

**Supranational Institution Building in the European Union:
A Comparison of the European Court of Justice and the European Central Bank**

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ABSTRACT:

The completion of the new supranational ECB provides an opportunity to compare how the EU builds new institutions. On the face of it, the two institutions now have a similar status, however, the creation of the ECJ was very different than that of the ECB. This paper looks comparatively at the two institutions and asks how the workings of these institutions have been affected by the initial mandate. Concretely, we examine the path the ECJ has taken to becoming an important EU actor, and compare that to the path that created the ECB. Will the ECB give rise to a literature similar to the ECJ about the institution's independence from Member State interference (Burley and Mattli, Garrett, Alter), or does the ECB's explicit mandate (price stability above all), institutional structure (strict independence), and delineated scope preclude any suggestion that the ECB considers the wishes of important Member States when it makes monetary policy? We examine four aspects of institutional design which may have significant impact on the institutional functioning of the two supranational institutions: 1) intentionality (did the Member States intend to create a supranational institution), 2) specificity (how concrete is the mandate of the institution), 3) relationship to national institution (how much does the supranational institution depend on its national counterpart), and 4) institutional copying (is the supranational institution explicitly modeled on a specific national institution). We find that each of these elements has significant implications for the institutions' stability and their ability to carry out their respective mandates.

Introduction

On January 1, 1999, the first major supranational institution of the European Union (EU) in 40 years was born. When the European Central Bank (ECB) was created, many people rightly marveled at the political achievement it represented. The fusing of the Member States' monetary - and to some degree, fiscal - policies represents the most significant deepening of the EU in its history. It also represents the first major supranational institution created since the signing of the Treaty of Rome in 1957.

This birth of a major new supranational institution provides an excellent opportunity for political scientists to test hypotheses on institutional creation and its effects on institutional development. While the actual testing of the hypotheses will occur in the ensuing months, years and decades, the elaboration of the hypotheses can begin now.¹ Setting out the hypotheses at this early stage means that their testing is not burdened with the appearance of *post hoc* explanation or strategic case study selection. In the spirit of *carpe diem*, the goal of this paper is to begin the dialogue about what the institutional trajectory of the ECB might be, given what we know from the paths taken by other institutions and from the literature about institutional development and change.

As Paul Pierson has noted, path dependence and institutional evolution research "has challenged the expectation that institutions embody the long-term interests of those responsible for the original design."² To understand this disjuncture between the design and the actual functioning of the institution researchers must explain how these "gaps" emerged and why they cannot easily be closed. In the EU context, these "gaps" lead to institutional autonomy at the supranational level and a loss of Member State control: "the functions of supranational institutions may reflect not so much the preferences and intentions of their member state principals but rather the preferences, and the autonomous agency, of the supranational institutions themselves."³ Pierson suggests four methods by which these gaps form: (1) the partial autonomy of EU institutions; (2) the restricted time horizons of decision makers; (3) the large potential for unintended consequences; and (4) the shifts in the policy preferences of heads of government.

In considering the possible institutional trajectory of the ECB, i.e., how autonomous the ECB will be from Member State influence, we compare the creation of the ECB to the European Court of Justice (ECJ). Looking at the ECJ's creation and subsequent institutional development, we consider what factors promoted ECJ autonomy along with the factors that constrained the ECJ. We then look at the existence or absence of those factors in the ECB. The emphasis here is on factors identifiable at the time of the genesis of these institutions, and what those mean for subsequent institutional development. Therefore, the fourth of Pierson's methods of gap formation is not within the scope of this paper.

The selection of the ECJ as the comparison institution was predicated on the fact that the ECJ and the ECB are generally acknowledged to be two of the most supranational of the EU's institutions. The ECJ is often credited with propelling integration forward over the past 40 years. Even those of the intergovernmentalist persuasion have acknowledged the importance

¹As the bible of qualitative researchers - lovingly referred to in the discipline as "KKV" - states, "Any definition of science that does not include the room for ideas regarding the generation of hypotheses is as foolish as an interpretative account that does not care about the truth." King, Keohane, and Verba (1994), p. 38.

²Pierson (1996), p. 131.

³Pollack (1997), p. 107.

of the supranational court in the development of the EU.⁴ Likewise, the ECB is already recognized as one of the most supranational institutions created by the EU.⁵ Neither the ECJ nor ECB is subject to Member State government oversight like the Commission, which can be overruled by the Council of Ministers. Both institutions have a larger scope of authority than the European Parliament. The ECB can actually make legally binding regulations and decisions itself, and the ECJ's decisions are also binding. If one were to place EU institutions on a continuum of intergovernmental to supranational, at the supranational end the ECJ and the ECB would stand side-by-side.

In addition to this similarity, the major differences of how the institutions received the mantle of "supranational" make their comparison of interest. The ECJ created in the Treaty of Rome was not clearly intended to have the scope of authority that the Court has subsequently claimed for itself. The ECJ has *evolved* into an important supranational institution (the so-called "silent motor of integration"). This evolution of the ECJ into a constitutional court of Europe contrasts with the creation of the ECB. The ECB was declared to be highly supranational from the start, and its effects on national sovereignty recognized at the date the Member States agreed to the Maastricht Treaty.

This paper will compare these two methods of institutional creation. From its subsequent development, the effects of its institutional creation are now largely known for the ECJ. Taking account of that knowledge and looking at the very different creation of the ECB, we derive a number of hypotheses about the Bank's future institutional path.

We will argue that the institutional creation of the ECJ and the ECB differed in four significant ways: 1) the intentionality behind the supranationalism of the institutional design; 2) the specificity of the institution's mandate; 3) the institution's relationship to its national counterpart; and 4) institutional copying from the national to the supranational level. These differences affect the institutions' autonomy by either helping or hindering the development of gaps in Member States' control. The discussion of the intentions of the institutions' designers is important for determining the original institutional preferences so that the gaps themselves can be identified. Intentionality, or lack thereof, also shows the time horizons of the Member States and, we argue, can allow lots of institutional freedom leading to many unanticipated consequences. The specificity of the institution's mandate also illustrates all three of Pierson's methods for gaps to develop: autonomous action of the European institution; restricted time horizon of the political decision makers; and unintended consequences. The relationship with the national counterpart primarily affects the autonomy of the institution. Finally, institutional modeling provides the possibility of unintended consequences and affects the autonomy of the institution.

The second part of this paper focuses on the implications of these differences on institutional autonomy. Specifically, we will explore the debate about the ECJ that questions the degree of autonomy that the institution has from member state influence, and ponder the applicability of that literature to the ECB. Since many observers of the ECB are concerned about the degree of member state participation in the ECB's decisions, we believe an analysis of the debate on the Court may be relevant to answering that question in greater detail. The second part of the paper thus focuses on the debate about the ECJ's institutional independence, and the structural components that make that debate theoretically possible. We find, in general, that the institutional structures that evolved in the case of the ECJ lend themselves to the interpretation that Member States can influence the court's decisions much

4Moravcsik (1993), p 513.

5Gros and Thygesen (1998).

more so than the institutional structures of the ECB that were created in the Treaty on European Union (Maastricht Treaty).

I. Four Significant Differences Between the ECJ and the ECB

The ECJ and the ECB are supranational institutions that clearly move the EU in the direction of a more federal Europe. The functions of a Court and a Central Bank are essential to any polity, and the creation of these institutions clearly implies that Europe continues the process of deepening its federal component. The interplay between the Member States and the supranational institutions continues to be hotly contested, however, and there is no reason to believe that the Member States will cede authority to these institutions completely. For these reasons, we believe it is useful to examine the historical paths by which these institutions were created, and to demonstrate in which ways these supranational institutions differ. The implications of these differences on the member state-supranational institution interactions will be discussed in the second section.

1. Intentionality of Institutional Design

We define intentionality of institutional design as the awareness of the Treaty drafters of the institutional design's effect on national sovereignty. There is little evidence that those who drafted the judicial system of the EU contemplated a supranational court that could make substantial inroads on national sovereignty. The limited role given the ECJ mirrored the anemic Court created for the European Coal and Steel Community (ECSC) in 1951. The architects of the ECB, in contrast, knew what they were doing would create a supranational institution to replace their national counterpart. This destination was unambiguous and the knowledge caused the Member States to operate carefully when drafting the statutes of the bank.

A. The European Court of Justice

The precise intent of Member States in designing the ECJ is difficult to determine. In drafting the Treaty of Rome, the Member States delegated the construction of the EC judicial system to a Judicial Committee composed of esteemed national jurists. They were given broad authority in devising a judicial system for the EC, and Member States apparently accepted their recommendations without much discussion or any major substantive changes. From this, it is hard to attribute a clear intent on the part of Member State governments. Also, because the records of the negotiations of the Treaty of Rome were destroyed, the intent of the Judicial Committee can only be found in post hoc accounts. All that can really be concluded from the limited amount that is known about the negotiations and from the text of the Treaty is that it is uncertain how far Member States or even the Judicial Committee intended to go beyond international law norms in creating a supranational court.

According to a member of the Judicial Committee, the Member States accorded the Committee substantial liberty in devising a Community judicial system.⁶ The Committee realized, however, that its final product had to be a politically acceptable solution. With that constraint in mind, the negotiators considered *and rejected* a number of proposals with more supranational elements, such as a self-contained European court system with its own system of lower courts and the ECJ as a supreme court, direct appeals from national courts to the ECJ, or a stronger enforcement mechanism including judicially imposed fines.⁷ From these rejected

⁶Pescatore (1981), p. 161.

⁷Alter (1996), p. 31.

options, the Committee certainly did not appear to desire an entirely innovative supranational judicial system. However, because so little is known about the actual negotiations, the best indication of Member States' intent is in the Treaty provisions.

The text of the EC Treaty provides conflicting evidence on whether Member States sought to design a judicial body operating under traditional international law concepts or whether they wanted something unique that would make greater inroads on national sovereignty. As a judge of the Court of First Instance has pointed out, the EC Treaty is replete with public international law concepts which reflect the apparent desire to craft a traditional international treaty among sovereign states.⁸ For example, the EC Treaty leaves enforcement of the Court's decisions to the Member States, making the Court's decisions only declaratory.⁹ A Member State can either abide by the Court's decisions voluntarily or be forced into compliance by the prospect or the reality of reciprocal actions or countermeasures by other Member States. These methods of enforcement are hardly a major innovation; they are also the main sanctions available in traditional public international law.

One could argue that appending a court to a treaty at all was a sign of desiring a new institutional structure in international law. However, the intended status of the Court is dealt with ambiguously in the text of the EC Treaty. The Treaty elevates the status of the Court while at the same time giving preference to political resolutions of disputes.¹⁰ In the ECSC Treaty the Court's role in the Community was subordinate to the High Authority. Article 8 of the ECSC Treaty spotlights the central role of the [High Authority] in the Community structure: "It shall be the duty of the High Authority to ensure that the objectives set out in this Treaty are attained in accordance with the provisions thereof."¹¹ In the EC Treaty the Commission does not receive such special emphasis. In Article 4 of the EC Treaty, the Judicial Committee appears to make a deliberate effort to ensure the equal status of the Community institutions, especially vis-à-vis the Commission. Article 4 of the EC Treaty states, "The tasks entrusted to the Community shall be carried out by the following institutions" and lists the Court alongside the Commission and the other institutions. Not just the Commission but the Court as well, have equal roles in accomplishing Community objectives.

While the EC Treaty gives the Court equal status with the other Community institutions, the EC Treaty does not take the concomitant step of enhancing the judicial enforcement mechanism. As in the ECSC Treaty, the political process is still the preferred method of enforcement in the EC Treaty. In the ECSC Treaty the two primary methods of enforcement rested with the political bodies. The High Authority could fine Member States but only if two-thirds of the Council agreed. The other enforcement method allowed the High Authority or Member States to take countermeasures against a noncompliant Member State, again if two-thirds of the Council approved.¹² Under both of these methods the Member States, through the Council, maintained a substantial amount of control over the enforcement process. Negotiators

⁸Lenaerts (1992), pp. 1-4.

⁹Article 171 of the EC Treaty states, "If the Court of Justice finds that a Member State has failed to fulfill an obligation under this Treaty, the State shall be required to take the necessary measures to comply with the judgment of the Court of Justice." There were no provisions, however, to force a recalcitrant State to comply until the Maastricht Treaty. After Maastricht if a Member State fails to comply with a Court decision, the Commission can request that the Court impose sanctions.

¹⁰This insight is from Rasmussen (1986), p. 229.

¹¹Article 7 of the ECSC Treaty adopts the use of "Commission" in place of "High Authority" throughout the Treaty's text. We reverted to "High Authority" here because that is the name most commonly used for that body outside of the ECSC Treaty.

¹²Article 88 ECSC.

only added the Court late in the negotiations as a third and backup method of enforcing the Treaty.¹³ Its addition probably did not reflect any belief on the part of the negotiators that a less intergovernmental, more supranational body was required to ensure Member State compliance. Rather, Member States like the Federal Republic of Germany pushed for the Court, instead of a weaker arbitral tribunal, because they desired a court to monitor Community institutions.¹⁴ The concern of the Member States that advocated a court centered on Community institutions overstepping their authority and violating Member States' sovereignty. Thus the ECSC Court, that served as the starting point for negotiations on the ECJ, was both a secondary institution in the enforcement procedures for the Treaty and was considered more of a protector of Member State sovereignty than a supranational institution to which Member States were ceding their sovereignty.

In many ways, the EC Treaty does not appear to vary from this assessment of the Court. The political process is still the preferred mode of dispute resolution in the EC Treaty. Under the Article 169 procedure, the Commission conducts most of its enforcement activities in private. From the time it sends a notice to the Member State believed to be in violation, receives its response, and issues a reasoned opinion, the entire process occurs outside of public view. This allows the opportunity for political accommodations to resolve the dispute. If no resolution is agreed and the Member State fails to comply with a reasoned opinion of the Commission during the time given, the Commission is not required to bring the Member State before the ECJ. Article 169 promotes the political resolution of disputes by allowing the Commission, first, to decide on Member State violations behind closed doors and, second, to decide not proceed even though a noncompliant Member State refuses to take remedial measures.

In addition to preserving the highly political enforcement procedure, the Judicial Committee also, in effect, upbraided the Court for its expansionist decisions under the ECSC. These actions by the Committee reflected not the desire to create a powerful supranational court but to *restrain* a court that was seen as going beyond its authority under the ECSC Treaty. The ECSC Treaty greatly restricted the access of business enterprises to the Court. Companies could not bring suits directly before the ECJ either against other companies or against Member States for violating Community law. While companies could directly challenge High Authority decisions that were directed specifically at them, if they wanted to contest general legal acts of the Community the ECSC Treaty imposed a strict standing requirement. Under Article 33 they could only "institute proceedings . . . against general decisions or recommendations which they consider to involve a misuse of powers affecting them." The ECSC Court had liberally interpreted the requirement, allowing many individuals to challenge the High Authority's general acts before the Court.¹⁵ The EC Treaty appears to respond to this liberal standing interpretation by very deliberately narrowing it in Article 173(2). Individuals are now only allowed to bring a suit directly before the ECJ against a Community institution when they are contesting the legality of a decision addressed to them or a regulation or decision addressed to another person but with which the individual has "direct and individual concern."¹⁶

¹³According to Jean Monnet's *Memoirs*, the Court was first discussed in October 1950. Rasmussen (1986), p. 204.

¹⁴Rasmussen (1986), p. 223, n. 18.

¹⁵Rasmussen (1986), pp. 210-211.

¹⁶The Treaty reads only that the suit may be brought against the "Council or Commission," but the ECJ has expanded Article 173 to allow individuals to bring suit against the Parliament. Case 294/83 *Les Verts v. European Parliament* [1986] ECR 1339.

Thus, the ECSC Court's expansion of its jurisdictional reach through its liberal view of standing was not validated by the Judicial Committee's adoption of the Court's jurisprudence in the EC Treaty. Rather, the negotiators further restricted the standing requirements. This apparent desire to reign in an overzealous Court certainly does not show an intent to create a more powerful supranational institution.

However, even given everything discussed above, the Treaty contains numerous provisions indicating that the ECJ was not envisioned as a typical international court. There are important procedural innovations that make it unique among the international courts that predated it. First, the consent of both parties to the Court's jurisdiction is not required. Under the rules of the International Court of Justice, the parties involved have to consent to the ICJ's jurisdiction before the case can proceed. Second, not just signatory states can bring cases before the ECJ: the Commission can as well. This is again very different from the ICJ which operates under a more traditional international law model where only the signatory states can bring a case before it, the UN and its subunits cannot. Third, the Article 177 preliminary ruling procedure is unlike anything in international law. Its origins are in national legal systems, and it allows individuals to pursue European legal issues in national courts and seek referral of questions of the interpretation of the Treaty or the interpretation or validity of Community legal acts to the ECJ. These three aspects of the EC Treaty diverge sharply from international law norms.

Traditionally, treaties leave enforcement entirely to signatory states, so the fact that a transnational institution like the Commission can sue a sovereign state was simply unheard of. Likewise --and proving more significant in practice-- the ability of individuals to effectively sue signatory states for failure to comply with Treaty provisions, regardless of whether their national legal systems would allow such a suit, made the EC legal system unique. It usurped national rules about how treaties were applied in national law and set its own standards. Therefore, while certain provisions of the EC Treaty may read like traditional international law, the Judicial Committee also included provisions that may indicate a desire to create something unique, although probably not as unique and powerful as the ECJ became.

B. The European Central Bank

In contrast to the Judicial Committee, the ECB architects were quite specific and in agreement on what it was that they were creating. Not only did they intend to create an institution which would usurp the power of the national governments to run their own monetary policy, but each of the politicians and, importantly, central bankers involved had a very concrete idea about how the institution would function and what the limits of the institution would be. Although there were some disagreements over which functions would lie with the ECB (should regulatory functions be handled by the ECB, for example, or should the ECB's mandate include fiscal policy) these debates were addressed *during* the discussions in the IGC and *resolved* in concrete detail. The scope of the institution was clearly limited, and the separation of powers between the Member States and the ECB enumerated in exhaustive detail.

The history of European monetary cooperation is well-documented elsewhere¹⁷ and thus a detailed rendering of the facts is unnecessary here. However, to support the claim that the policymakers knew exactly what they were constructing, a brief synopsis of the critical points in the ECB's genesis is relevant. The primary blueprint for the ECB was crafted in the Delors Committee (formally the Committee for the Study of Economic and Monetary Union), which met eight times from July 1988-April 1989. The Delors Committee, chaired by Commission

¹⁷See Tsoukalis (1977), Kruse (1980), Ludlow (1982), Dyson (1994), and Gros and Tygesen (1998).

President Jacques Delors, comprised the central bank governors of the twelve Member States in an ex officio capacity, and two economists. From the mandate given the committee “to study and propose concrete stages leading towards economic and monetary union,” it was clear that the group was undertaking to create a single currency and a European central bank. In deference to Margaret Thatcher, the Hannover communique did not specifically mention creating a central bank, but it was clear that the objective of most countries was to introduce a supranational entity, and to transfer monetary policy making to that institution.¹⁸ A Delors Committee member recalled that “centralized and collective decisions on the instruments of monetary policy would be required from the time when participants committed themselves to maintaining permanently – or ‘irrevocably fixed’ – exchange rates among themselves.”¹⁹

The Delors Report, released April 17, 1989, envisioned a process in stages that would result in the creation of a single currency. This “would imply a common monetary policy and require a high degree of compatibility of economic policies”²⁰ and “the need for a transfer of decision-making power from Member States to the Community as a whole.”²¹ From these quotes, it is clear that the Member States were well aware of the fact that they would be giving up sovereignty to be pooled at the supranational level. Although the report was unambiguous on the need to consolidate monetary policy at the ECB, the issue of fiscal policy was divisive in the Delors Committee. Fiscal constraints were eventually negotiated in the IGC on EMU from December 1990-December 1991 (and incorporated into the Treaty as article 104). The right of the ECB to monitor the fiscal position of the Member States even after the beginning of monetary union was added at the Amsterdam summit, and incorporated into the Treaty as the Stability and Growth Pact in June of 1997.

The main difference between the creation of the ECJ and the ECB was that all Member States were completely aware that they were be giving up monetary policy autonomy as well as significant aspects of fiscal policy autonomy. Article 14.3 is unambiguous that “the national central banks ... shall act in accordance with the guidelines and instructions of the ECB.” All national central bank autonomy was to be relinquished. For this reason, negotiations during the IGC were difficult. Highlighting these problems, in October 1991 the Member States had to negotiate an “opt-out” for Britain on EMU—the Danish opt-out had to be negotiated after the failure of the June 1993 referendum on the Treaty in Denmark. Thus whereas the negotiations about the Court were held without the foreknowledge of the eventual significance of the Court, the Bank negotiations reflect a much greater awareness of the effects of that institution on national sovereignty. In both cases the Member States could not precisely foresee how these institutions would affect their interests, but Member States’ apparent lack of attention to the details of the Judicial Committee’s work surely must have made agreement easier. Eric Stein characterized the Member States’ relationship with the ECJ in the 1960s as “benign neglect,” implying that the Member States were unaware of the potential significance of the Court.²² No such claim could ever be made about the ECB.

2. Specificity of Institutional Mandate

A second difference between the ECJ and the ECB, somewhat related to the previous point, is in the specificity of the institutional mandate. The “specificity of the institutional

¹⁸See *Financial Times* (London), June 29, 1988.

¹⁹Gros and Thygesen (1998) p. 401.

²⁰Committee for the Study of Economic and Monetary Union (1989) p. 17.

²¹*Ibid.* p. 18.

²²Stein (1981), p. 1.

mandate” examines the precision and detail of the treaty language stipulating the rights and responsibilities of the supranational institution. The implication of a tight mandate like the ECB’s is that the institution does not have a great deal of flexibility to interpret which duties fall within its purview or to approach its tasks autonomously. In contrast to the ECB, the ECJ has a great deal of leeway in its Treaty provisions, and has made full use of the flexibility provided by the general language in the Treaty. To some extent, the difference between the ECB and the ECJ’s specificity of mandate is a byproduct of the different tasks assigned to the institutions. Perhaps the ECJ, like most courts, must necessarily have more room for interpretation and discretion than the central bank?

The “rules versus discretion” argument in central banking, however, concerns primarily the conduct of the actual monetary policy—i.e. should the bank announce a specific inflation target, or make a rule about money creation. It says virtually nothing about the institutional framework governing that monetary policy, except that the monetary policymakers must have the autonomy to stick to rules if they chose to make rules.²³ Moreover, the rules versus discretion debate is also possible in the Court setting, as with Britain’s move from administrative discretion as a base of legal doctrine toward more rules (a consequence of its EU membership).²⁴

The institutional mandate we mention in this section does not refer to the details of the way in which the ECB conducts monetary policy (indeed, at the time of the launch of the euro in January 1999, the issue of which monetary policy strategy – rules or flexibility--to follow was still rather murky.) We focus instead on the Treaty provisions that detail the respective roles of the Member States versus the supranational institution. In the case of the ECB, the roles are well defined, whereas with the ECJ, not only are the roles not well delineated, but they change over time as the institution is transformed.

A. *The European Court of Justice*

The ECJ’s mandate is many-layered. The broadest statement of the Court’s mandate is found in Article 164 of the EC Treaty: “The Court of Justice shall ensure that in the interpretation and application of this Treaty the law is observed.” The key terms of this provision - interpretation, application, and law - are all left undefined, making the Court’s mandate rather amorphous. The next level of the Court’s mandate exists in the section of the Treaty that concerns the “Principles of the Community.”²⁵ These provisions establish the Community’s policy objectives and guiding principles. They also obligate the Court, along with the other Community institutions and the Member States, to ensure that these objectives are carried out. While these provisions are more concrete in their formulation than Article 164, they still define the policy goals and political values in the broadest of terms, leaving much of the practical implementation for later agreement. Finally, the third level of the Court’s mandate is found in each substantive section of the Treaty. In these provisions, the general policy goals of Article 2 and the more specific activities to promote those goals of Article 3 are given more detail. However, even here the Treaty contains vague provisions that are left to later amplification.

The fact that the Treaty contains, even in its most concrete sections, vague words or phrases is not, of course, surprising. The EC Treaty is a framework treaty, or a *traite cadre*, where many provisions are intentionally not well defined. Incomplete contracting enabled the

²³For a good overview of the topic, see *The Economist*, March 2, 1991. More scholarly treatment is in Kydland and Prescott (1977) and Macesich (1992).

²⁴See Johnson (1998), p. 158 and Richmond (forthcoming).

²⁵Articles 1-8c of the EC Treaty.

Member States to sign the Treaty, as they approved of its general purpose and direction, but it also meant that the terms of the Treaty would have to be filled in by later, more concrete decisions. This postponement of building a consensus around the more difficult decisions had unique consequences under the EC Treaty because of its unusual structure.

Typically treaties are not devised with a court or an entire set of political institutions attached to them. When issues later arise that were either unforeseen or deferred, the signatory states then enter into more specific agreements or understandings. In the EC, not just the signatory states but also the Community political and judicial institutions are involved in this subsequent contracting process. Because the contracting process occurs in everyday decision-making within the Community and not just during Treaty revisions, several groups of actors are involved. This ongoing contracting process, in conjunction with the broadly stated powers given the ECJ in Article 164 and the many vague or undefined substantive Treaty provisions, has served to hand the ECJ the opportunity to act as a sort of political entrepreneur. The Court has used this situation to extend its authority, and to promote specific policies as well as a general policy about the role and rule of law in Europe.

Article 164 is the prism through which the Court views its powers. If the Court had interpreted Article 164 narrowly, its authority would be rather limited. However, the Court gave Article 164 a liberal reading to legitimate its exercise of powers not explicitly included in the EC Treaty. This liberal interpretation centered on the three key undefined terms: interpretation, application, and law. National legal systems do not typically define these terms, but the EC, as a treaty-based organization, could certainly have attached limiting definitions. Because it chose not to, the EC effectively allowed the ECJ to define these terms in a way which expanded the area and substance of the Court's authority.

First, consider what is meant by "law" in Article 164. Legal scholars have long argued about the nature of law and what constitutes law. In the EC Treaty, the drafters could have defined the "law" of Article 164 as the Treaties, Community legislation and Community administrative acts. This would have restricted "law" to the written law of the political institutions of the Community and left the ECJ with a narrower authority. Without such a limitation, the Court has considered "law" in Article 164 to mean more than the written law of the Treaties or the Community political institutions but to include the idea of "the rule of law."

Reading its mandate under Article 164 as protecting the *rule of law*, the Court used judicially created concepts to ensure that the Community's laws meet a standard of fairness and lack arbitrariness. For example, the Court applied such general legal principles as legal certainty, proportionality, nondiscrimination, the right to be heard, the right to judicial review, and the protection of fundamental human rights as constraints on Community political authority. While none of these concepts are contained in the EC Treaty, the Court relied on its Article 164 mandate to justify including these concepts in EC law.²⁶

Using this "rule of law" interpretation of its Article 164 mandate, the ECJ also expanded its jurisdictional reach. The Treaties' jurisdictional provisions circumscribe the situations in which the Court can act. The Court's jurisdiction is often considered a *compétence d'attribution*, meaning that the jurisdictional provisions provide the exclusive means for litigants

²⁶For example, in finding the right to be heard in Community law, the Advocate General to the ECJ stated that before an administrative authority acts to the detriment of individuals, those potentially affected have a right to be heard on the matter, even if the statute does not require it. He found this right exists in the body of rights that "the law" referred to in Article 164 of the Treaty upholds, and of which, accordingly, it is the duty of this Court to ensure the observance." Case 17/74 *Transocean Marine Paint Association v. Commission* [1974] ECR 1063.

to reach the Court. However, the ECJ has held that these jurisdictional restrictions can conflict with its duty to protect the rule of law in the Community. The result is that the ECJ, relying on Article 164, has appended a form of inherent jurisdiction to the express grants of jurisdiction in the Treaty. Ignoring the apparent exclusivity of the jurisdictional provisions in the Treaty, the Court has held that the spirit of the Treaty contained in Article 164 requires the Court to expand its jurisdiction to ensure that all measures taken by all Community institutions are subject to judicial review. That way, if the political institutions fail to ensure that all measures are susceptible to the rule of law, the Court can still act. The Court can declare that the rule of law embodied in the Treaty requires it to review the disputed measures.²⁷

Thus, the ECJ has increased its authority through its interpretation of the "law" it is meant to protect under Article 164. The Court has both extended its jurisdictional reach and added standards that EC laws must meet. Likewise, the Court has broadened its authority through the rules of interpretation it uses. Methods of interpretation go to the heart of the debate over the appropriate role of courts and degree of judicial discretion. The choice of interpretative method involves an assessment of how power should be allocated among institutions.²⁸ If political institutions are accorded greater authority, courts will defer to their judgment and typically restrict their own interpretation of a legislative act to the ordinary or plain meaning of the term used. Other methods of interpretation provide greater room for the exercise of judicial discretion, tipping the allocation of authority in the direction of the court. The interpretation of treaties is especially tricky as they are creatures of international law. The balance of authority involved in the interpretation of a treaty is not simply between the judicial and legislative branches of a government but goes to the heart of national sovereignty.

Around the time of the drafting of the EC Treaty, there was considerable discussion among international law experts and even national governments about the propriety of codifying rules of interpretation for treaties. In 1933 the Conference of American States passed a resolution submitting a list of rules of interpretation for study by the International Commission of American Jurists.²⁹ Around the late 1940s and early 1950s the debate between different schools of thought intensified over whether it was appropriate to elaborate a set of rules for the interpretation of treaties.³⁰ Also around the time of the EC Treaty, several legal organizations reviewed and adopted articles containing the basic rules of treaty interpretation.³¹ Thus, the idea of codifying rules of interpretation as a way limiting judicial discretion was not unheard of at

²⁷One example of this type of inherent jurisdiction is in *Case 294/83 Parti Ecologiste 'Les Verts' v. European Parliament* [1986] ECR 1339. In *Les Verts*, the ECJ was asked to review the legality of an act of the European Parliament, but no provision of the EC Treaty allowed such review. The Court decided that the European rule of law could not tolerate the situation where the actions of a Community institution that were intended to have legal effects on third parties were essentially above the law by being unreviewable by the Court. Emphasizing the spirit of the Treaty as embodied in Article 164, the Court effectively amended Article 173 to allow review of not just acts by the Council or the Commission but all "measures adopted by the institutions, whatever their nature or form, which are intended to have legal effects."

²⁸Sunstein (1996), pp. 168-69.

²⁹Lauterpacht (1949), p. 48, n.2.

³⁰Fitzmaurice (1951), pp. 1-3.

³¹In 1956 the Institute of International Law adopted two articles containing rules of treaty interpretation. See *Annuaire de l'Institut de droit international*, 46 (1956), p. 359. After years of study, in 1966 the International Law Commission adopted its own articles on rules for treaty interpretation which were later adopted in the Vienna Convention (1968 and 1969). See *Yearbook of the International Law Commission*, I (1964), pp. 275-317; and II (1966), pp. 217-226.

the time the EC Treaty was negotiated. Treaty drafters could have considered elaborating rules of interpretation as a way to restrict the Court's authority. They did not, leaving Article 164 to stand alone as requiring the ECJ to ensure through its interpretation of the Treaty that the law was observed. With no limitation or even guidance on the rules of interpretation that should be applied, the ECJ could adopt its own methods for interpreting the Treaty.

Through its choice of interpretative methods, the ECJ established its difference not only from national legal systems but from international law as well. As a former Justice of the ECJ noted, the ECJ's methods of interpretation *are* used in national legal systems. However, the ECJ's methods "are so prominent in the interpretation of Community law as to suggest in this respect a conversion of quantity into quality. The importance which the Court of Justice attributes to them can only be understood if one has in mind the special nature of the Community and its legal system as well as the special functions of the Court of Justice."³² As for international law, the same judge said simply, "the principles of interpretation peculiar to and governing treaties cannot as a general rule be enlisted for the purposes of interpreting the Community treaties."³³ The Court clearly considers the EC and its legal system as *sui generis*: "By contrast with ordinary international treaties, the EEC Treaty has created its own legal system" which is of a "special and original nature."³⁴

In large part because the Court views the EC as a unique treaty-based system, where the EC Treaty resembles more a constitution than a treaty, the Court has often adopted what some international law commentators have called the "more radical" approach to treaty interpretation.³⁵ The teleological, or purposive, approach to interpretation emphasizes overall Community objectives in interpreting specific Treaty provisions. It is considered an approach to interpretation that gives the judiciary a large amount of discretion. The Court has defined this approach: "Every provision of Community law must be placed in its context and interpreted in the light of the provisions of Community law as a whole, regard being had to the objectives thereof and to its state of evolution at the date on which the provision in question is to be applied."³⁶ The Court views its obligation to the Community legal order as supplying the necessary terms to give effect to the Treaty's purposes which are found in the early part of the EC Treaty which states the "principles" of the EC, as well as in the preamble. Largely from these two sections, the Court determines the "spirit" of the Treaty which it then uses to interpret the Treaty's provisions. Through this view that the Court was a guardian of the larger purpose and spirit of the Treaty, the ECJ expanded its duty to apply the Treaty beyond previous judicial interpretations of the effect of treaties in national legal orders.

Because Article 164 set a very broad mandate for the Court in the context of a Treaty with very sketchy detail, lots of language about general aims and purposes, and an unusual institutional set-up, the Court had virtually a clean canvas upon which to draw. And the Court, like any other political entrepreneur, took advantage of these opportunities to press its preferred policy goals, and to increase its competencies.

B. The European Central Bank

³²Kutscher (1976), p. 1-30.

³³Kutscher (1976), p. 1-31.

³⁴Case 6/64 *Costa v. ENEL* [1964] ECR 585, 593-4.

³⁵Brownlie (1998), p. 637.

³⁶Case 283/81 *CILFIT v. Italian Ministry of Health* [1982] ECR 3415, 3430. This statement of the Court combines the schematic approach (interpreting the provision in the context of the entire Treaty) along with the purposive approach. The ECJ's method of interpreting the Treaty often combines the two methods.

In contrast to the Court, the ECB had a very specific institutional mandate. Because agreement was difficult to reach in the IGC, and because several Member States (among them Britain, Denmark, and the Netherlands) were hostile to the very idea of monetary union and the encroachment on their sovereignty, the negotiators specified the scope of the ECB's actions precisely. Using a principle of subsidiarity, only those tasks that were deemed essential to running a coherent EU monetary policy would be transferred to the ECB, and all others were presumed to remain with the Member State. In 53 articles the protocol spells out everything from staff to the allocation of monetary income of national central banks. It does not leave open the possibility of accreting more powers to the central bank like budgetary powers or tax harmonization, for example.

Article 3.1 of the Treaty specifies the basic tasks of the ECB: 1) to define and implement the monetary policy of the Community; 2) to conduct foreign exchange operations consistent with the provisions of Article 109 of the Treaty; 3) to hold and manage the official foreign reserves of the Member States; and 4) to promote the smooth operation on payment systems. The details of the duties are spelled out in Chapter IV of the Treaty. Absent from this mandate are elements of central banking that national central banks usually have control over, like banking supervision (the ECB should only "contribute to the smooth conduct of policies pursued by the competent authorities relating to the prudential supervision of credit institutions and the stability of the financial system", duties which are spelled out in Article 25) or lender of last resort functions.

The mandate of the ECB is so specific and rigid, it caused one central bank scholar to comment, "The ECB and EMU could fail disastrously because so many of the features that define a truly well-designed political institution [an allowance for spontaneity, adaptability, informal coordination and disorganization] were deliberately 'designed away': the driving force behind the apolitical design of EMU is fear of, and contempt for, democratic politics."³⁷ Essentially, many of these features rely on sufficient institutional "room" to interpret duties flexibly. That room has not been granted the ECB.

Instead, because the ECB's mandate is so tightly circumscribed, any deviation from the prescribed actions will either be seen as precedent-setting for other deviations, or will be penalized. The explicit enumeration of the ECB's role implies that the scope of action outside of that role is limited, and that room for "spillover", or the ability to change its mandate or increase its competencies in the way that the Court did, is virtually non-existent.

3. Relationship to the National Institution

The relationship between the supranational institution and its national counterpart is significantly different in the ECB and the ECJ. The ECJ and the national courts have continued to exist in parallel for 40 years, and an essential element of the ECJ's competency depends on the national courts for implementation. There is a symbiotic relationship between the national courts and the ECJ that would make separating these institutions difficult. By contrast, the ECB usurped the essential functions of the national central banks on January 1, 1999, and they could easily be eliminated without hindering the functioning of the ECB. These differences are sketched in greater detail below.

A. The European Court of Justice

The Court depends to a great extent on the national and subnational courts to refer cases and to work with it. The ECJ's relationship to national courts is the key to its development as a supranational institution. In order to enlarge its competencies, the Court must have a

³⁷Lohmann (1998b), p. 27.

decent supply of cases that make the legal judgements possible. The main routes for cases to reach the ECJ are (1) Member States versus Member State (2) Community institutions versus a Member State; and (3) Article 177 under which individuals can raise EC law in national courts and request a referral of questions of interpretation of EC law to the ECJ.

Today, the bulk of the ECJ's caseload is Article 177 referrals. This is largely because of the politics behind the other two Articles. Very few Member States want to charge another Member State with shirking its Treaty obligations because of the possible political repercussions of doing so (like reciprocity at a later date, or just engendering ill will with the other Member State). The EC procedure for a Community institution like the Commission to bring a suit against a Member State encourages a political solution to the issue. Prior to filing a suit against a Member State, the Commission must engage in what amounts to closed-door pre-litigation settlement talks.

Hypothetically, if the ECJ had jurisdiction to hear only these two kinds of cases, there would not have been much scope for development of EC law. Because law is necessarily a slow process of building rules through individual cases, the ability of a court to have much effect therefore depends on an ample supply of cases. Moreover, the increasingly routinized interaction with the ECJ helps legitimate it and its rule-making authority.

Most importantly, without Article 177 referrals, the ECJ would not have been able to truly constitutionalize the Treaty of Rome. An important aspect of constitutionalization was bypassing national governments and giving EC legal rights directly to individuals which they could then exercise on their own behalf. Therefore, the willingness of national courts to participate in the referral process was the essential ingredient to the ECJ's supranationalism.

This discussion highlights two distinctions between the ECJ and the ECB. The first is the incremental (ECJ) versus big bang (ECB) nature of institutional genesis and growth. Each time a national court refers a case to the ECJ, the national systems are ceding sovereignty to the EC level. This is especially true for lower national courts which do not have to refer cases to the ECJ. When they refer a case, they are handing over the interpretation of EC law, and often, in effect, national law, to the ECJ.

The second distinction is the grant of institutional discretion to the national counterpart. Allowing national courts some autonomy in the EC legal system is a critical part of building the cooperative relationship between the ECJ and national courts that is essential to the functioning of the EC legal system. Article 177 provides that lower national courts do not have to refer cases to the ECJ. This allows national courts to maintain some control over the process of EC legal development and helps create the institutional environment that all courts are EC law courts. The ECJ has also recognized the need to build professional rapport with national courts of last resort. To do so the Court has loosened the unbending language in Article 177 that those national courts must refer all cases involving the interpretation or application of EC law to the ECJ. Instead, the ECJ has held that referrals by courts of last resort are unnecessary when the ECJ has already given a definitive interpretation of the legal issue or when the correct application of Community law is so clear that there can be no reasonable doubt about how the legal point should be decided.³⁸ In this way the ECJ has accorded national courts of last resort a measure of institutional respect.

In short, the ongoing relationship between the ECJ and its national counterparts is crucial to the ECJ's institutional development, and the ECJ has shown a willingness to adapt Treaty procedures at the expense of its own authority to ensure a cooperative relationship with its national counterparts.

³⁸Case 283/81 *CILFIT v. Ministry of Health* [1982] ECR 3415.

B. The European Central Bank

The institutional structure of the ECB, in contrast to the ECJ, does not depend on the national central banks to any great extent. National institutional discretion is not a component of the ECB's relationship with the national central banks of the ESCB. The national central banks' participation with the ECB is not optional, but mandatory. They receive directions from the ECB, not interpretations which they then apply themselves. The important decision-making bodies are at the ECB, and the role of the national central banks is primarily supplying statistical information and personnel to the ECB. Monetary policy in the EU is communicated by the ECB to the financial markets directly (although the national central banks of non-English speaking Member States translate the ECB communiqués), and thus implementation is not an essential function of the national central banks. Banking supervision is an area in which the national central banks continue to be the dominant actors, but it is hardly more than an administrative burden that could easily be delegated to the ECB without modification of the Treaty. In short, unlike the national courts, the national central banks could cease to exist without significantly affecting the workings of the ECB. As Alexandre Lamfalussy indicated in his paper appended to the Delors Report:

A second distinctive feature of the proposal is that the new institution would *replace* rather than duplicate facilities that already exist in the member central banks. This would minimize the risk of real or perceived conflicts emerging between the member central banks and the new collectively owned institution.³⁹

The vital role of the national central banks was essentially eliminated at the stroke of midnight on December 31, 1998, and the ECB became the sole locus of power.

4. Institutional Copying

The issue of institutional copying is defined as the extent to which the supranational entity was explicitly copying features of a specific national counterpart. Whereas it is obvious that the ECB was deliberately modeled on the German Bundesbank, the ECJ was rather an amalgamation of several different systems. The importance of this difference is that the systemic workings of the ECB were supposed to mirror the workings of the Bundesbank, making any deviations from the model easier to spot and to correct. Unanticipated consequences were minimized. By contrast, the Court was a new institution, and the combination of features and institutions from several different judicial systems created the possibility of unique institutional effects and unintended consequences that were not immediately apparent to the Member States.

A. The European Court of Justice

As noted earlier, when the Judicial Committee met in 1956-57 to construct a judicial system for the European Economic Community, it did not have a single model in mind, nor were there obvious models from which to choose. International courts were very few (and a rather recent phenomenon), and therefore the effects of transplanting national judicial procedures into a transnational context were not known. At the end of the negotiations, the Committee decided upon an amalgam of national judicial systems and the Court as it had existed under the ECSC

³⁹Committee for the Study of Economic and Monetary Union (1989), p. 218 (original emphasis). Lamfalussy was speaking about the institution he envisioned for stage two, which did not ultimately come to pass until stage three. The quote demonstrates that all members were fully aware that the power at the national level was to be completely transferred to the supranational level.

Treaty.

In terms of the number of provisions imported from national judicial systems, the French system had the greatest influence on the Court as initially conceived. The logical starting point for structuring the new EC judicial system was the ECSC. The Court in the ECSC Treaty was modeled on the French Conseil d'Etat.⁴⁰ Its primary function was to provide judicial redress for abuse of power by government, which in the ECSC was the High Authority. French administrative law concepts also appear in both the ECSC and the EC Treaties. For example, Article 173 of the EC Treaty gives the Court judicial review powers over certain acts of the Council and Commission. Under the Article, the Court can review these legislative and administrative acts under a number of grounds, including lack of competence and misuse of power. These grounds are derived from French administrative law.⁴¹ The structure of the judicial system also incorporates French characteristics. The provision for advocates general in the Treaty of Rome shows the influence of the French legal system which also employs these legal experts as an aid to the courts.

However, the negotiators borrowed from legal systems other than France. The EC Treaty provision considered the most innovative and the one most credited with giving the ECJ the unique opportunity to turn a treaty into a "constitution" is Article 177. The French negotiators did not suggest it nor did the French legal system inspire it. Partly, Article 177's procedure is a continuation from the ECSC Treaty, which contains a preliminary ruling procedure in Article 41. The ECSC provision, however, contains a major limitation. It only allows preliminary rulings to challenge the validity of High Authority acts. Because of its limited scope, the procedure has been used only once, making it a virtual dead letter.

The Judicial Committee that crafted the EC Treaty provisions on the ECJ decided to allow interpretation of the Treaty and Community law as part of the preliminary ruling procedure. This greatly expanded the ECJ's authority. Now individuals bringing suit in national courts could seek clarification of the Treaty or Community legislation from the ECJ, and did not need to attempt to have Community law declared invalid. This made preliminary rulings a part of EC law's development and not simply another annulment procedure. The impetus behind the idea was that the procedure then more closely reflected the preliminary ruling procedure of some national judiciaries, namely Italy and Germany. Italian negotiator Nicola Catalano recalls in his memoirs that this grant of interpretative authority in the context of preliminary rulings was initially his idea.⁴² Germany easily accepted this suggestion because the German court system has a similar mechanism.⁴³ Thus, Article 177 traces its lineage back to the ECSC Treaty as modified by the Italian and German constitutional court practices.

The Treaty provisions creating the ECJ reflect the negotiators' judgment to use the ECSC Court as a starting point but add procedural mechanisms from other national legal systems. Unlike the ECB, the ECJ was not as heavily influenced by any one national institution. More importantly, the Member State judicial institutions did not represent competing legal philosophies with one side ultimately prevailing. The process of designing the ECJ resulted in a hybrid institution that was, therefore, freed from the expectations that it would develop along any particular lines. The ECB has not been created with a similar prospect for institutional freedom and creativity.

In the case of the ECJ, the implications of institutional copying had at least two major

⁴⁰Alter (1996), p. 30.

⁴¹Hartley (1988), p. 409; see also, Scheingold (1965)pp. 44-45.

⁴²Catalano's memoirs are discussed in Pescatore (1981), p. 173.

⁴³Ibid.

effects, both of which helped expand the authority of the institution and allow it to develop its own institutional character. First, the importation into a transnational community of different aspects of national judicial systems led to some unintended consequences. As Pierre Pescatore, a member of the Judicial Committee and later an ECJ judge, wrote about Article 177, "I am inclined to believe that perhaps all were not aware of the importance of this innovation."⁴⁴ Placing a national preliminary ruling procedure into a transnational context gave the ECJ the authority to interpret the Community law within the context of a national legal dispute. Because the procedure arose from a national court case, the question was frequently whether national law conflicted with EC law. In the now-famous case of *Van Gend en Loos*⁴⁵ the Court found that certain treaty provisions had direct effect in EC law without the need for national implementing legislation. This meant that in interpreting the Treaty provision, the ECJ was, in effect, telling national courts what the national law now was, irrespective of preexisting national law. What it also meant was that national courts were now empowered to hold national laws invalid if they violated Community law. This was true whether or not judicial review had been previously allowed under the national system or whether or not the national system was a dualist system that had previously required international law to be legislatively implemented into national law before it was binding. The story of the expansion of the direct effects doctrine is well-known, and it is not contested that this was an unintended development.

The second effect of institutional copying is that the lack of a single legal philosophy underlying the construction of the ECJ created a rather fluid setting for the influence of the different judicial styles of the Member States. As an ECJ judge and a legal secretary for the ECJ have noted, initially the Court had a very French style and substance.

Throughout the 1950s and early 1960s the judgments of the European Court looked like a carbon copy of the judgments of the great French courts: same conceptual frames of reference (a strict notion of misuse of powers is a case in point), same idiosyncrasies (such as a reluctance to use general principles of law), same method of exposition [for example, the opening of each paragraph with "*attendu que...*"("considering that...")].⁴⁶

However, that changed and with time a German legal influence became apparent.⁴⁷ The use of general clauses in EC law to expound upon the "guiding legal principles" gradually became more prevalent as well as the application of general legal principles like proportionality and legitimate expectations. The attention paid to human rights is also heavily German-influenced. After the United Kingdom and Ireland joined the EC, common law concepts, such as estoppel, became part of the ECJ's jurisprudence.⁴⁸ The common law practice of precedent-citing became more frequent as well with direct references made to previous decisions.

Because the Treaty did not mandate the legal philosophy of the Court, the Court was allowed to build its own institutional culture which borrowed from the Member States' different legal traditions. This allowed the ECJ to build an institutional identity that is unique from the Member States' courts, but at the same time not wholly foreign. While the Court was not then burdened with expectations that it would respond to situations and evolve like a particular

⁴⁴Ibid.

⁴⁵*Van Gend en Loos v. Nederlandse Administratie der Belastingen* Case 26/62, [1963] ECR 1.

⁴⁶Mancini and Keeling (1995), p. 399.

⁴⁷Ibid. pp. 399-401.

⁴⁸Ibid. pp. 401-403.

national system had, this did not mean that Member States would never attempt to influence it. The fact that it had this room for institutional evolution meant only that Member States' attempts at influence occurred later in the development of the Court. Unlike in the case of the ECB, the Member State governments were not directly involved in the negotiations of the EC judicial system nor did they place any parameters on the Judicial Committee's decisions about the ultimate structure of the Court.⁴⁹ Only after the ECJ decided cases that Member States felt threatened their sovereignty did the Member States get directly involved and attempt to influence the Court.

B. The European Central Bank

In contrast to the hybrid Court described above, the ECB has been called a "super-Bundesbank" because of its close resemblance to the German Bundesbank. Institutional copying on the part of the negotiators in the Delors Committee and in the Committee of Central Bank Governors was explicit, and was the price extracted by Germany for its membership in the single currency.

From the moment Germany put the proposal for monetary union on the European Council agenda in early 1988, it was made clear to the other Member States that if a European Central Bank was to be created, it had to have similar institutional features to the Bundesbank, specifically independence from political instruction and a primary mandate to guarantee price stability. In a February 1988 cabinet resolution the German position on monetary union was clear: "The longer term goal is economic and monetary union in Europe, in which an independent European Central Bank, committed to maintaining price stability, will be able to lend effective support to a common economic and monetary policy."⁵⁰

Moreover, during the Delors Committee meetings, Germany was willing to walk away from the project if the institutions conceptualized in the Delors Report did not meet its specifications. This threat was made explicit to the French, and precluded any serious variations to the Bundesbank that the French or others might have wanted to make.⁵¹ Germany's leverage on these points was great because German law essentially gave the Bundesbank a veto right over international commitments that potentially affected its duty to preserve the stability of the German currency, and thus the German government was loath to consider other institutional features that might provoke a Bundesbank reaction.

At stake, of course, were not only considerations of national pride, or a conception of "European" institutions that do not reflect entirely the structures of one specific country, but most importantly, an economic philosophy that advantaged one economy over another. Whereas the Judicial Committee writing a statute for the Court might have thought it contrary to the principles of building a European institution to use only the French institutions as a blueprint, the committees writing the ECB statute felt it would be difficult to obtain the Bundesbank's blessing unless the new institution mirrored the Bundesbank. For the other Member States, it was clear that the new economic philosophy that would be enshrined in the Maastricht Treaty was one that mirrored the German economic philosophy exactly, and might disadvantage their own. Their assent (bought with the British and, later, the Danish opt-outs) was based on the logic that the European Monetary System, which was also biased against divergent economic philosophies, already constrained them to following the German model, and thus a new supranational institution would give them the ability to participate in policy making to some small degree.

⁴⁹Pescatore (1981), p. 161.

⁵⁰*Financial Times*, June 23, 1988.

⁵¹See Heisenberg (1999) p. 106.

Had the Bundesbank's potential veto not been the driving force behind the institutional design to come out of the Delors Committee, the economic philosophy might have been more flexible, pragmatic or even-handed about other economic objectives. Putting employment considerations, for example, into the mandate of the ECB would have changed the character of the monetary policy the central bank would follow and might have been more accommodating to certain Member States. The fact that the ECB enshrined price stability above all made the institutional design problem one of accepting a certain economic philosophy as *opposed* to another and requiring the "losers" of that debate to support the institution nonetheless.

From the perspective of Member State oversight of supranational institutions, the main implication of this fact is that the ECB is far less likely to suffer unanticipated consequences than the Court. Because the Bundesbank had functioned for 50 years, there was a base of institutional knowledge that had to be tinkered with, not invented. Moreover, any deviations from the expected outcome would likely flag the Member States' attention, giving them the potential opportunity to exercise direction.

II. Supranational Autonomy From Member States in Light of these Differences

Perhaps the most frequently pondered question about the new European Central Bank is "how much influence can the Member States have over the independent ECB?" The question has been examined in great detail about the European Court of Justice, and in this section of the paper, we examine the ECJ debate and judge its transferability to the ECB.

The literature that examines the power of Member States to influence decisions or outcomes of the ECJ sparked an enormous debate because it posited indirect—or internalized— influence rather than direct influence. Both the Court and the Central Bank have institutionalized independence from Member State direct influence by such provisions as 1) long, non-renewable (or only renewable once) terms of office for the officers of the ECB and judges of the ECJ, 2) verdicts and interest rate decisions being handed down unanimously rather than allowing the public to know who the dissenters were, and 3) the complete secrecy of the decision-making process in order to ensure that member governments are unable to know what position the national representative took in the decision.⁵² It is interesting to point out that in each of these aspects, the European supranational body is different from its U.S. counterpart (except for the life long appointments of U.S. Supreme Court justices, which mirrors the European logic for avoiding the politicization of the office). The Europeans definitely fear a national influence on their supranational institutions more than the U.S. fears a regional or state-led bias in its decision-making institutions.

However, while institutional safeguards exist to prevent the Member States from directly telling their national representative how to vote, the literature on the ECJ's autonomy posits an *indirect* influence of powerful Member States on the decisions on the court. A brief synopsis of this literature is appropriate here.

There is no debate in the literature that the court has evolved into something far more significant than its original intent. Member States continued to argue against the judicial activism of the court, but did not act to either censure the court or to revolt by systematically

⁵²The court's judges are nominated for a 6 year term, renewable only once, and all of the court's decisions are handed down "unanimously" without any dissenting opinions. This is true no matter what the actual vote was. Borrowing from this institutional design, the Central Bank also institutionalized safeguards to inhibit direct Member State influence: the Executive Council's term is 8 years, non-renewable, and the minutes of the Board's meetings are never made public.

refusing to comply with its decisions. As a result, the competencies of the court continued to grow, and the court now acts more like a Supreme court of Europe than its founders ever intended. These facts are undisputed by all scholars of the court. How to explain these facts, however, is a matter of some debate.

In an article laying out the important role the ECJ has played in European integration, Burley and Mattli addressed the question of how the Court was able to overcome member state objections to its increasing power and growing mandate.⁵³ They showed that the court was operating outside of the political arena, and was more technocratic and hence complex than the Member State politicians realized. This incremental increase in court competencies was unobserved, or, if it was observed, it was considered the price to pay for having a rule of law in Europe. Moreover, institutional links (Article 177 and preliminary rulings) which promoted the lower national courts' interaction with the ECJ had the effect of legitimizing the ECJ, and the court took advantage of the increased legitimacy to help itself to state sovereignty.

Garrett, by contrast, took issue with this neofunctionalist account of the court's increased mandate, and hypothesized an alternative, rational choice, account of the court's power: the court's power was unchallenged because the court was acting as agent for powerful Member States.⁵⁴ In essence, a strong principle-agent relationship exists between important Member States and the supranational entity, and this relationship is not called into question even when important Member States lose their cases in court but continue to accept the court's judgements. Garrett argued that the perception of ECJ power posited by Burley and Mattli was in reality only a perception, the result of the court not ruling against significant interests of important Member States, and thus not challenging the important Member States. In practice, the court acknowledged its powerful patrons, and understood which decisions would anger its patrons to such a degree that they would either intervene to change the court's mandate in the Council of Ministers, or stop complying with the court's judgements, thereby delegitimizing the court.

Garrett's argument of Member State power vis-à-vis the ECJ's rational subservience rests fundamentally on several different aspects of the Court-Member State relationship: 1) the ability of the Member States to make the increased power of the Court look illegitimate (a 'power grab'), 2) the ability of the Member States to threaten to change the court's mandate and revert to the supremacy of national law, and 3) the ability of the Member States to refuse to implement ECJ judgements. Using the institutional differences elaborated in the first section, we now turn to the question of whether it would be possible for the Member States collectively, or important Member States individually, to exert similar, indirect power on the ECB.

A. Making the European Central Bank Look Illegitimate

One of the most important sources of leverage of the Member States is the ability to make the supranational institution look illegitimate. In the case of the ECJ, powerful member states routinely question the legitimacy of Court actions. John Major's position paper and proposals for the 1996 IGC show that his government was intent on adding constraints to the Court's assertions of authority. For example, the UK Government proposed limiting the Court's mandate under Article 164. Noting that "neither the Treaty nor other provisions of Community law set out explicit rules of interpretation," the UK suggested adding a protocol to the Treaty to limit the Court's methods of interpreting subsidiarity issues. The protocol would have moved

⁵³Burley and Mattli (1993) and (1995).

⁵⁴Garrett (1995).

the Court toward traditional public international law norms by requiring the Court to “presume[] that, in the absence of a clear contrary intention, the Community legislator intends to conserve the freedom of Member States as far as possible.”⁵⁵ Likewise, German policy-makers also wanted to limit the Court’s dominance.⁵⁶ The fact that the Court’s role was not diminished in the Amsterdam Treaty in 1997 does not alter the fact that Member States *do* question the status of the court precisely because there was no fundamental agreement on the Court in advance. The incremental increases in the Court’s role were never ratified formally by all the Member States, and thus it is possible to portray this evolution as a power-grab by the court.

In contrast, the fact that all Member States signed on to the Maastricht Treaty makes it difficult for any state to claim, even rhetorically, that the ECB is illegitimate. In fact, quite the opposite: any criticisms of ECB monetary policy are immediately denounced by ECB executives as undue political interference. The legitimacy of the ECB is based on the explicit agreement between the Member States rather than the tacit, *de facto* agreement that characterized the Court’s legitimacy.

B. Threatening to Roll Back the European Central Bank’s Competencies

A second element of Garrett’s analysis rests on the ability of the Member States to reduce the Court’s influence. Garrett’s argument rests on the Court’s ability to recognize when a significant member state is sufficiently angered to try to change the Court’s mandate (difficult as that may be) or to cease complying with its judgements. That implies that the functions of the court can be replaced by national institutions in a reasonably efficient and timely manner. Having the infrastructure in place at a national level is therefore essential to maintaining that threat over the supranational institution. In the case of the judicial system the infrastructure has been built in parallel, however, in the case of the central banking/financial system the national central banks have relinquished all of their functions to the center. By June 30, 2002, all of the currency circulating will be euros, and it will become extremely difficult (and politically obvious) to re-nationalize the central banking functions. By changing to the ECB on January 1, 1999, the Member States effectively burned their bridges. Leaving monetary union or dissolving it entirely would be an extremely difficult procedure, and would cause great turmoil in the financial markets which are transnational actors rather than national actors. Thus the “threat of retaliation or noncompliance” by the Member States is virtually nonexistent in the case of the central bank.

C. The Threat of Member State Non-compliance

The third assumption by Garrett is that Member States’ threatened non-compliance with ECJ decisions can influence Court decisions. Because the ECJ must rely on Member States to implement its judgments, its institutional legitimacy is dependent on Member States’

⁵⁵Memorandum by the United Kingdom, Intergovernmental Conference: The European Court of Justice (1996).

⁵⁶In 1992 Chancellor Helmut Kohl stated, “The Court of Justice ... does not only exert its competencies in legal matters, but goes far further. We have something that was not wanted in the beginning. This should be discussed so that necessary measures may be taken later.” *Europe*, October 14, 1992, No. 5835.

acceptance of its authority.⁵⁷ Garrett assumes that the threat of member state noncompliance will cause the ECJ to consider the interests of significant Member States seriously.

With the institutional relations of the ECB and the national central banks, this threat is not available to the Member States. Implementation of the ECB's monetary policy is done by the financial markets, with no opportunities for the Member States not to comply with the ECB's monetary policy. However, while the non-compliance option does not exist in *monetary* policy, it may exist in *fiscal* policy. The threat of fiscal non-compliance with the Stability and Growth Pact (which limits the fiscal deficit of euro members to 3% of GDP unless there are extraordinary circumstances) is the closest analogy to non-compliance with the Court's directives. Yet even in the case that a Member State runs excessive deficits in defiance of the Stability and Growth Pact, the institutionally most likely outcome is not ECB compliance with the member state's wishes; on the contrary, the most likely outcome is a fiscal policy-monetary policy mix that is unbalanced, and primarily difficult for third currency countries. Rather than capitulating to the demands of the Member States, the ECB would act in direct opposition to the Member States' preferences. Two historical examples of this scenario are 1) the Reagan fiscal expansion that was matched by a fierce monetary policy contraction in the 1980s by the US Federal Reserve Bank, and 2) the German government's fiscal expansion to finance unification in the early 1990s that was matched by an enormous monetary policy contraction by the Bundesbank. In both cases, the effect of fiscal "non-compliance" was the opposite of what the Garrett argument about the Court would posit. Rather than making the ECB more interested in tailoring its monetary policy to the demands of important Member States, the ECB would likely *offset* the fiscal non-compliance with an ever more onerous monetary policy. Thus, in the final analysis, the threats of member state non-compliance, that Garrett assumes create leverage for specific member states' interests in ECJ decisions, are impotent in the case of the ECB.

III. Comparing the Models of Supranational Institution Building

In this paper we have examined two different paths taken by the EU to creating binding, supranational institutions: the slow, incremental expansion of the power of the European Court of Justice, and the "big bang" creation of the European Central Bank. In the ECB's case, the process of institution building was tightly controlled by the Member States, specified in detail and agreed upon publicly. The process of institution-building in the ECJ's case was very different: the scope of the Court's duties was loosely defined, the agreement of the Member States was given in an implicit, *ad hoc* way, and the development of the Court occurred mostly out of the tight control by the Member States.

Could these two processes have been reversed, or was it inevitable that the Court would be created by the slow, incremental path, and the bank by the big bang? We will argue that the roles could easily have been reversed: there was nothing preordained about the path that each institution took, and there is nothing about the specific functions (court versus bank) that makes one path more likely than the other.

The Judicial committee that drafted the Court's role acknowledged that a "big bang" approach was considered but rejected due to the lack of member state support. A supreme court of Europe which usurped the independence of the national courts is not difficult to imagine, nor was it functionally impossible to create in 1958. What was lacking was a

⁵⁷As mentioned earlier, under the Maastricht Treaty, the Commission can now request the Court to sanction a Member State that has not complied with a prior Court decision. Absent this Community-level sanctioning, the Commission does not have any other enforcement powers.

motivation by the Member States to commit to that level of supranational authority explicitly.

By the same token, it is also not difficult to imagine a Central Bank created in an incremental way, out of the control of the Member States. This process was explicitly advocated by the British in 1991 as a counter to the formal, centralized fashion the ECB came to be created. Although the British proposal for a “parallel currency scheme for monetary union” had all the economic logic to make it a viable alternative to the centralized approach of monetary union in stages, it came too late in the negotiations to alter the institution-building path that the Delors Committee had set up. The principles of the plan, however, mirrored several aspects of the ECJ’s evolution: a single currency would be created in parallel to the national currencies, there would be no member state in charge of the evolution of the new currency, the new currency would force the convergence among Member States rather than having convergence imposed from above, and no timeline was pre-ordained.

An earlier attempt at monetary cooperation also demonstrates that an incremental approach to monetary union and a central bank was tried. In 1978, when the European Monetary System (EMS) was developed, the Member States communicated that:

We remain firmly resolved to consolidate, not later than two years after the start of the [EMS], into a final system the provisions and procedures thus created. This system will entail the creation of the European Monetary Fund [essentially a European Central Bank] as announced in the conclusions of the European Council meeting at Bremen on 6 and 7 July 1978 as well as the full utilization of the ECU as a reserve asset and a means of settlement. It will be based on adequate legislation at the Community as well as the national level.⁵⁸

The idea behind an incremental approach to EMU was that since several Member States were averse to centralized monetary policy at that point in time, the members of the EMS would give the Member States more time to bargain, change preferences, or otherwise appease their domestic veto players (specifically the Bundesbank in Germany). The fact that the next phase never occurred showed the degree of member state resistance to centralized authority.⁵⁹

The key point about the above examples of failed institution-building paths is that both the court and the bank tried different approaches, and the fact that each one was successful with a different path does not mean that courts and banks are necessarily constrained to a specific evolution.

The implications of each institution’s evolution, however, are more important. The idea of path dependency as articulated by Paul Pierson figures prominently in our analysis. The ECB and the ECJ are products of very different evolutions, and their functioning has been influenced by their respective paths. We argue that in order to adequately understand the institutional workings of the bank and the court, one must understand the way in which each developed. Taking a historical approach highlights one significant aspect of the institutions that a rationalist approach might miss: these institutions have widely differing degrees of independence from member state influence. The tradeoff between what might be called an “incrementalist” (ECJ) versus a “big bang” (ECB) creation model of supranational institutions is that although it is politically easier to create a supranational institution through the incremental method, that institution is more indebted to its principals, and hence more susceptible to taking direction from them than an institution that has documented agreement about its status.

⁵⁸van Ypersele and Koeune (1985), p. 122.

⁵⁹For more on the EMF, see Gros and Tygesen (1997) and Heisenberg (1999) ch. 4.

This relationship is important in two ways: one methodological and one substantive. The methodological implications are that a rational choice analysis of the ECB-Member State relationship is unlikely to resonate because of the historical path by which the ECB came into being. Although many of the formal institutional structures of the ECB and the ECJ are similar, we have shown that the informal mechanisms which make a rationalist interpretation of the Court's actions possible, are not present in the bank's case. This is due to the *path* taken by the member states, not characteristics inherent in central banking or judicial process.

Second, the influence of member states on ECB policy is likely to be severely limited in practice. Lohmann notes that even institutionally independent banks like the Bundesbank show signs of having been influenced by political actors.⁶⁰ The logic behind this argument is that the Bundesbank needed some political patrons that could guarantee its long-term survival. This same argument cannot be made, however, about the ECB. Whereas the Bundesbank law could be overturned by a simple majority in the German parliament, the ECB's structure can only be changed by a unanimous vote of all the member states in the EU, a considerably more difficult hurdle. Thus by writing the specific mandate of the central bank explicitly, and by having unanimous approval of the document, the ECB's role is substantially more autonomous than the Bundesbank's was. We do not address the issue of whether that degree of independence from political bodies is a good or bad thing; we merely highlight the fact that no other EU institution has such autonomy.

The final point of our analysis is a comment on supranational institution building in the EU going forward. The point of EMU, as so many policy-makers indicated, was less economic than political and it would be naive to think that there will not be further attempts to create more supranational institutions. Without a question, the addition of a central bank changes the character of the EU into a more federal body. For those who think this is a positive development, the historical path by which the ECB was created may serve as a model for future EU institutions (for example a centralized tax organization, or a fiscal organization that distributes EU funds and monitors the national compliance with the Stability and Growth pact.)

Our interpretation of the possibility of making new supranational institutions leads us to the following thoughts. Overall, it is politically much easier to create new supranational institutions in an evolutionary way. An EU with expanding membership makes unanimous agreement on politically sensitive matters extremely difficult. An evolutionary path is far less transparent and therefore easier. Taking the example of a centralized tax organization, one might conclude that it would be easier to simply create a fledgling organization and give it a mandate that is sufficiently vague to allow it to evolve into a European tax authority. For years it could run in parallel with the national tax authorities, harmonizing tax codes, and having conflicts between the supranational and the national levels resolved in the ECJ (which would generally rule in favor of the supranational institution and thereby build the tax authority's reputation). When Member States objected to specific rulings or policies, the choice would be to not accept the ECJ's ruling (a huge political statement) or to assume that the benefits of coordination in this issue area outweigh the sovereignty loss in that specific issue. The downside to this approach, as this paper has shown, is that it potentially leaves the supranational organization open to Member State influence because the organization's legitimacy can be questioned. Moreover, the process of evolution is ongoing, and so the final shape of the organization cannot be determined. As JHH Weiler said about the ECJ, it is a journey to an unknown destination⁶¹. In the language of principal-agent theory, there is loose

⁶⁰Lohmann (1998a).

⁶¹Weiler (1993).

agent control, and the Member States may have to give up more sovereignty than some had ever intended.

Alternatively, the ECB's path shows that if a political deal can be made to give unanimous support for a new institution, it is more politically insulated. Its final shape is necessarily specified in great detail, and it does not have the power to expand its competencies beyond the mandate given by the member states. As the ECB's history shows, this path is politically much more difficult. Agreement on the ECB was reached only after Britain and Denmark were given opt outs, and it is unclear that this policy of exemptions is one the EU wants to perpetuate.

Thus, the manner which the Member States chose to create new supranational institutions has an impact on the future behavior of those institutions and should be considered in advance. With the advent of the monetary union, there is now a second viable model for creating supranational institutions. This paper has shown some of the issues and tradeoffs between these two models.

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