEA to TEU**

The simulated effect of disputes (actually, dispute differentials) on the probability of procedural change, holding credibility problems at their mean, is strong. Where differentials are negative—that is, where treaty articles account for a greater share of legislation adopted than of legal basis or procedural political disputes—procedural change is an extremely low probability event, given an average level of credibility problems. When the differential reaches around  $-2\%$  the probability begins to increase rapidly, and at a differential of around  $+5\%$  procedural change becomes a near-certainty.

Procedural politics during the SEA period influenced long-run institutional change, and this influence appears to have been substantial.

What of the more specific set of changes made to the role played by the European Parliament in the EU legislative process? Clearly the most significant change from the Single Act to the Maastricht Treaty was the creation of the new codecision procedure in the latter treaty, giving the EP both the conditional agenda-setting power it had been enjoying under the Single Act and an airtight veto over changes to the status quo. To what extent did this change and the others undertaken to the EP's role reflect a response to procedural politics, especially procedural politics played by the Parliament itself, in the earlier period?

To answer this question, I specify a linear regression model with the a procedural rank-difference change to EP role (see Jupille 2004, ch. 3) as the dependent variable, and three independent variables: credibility problems in the issue-area in question, European Parliament legal basis and procedural political disputes, and European Commission legal basis and procedural political disputes. Moravcsik's narrow liberal intergovernmentalism expects the first to show a positive sign and to attain statistical significance, while probably expecting no statistical significance for the latter two variables. My own approach, by contrast, suggests that even controlling for credibility problems, EP disputes will matter for changes to the EP's role, while Commission disputes, aimed as they are at maximizing the Commission's own influence, will be irrelevant. Table 3 reports the results of this analysis.

**Table 3. Explaining EP Empowerment: SEA to TEU**

<b>Dependent Variable: EP Role Change (Rank Difference)</b>	<b>Coefficient (Standard Error)</b>
(Constant)	0.0741 (0.16)
Dispute Differential: Commission	-1.587 (2.532)
Dispute Differential: EP	4.236 * (2.145)
Credibility Score	0.496 * (0.261)

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N = 42  
Adj. R<sup>2</sup> = .112

\* p < .10

These cursory results support the elaborated intergovernmentalism being developed here. As expected, disputes involving the European Commission do not seem to matter as determinants of change in the EP's legislative role. Both credibility and EP disputes show expected signs and are statistically significant, albeit only at the .10 level ( $p=.056$  and  $p=.055$ , respectively). Overall variance explained, with  $R^2=.11$ , remains quite low. Thus, while the results presented here are consistent with theoretical expectations developed above, it seems clear that additional work, including additional variables and especially extending to additional time periods, will be called for.

#### **IV. Some Conclusions**

Summarizing, I have suggested that institutional political scientists quite generally, and those working on the EU particularly, should do more to attend to endogenous institutional change, identifying internal developmental logics that shape the over-time course that institutions run. In the EU case, it makes sense even from a liberal intergovernmental perspective to imagine that treaties represent incomplete contracts that give rise to dynamic responses which might eventually find expression in longer-run institutional changes to those same treaties. In the empirical setting of legislative

procedures and their change, I argued that "procedural politics," responding as it does to the jurisdictional ambiguity of policy issues, and entailing as it does considerable deadweight losses in the form of reduced decisionmaking efficiency, might both *incite* and *inform* specific subsequent treaty modifications. Everyday choice, in short, should also produce long-run change.

I have only been able to compile cursory evidence to explore these claims, but based on results here they do seem plausible. At the level of treaty regimes as a whole, there is a correlation between everyday fights over rules and long run procedural changes. At the level of individual legal bases, prior-period fights over procedures shape the likelihood of subsequent procedural change, and specific fights (e.g., involving the European Parliament) are shown to produce specific kinds of institutional changes (e.g., to the EP's power). In short, as our intuition would seem to suggest, but as traditional liberal intergovernmentalism tends to deny, there seems to be a relationship between the everyday operation of EU institutions and their long-run change. Existing claims about credible commitments perform well enough that they should arguably be retained. These claims and results represent, then, not a challenge to, but an elaboration on, intergovernmental theory.

More work is now called for. I now have in hand the rudiments of a dataset which, with substantial work, will allow me to test these expectations across four treaty changes (Rome-SEA, SEA-Maastricht, Maastricht-Amsterdam, and Amsterdam-Nice) spanning most of the EU's history. For at least some of these periods it may be possible to introduce various member state preference measures as additional controls. The point is that there is much to be done here which, given the results so far, should be pursued.

What does all of this tell us about the EU that we did not know, but should have? First, it suggests that EU institutions are partially endogenous to the integration process itself. This bespeaks the importance of research strategies that take seriously both grand bargaining and everyday politics, and militates against the notion that different aspects of the EU require separate theories to explain them. Second, from a policy perspective it suggests that institutional designers ought perhaps to "pleas for Cartesian clarity or institutional streamlining" (Moravcsik and Nicolaïdis 1999, 79). I agree with many others that there are significant limits to institutional design, that institutions suffer from inherent entropic tendencies that tend to take them out of phase with their environments, often very quickly. But the inefficiencies inherent in the EU's current institutional patchwork --its "constitution of bits and pieces" (Curtin 1993)-- are tremendous and do not appear to be getting any better. With the "Big Bang" enlargement just accomplished and the constitutional treaty now up for ratification, the opportunity to rationalize the rules may have passed. But in the event of ratification difficulties, there may yet be time to reconsider.

At the level of theory, confirmation of everyday institutional effects on long-run institutional change would incite some convergence of hitherto separate research agendas, regardless of the names under which they go. Better explanations of everyday politics would produce better theories of long-run change, and vice versa. The end result would be better institutionalism, so important to the EU's political system in which rules are so uniquely important.

Finally, and most speculatively, the analysis raises questions about the nature of rule governance in the European Union. Specifically, the increasing frequency of

intergovernmental conferences --at one time thought to occur once in a generation, perhaps once a decade, but now apparently occurring about once every five years-- alongside the close coupling of everyday politics and grand bargaining, suggests a sort of a permanent revolution (I can't remember who coined this phrase, but I know I read it somewhere) in which the rules themselves take on disproportionate importance. That is, perhaps more than in other systems (although that is an empirical question), the rules become not just the means, but the ends of politics and the measure of the system.

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