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Constitutional Agenda-Setting Through Discretion in Rule Interpretation: Why the European Parliament Won at Amsterdam

SIMON HIX*

It is widely accepted that the 1999 Treaty of Amsterdam significantly increased the powers of the European Parliament (EP). The critical question, however, is why the European Union (EU) governments did this. I argue, contrary to existing explanations, that these changes came about because the EP was a ‘constitutional agenda-setter’. The rules in the EU Treaty, as established at Maastricht, were incomplete contracts, and the EU governments had imperfect information about the precise operation of the Treaty. As a result, the EP was able to re-interpret these rules to its advantage and threaten not to co-operate with the governments unless they accepted the EP’s interpretations. The article shows how this process of discretion, interpretation and acceptance worked in the two main areas of EP power: in the legislative process (in the reform of the co-decision procedure), and in executive appointment (in the reform of the Commission investiture procedure). The article concludes that ‘agenda-setting through discretion in rule interpretation’ is a common story in the development of the powers of parliaments, both at the domestic and EU levels.

CONSTITUTIONAL DESIGN AND DELEGATION IN THE EU

The Treaty of Amsterdam entered into force in May 1999. Under the terms of the Treaty, the European Union (EU) governments dramatically increased the powers of the European Parliament (EP), thus profoundly changing the basic constitutional design of the EU. The EP now has legislative and executive appointment powers akin to those of elected assemblies in domestic parliamentary systems.¹ But we do not yet have a coherent explanation of why the governments did this.

We have very good explanations of why the governments have increased the powers of the Commission and the European Court of Justice (ECJ).² From an intergovernmentalist perspective, the EU governments delegate executive and judicial powers to these institutions to solve collective action problems, reduce

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¹ E.g. Andrew Duff (ed.), *The Treaty of Amsterdam: Text and Commentary* (London: Federal Trust, 1997); Michael Nentwich and Gerda Falkner, ‘The Treaty of Amsterdam: Towards a New Institutional Balance’, *European Integration On-line Papers*, 1 (1997), <http://eiop.or.at/eiop/texte/1997-015a.htm>.

² Mark A. Pollack, ‘Delegation, Agency and Agenda Setting in the European Community’, *International Organization*, 51 (1997), 99–134; Simon Hix, *The Political System of the European Union* (London: Macmillan, 1999), pp. 50–4 and pp. 118–27.

transactions costs and/or establish credible commitments.³ Alternatively, from a neo-functional perspective, strategic behaviour by the Commission and the ECJ coupled with incomplete information on the part of governments allows these agents a high degree of discretion to shape policy-outcomes.⁴ Neither intergovernmentalists nor neo-functionalists, however, have explained the growing powers of the EP.

Part of the problem is that contemporary political science does not have a general theory of how parliaments gain power in democratic systems.⁵ As in the specific case of the EU, we have sophisticated general theories of why constitutional principals (the people who draft and ratify constitutions – the national governments in the case of the EU) delegate powers to independent bureaucratic or regulatory agents,⁶ separate legislative and judicial powers,⁷ and increase the powers of courts.⁸ But we are not able to explain why constitutional designers also grant powers to parliaments.

³ E.g. Andrew Moravcsik, 'Preferences and Power in the European Community: A Liberal Intergovernmentalist Approach', *Journal of Common Market Studies*, 31 (1993), 473–524; Geoffrey Garrett, R. Daniel Kelemen and Heiner Schulz, 'The European Court of Justice, National Governments, and Legal Integration in the European Union', *International Organization*, 52 (1998), 149–76.

⁴ E.g. Paul Pierson, 'The Path to European Integration: A Historical Institutionalist Analysis', *Comparative Political Studies*, 29 (1996), 123–63; Giandomenico Majone, *Regulating Europe* (London: Routledge, 1996); Anne-Marie Burley and Walter Mattli, 'Europe Before the Court: A Political Theory of Legal Integration', *International Organization*, 47 (1993), 41–76; Karen J. Alter, 'Who Are the "Masters of the Treaty"? European Governments and the European Court of Justice', *International Organization*, 52 (1998), 121–47.

⁵ Cf. John Ferejohn, 'Structure and Ideology: Change in Parliament in Early Stuart England', in John Goldstein and Robert O. Keohane, eds, *Ideas and Foreign Policy: Beliefs, Institutions and Political Change* (Cornell: Cornell University Press, 1993), pp. 207–31.

⁶ E.g. Barry R. Weingast and Michael Moran, 'Bureaucratic Discretion or Congressional Control? Regulatory Policymaking by the Federal Trade Commission', *Journal of Political Economy*, 91 (1983), 775–800; Matthew D. McCubbins, Roger G. Noll and Barry R. Weingast, 'Positive and Normative Models of Procedural Rights: An Integrative Approach to Administrative Procedures', *Journal of Law, Economics, and Organization*, 6 (1990), 307–32; Michael Horn, *The Political Economy of Public Administration: Institutional Choice in the Public Sector* (Cambridge: Cambridge University Press, 1995); David Epstein and Sharyn O'Halloran, *Delegating Powers: A Transaction Cost Politics Approach to Policy Making Under Separate Powers* (Cambridge: Cambridge University Press, 1999).

⁷ E.g. James M. Buchanan and Gordon Tullock, *The Calculus of Consent* (Ann Arbor: Michigan University Press, 1962); Gary J. Miller and Thomas H. Hammond, 'Stability and Efficiency in a Separation-of-Powers Constitutional System', in Bernard Grofman and Donald Wittman, eds, *The Federalist Papers and the New Institutionalism* (New York: Agathon, 1989), pp. 85–99; Elinor Ostrom, *Governing the Commons: The Evolution of Institutions of Collective Action* (Cambridge: Cambridge University Press, 1990).

⁸ E.g. Alec Stone, *The Birth of Judicial Politics in France: The Constitutional Council in Comparative Perspective* (Oxford: Oxford University Press, 1992); Barry R. Weingast, 'Political Institutions: Rational Choice Perspectives', in Robert E. Goodin and Hans-Dieter Klingeman, eds, *A New Handbook of Political Science* (Oxford: Oxford University Press, 1996), 167–90; Georg Vanberg, 'Abstract Judicial Review, Legislative Bargaining, and Policy Compromise', *Journal of Theoretical Politics*, 10 (1998), 299–326.

This article consequently proposes a new theory of the development of the powers of the EP, which is connected to general explanations of why constitutional designers delegate to bureaucracies, courts *and* also parliaments, and why these institutions are able to exercise discretion in the interpretation of these powers. This theory explains how the EP was able to manipulate the Treaty of Maastricht rules and then force the EU governments to institutionalize these practices with the Treaty of Amsterdam. This theory is contrasted with existing explanations of the Amsterdam reforms, and is then applied to the two main areas of reform of the EP's powers: in the co-decision legislative procedure, and in the appointment of the President of the Commission. Finally, the article discusses what this theory means for our general understanding of how parliaments in democratic systems force constitutional designers to increase their powers.

THE *DE JURE* POWERS OF THE EP: FROM ROME TO AMSTERDAM

Through successive constitutional reforms, culminating in the Treaty of Amsterdam, the EU governments have increased the powers of the EP in two of the traditional areas of parliamentary authority:

- (1) *legislative* – the ability to amend draft legislative proposals made by the executive and to formally enact law; and
- (2) *executive appointment* – the requirement that the executive secures the support of a parliamentary majority when taking office.

Legislative Powers: From Consultation to Bicameralism

In 1958, the Treaty of Rome established the so-called 'consultation procedure' as the main procedure for passing European legislation, under which the EU governments must 'consult' the EP, but can nevertheless ignore its views.⁹ In 1987, the Single European Act introduced the 'co-operation procedure' (Article 252 [ex 189c]), which gave the EP two readings of EU legislation, but ultimately allowed the Commission and the Council the final say.

In 1993, however, the Treaty of Maastricht introduced a third legislative procedure, the so-called 'co-decision procedure' (Article 251 [ex 189b]). Under this procedure, if the EP and Council disagreed after two readings, a 'Conciliation Committee' was convened, where an equal number of representatives from the EP and Council would try to reconcile their differences. Nevertheless, the Maastricht version of this procedure ('co-decision I') still allowed the Council to control the final stages of the legislative game. As the Treaty stated:

6. Where the Conciliation Committee does not approve a joint text, the proposal shall be deemed not to have been adopted unless the Council ... confirms the common position which it agreed before the conciliation procedure was

⁹ The consultation procedure still applies to many areas of EU legislation.

initiated ... In this case, the act in question shall be finally adopted unless the European Parliament ... rejects the text by an absolute majority of its component members, in which case the proposed act shall be deemed not to have been adopted.

In other words, if conciliation broke down, the Council could act unilaterally: making an offer to the EP, which the EP would have to either accept or reject.

In 1999, the Treaty of Amsterdam replaced the old co-decision procedure with a new procedure (the so-called 'co-decision II' procedure). The key change was to this last stage:

6. Where the Conciliation Committee does not approve a joint text, the proposed act shall be deemed not to have been adopted.

As a result, the Conciliation Committee is effectively the final stage of negotiation on legislation, and the EP and the Council are genuine 'co-legislators' under this procedure for the first time. The Treaty of Amsterdam also established this 'co-decision II' as the main legislative procedure of the EU, by extending the new procedure to cover all legislation on the regulation of the single market and replacing the old co-operation procedure.

A simple model, set out in Figure 1, can explain the significance of these constitutional reforms for the EP. This model uses the following standard assumptions of spatial analysis:¹⁰

- there is one policy dimension (this is a generic dimension, which could represent any policy content, such as left–right, pro/anti-Europe, or more/less EU regulation);
- the two actors (the EP and the Council) have 'ideal policies' and Euclidean and symmetric preferences (actors prefer outcomes that are closer to their ideal and are indifferent between policies that are equidistant from this ideal);
- the status quo (SQ) (if legislation is not adopted) varies along the dimension as different pieces of legislation are proposed; and
- the actors have 'complete information' about the location of the SQ, each other's preferences and how the rules of the game work.

The X-axis in the figure shows the start of the negotiating game and the Y-axis shows the outcome of the negotiating game. A particular location of the SQ (on the X-axis) with a particular set of decision-making rules produces a particular policy outcome (on the Y-axis). As a result, the model illustrates that different policy outcomes emerge if either the location of the SQ or the decision-making rules change.

The model consequently shows that if all the possible status quos are considered, the EP can secure outcomes closer to its ideal point (on the Y-axis) under the Treaty of Amsterdam version of the co-decision procedure (shown by the dashed line in the figure) than under the Treaty of Maastricht version of the

¹⁰ E.g. George Tsebelis and Jeanette Money, *Bicameralism* (Cambridge: Cambridge University Press, 1997); and Keith Krehbiel, *Pivotal Politics: A Theory of US Lawmaking* (Chicago: University of Chicago Press, 1998).

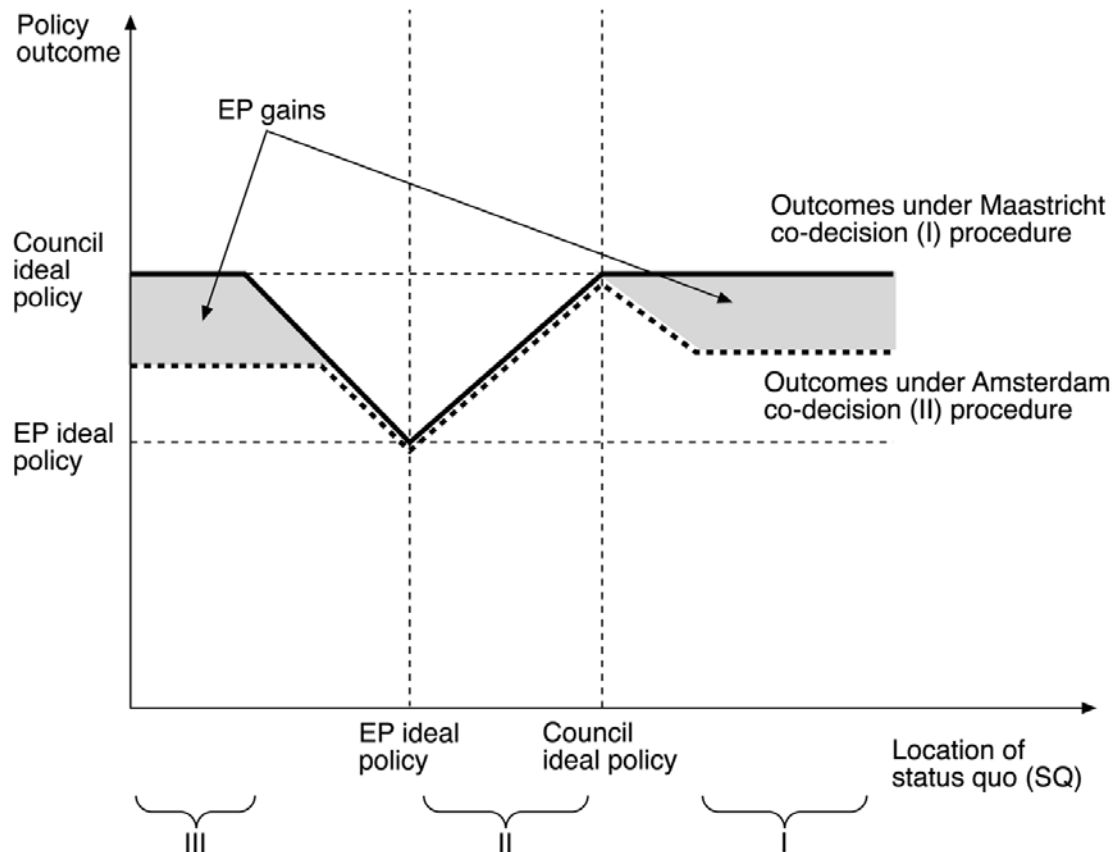


Fig. 1. Legislative bargaining under Maastricht and Amsterdam

co-decision procedure (shown by the bold line). The total amount gained by the EP is represented by the shaded area in the figure.

For example, if the SQ is in region I in the figure, under the Maastricht co-decision procedure the likely policy outcome (on the Y-axis) is the Council's ideal position. In this scenario, the Council would know that if the negotiations in the conciliation committee break down, the Council would be able to propose its common position to the EP in a take-it-or-leave-it offer. The EP would then accept this offer, since this proposal is closer to its ideal point than the SQ.¹¹

¹¹ This is the insight of Tsebelis and Garrett. See George Tsebelis, 'Will Maastricht Reduce the "Democratic Deficit"?' *APSA-Comparative Politics Newsletter*, 6 (1995), 4–6; Geoffrey Garrett, 'From the Luxembourg Compromise to Codecision: Decision Making in the European Union', *Electoral Studies*, 14 (1995), 289–308; George Tsebelis, 'Maastricht and the Democratic Deficit', *Aussenwirtschaft*, 52 (1996), 29–56; George Tsebelis and Geoffrey Garrett, 'Agenda Setting, Vetoes and the European Union's Co-decision Procedure', *Journal of Legislative Studies*, 3 (1997), 74–92; George Tsebelis and Geoffrey Garrett, 'Legislative Politics in the European Union', *European Union Politics*, 1 (2000), 9–36. However, this view of the Maastricht co-decision procedure is criticized in Bernard Steunenberg, 'Decision-Making under Different Institutional Arrangements: Legislation by the European Community', *Journal of Institutional and Theoretical Economics*, 150 (1994), 642–69; Christophe Crombez, 'Legislative Procedures in the European Community', *British Journal of Political Science*, 26 (1996), 199–218; Peter Moser, 'The Benefits of the Conciliation Procedure for the European Parliament: Comment to George Tsebelis', *Aussenwirtschaft*, 52 (1997), 57–62;

However, under the Amsterdam co-decision procedure, with the removal of the third reading, the Council would not be able to make this bid. In this situation, the two institutions would probably agree an outcome which is equally as beneficial to both chambers – hence, half-way between their ideal positions.

If the SQ is in region II, under both the Maastricht and Amsterdam rules, the EP and Council would not be able to agree any change to the SQ, as this would make either of them worse off. But, if the SQ is in region III, under the Maastricht rules the outcome (on the *Y*-axis) would be the position of the Council. In the third reading, the Council would again be able to propose a take-it-or-leave-it bid which the EP would accept, as the position of the Council is closer to the EP's ideal position than is the position of the SQ. However, under the Treaty of Amsterdam, without the 'third reading' the Council would not be able to make this bid, and so would again accept an outcome that is equally good for both chambers – half-way between their ideal positions.

Executive Appointment: From International Organization to Parliamentary Government

A similar story can be told about the EP's powers of executive appointment. Under the Treaty of Rome, the appointment of the Commission was the exclusive preserve of the EU governments. The President of the Commission was chosen by a collective agreement between the heads of government, in the European Council. This was more akin to selecting the head and governing board of an international organization than to choosing a 'prime minister'.

However, the Treaty of Maastricht introduced a new procedure (Article 214 [ex 158]). The key paragraph was the following:

2. The governments of the Member States shall nominate by common accord, after *consulting* the European Parliament, the person they intend to appoint as President of the Commission.¹²

As under the legislative consultation procedure, the EU governments could simply ignore the EP's opinion. Under the Treaty of Maastricht, then, the governments maintained a monopoly on the power of executive appointment.

In the Treaty of Amsterdam, however, this key paragraph was replaced with the following:

2. The governments of the Member States shall nominate by common accord the

(Footnote continued)

Christophe Crombez, 'The Co-Decision Procedure in the European Union', *Legislative Studies Quarterly*, 22 (1997), 97–119; Roger M. Scully, 'The EP and the Co-Decision Procedure: A Reassessment', *Journal of Legislative Studies*, 3 (1997), 58–73; Bernard Steunenberg, 'Codecision and its Reform: A Comparative Analysis of Decision-Making Rules in the European Union', in Bernard Steunenberg and Frans van Vught (eds) *Political Institutions and Public Policy* (Amsterdam: Kluwer, 1997); and Christophe Crombez, 'Institutional Reform and Co-Decision in the European Union', *Constitutional Political Economy*, 11 (2000), 41–57.

¹² Emphasis added.

person they intend to appoint as President of the Commission; the nomination shall be *approved* by the European Parliament.¹³

For the first time, in the classic model of parliamentary government, the President of the Commission now required the support of a parliamentary majority to take office.

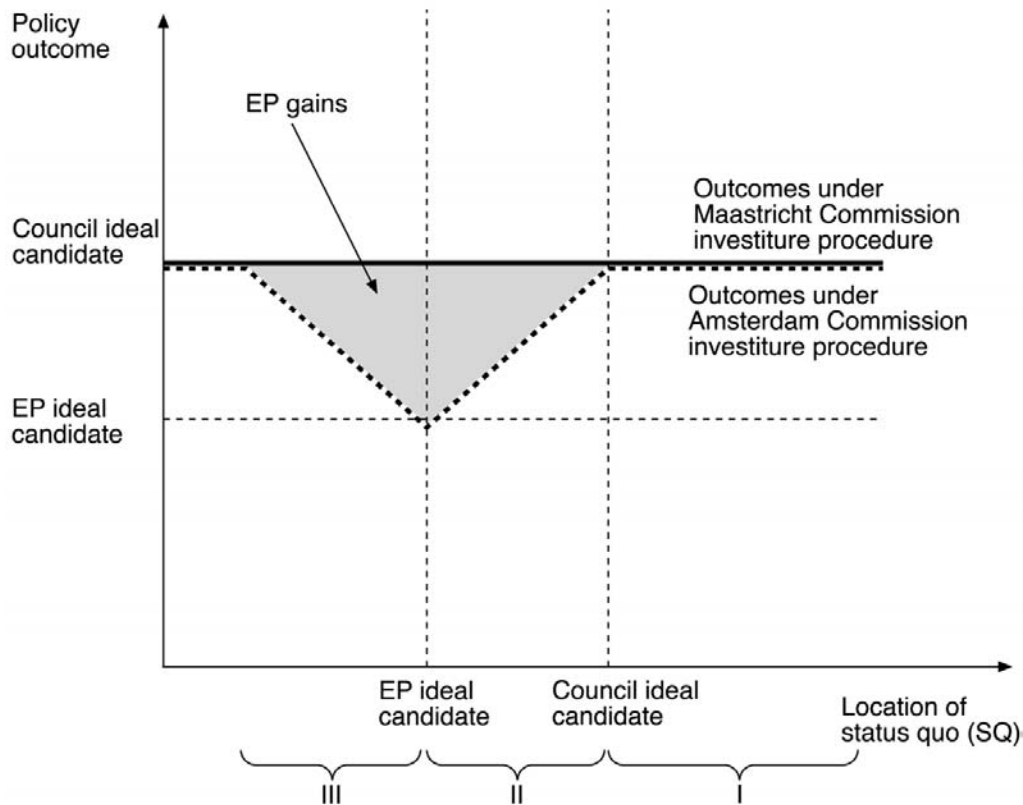


Fig. 2. Executive Appointment Bargaining under Maastricht and Amsterdam

As with the legislative procedures, a simple model can explain how these constitutional changes affect the EP’s powers – see Figure 2. This model uses the same assumptions as in the above model of the legislative process. The model illustrates that if all the possible locations of sitting Presidents of the Commission are considered, the EP can secure outcomes closer to its ideal point under the Treaty of Amsterdam appointment procedure (shown by the dashed line in the figure) than under the Treaty of Maastricht procedure (shown by the bold line).¹⁴ The total amount gained by the EP is again represented by the shaded area in the figure.

For example, under the Treaty of Maastricht, irrespective of the policy position of the sitting President of the Commission (the location of the SQ on

¹³ Emphasis added.

¹⁴ Cf. Christophe Crombez, ‘Policy Making and Commission Appointment in the EU’, *Aussenwirtschaft*, 52 (1997), 63–82.

the *X*-axis), the new President of the Commission (the outcome on the *Y*-axis) would be the sole choice of the Council, as the Council can simply ignore the EP's non-binding opinion. Similarly, under the Treaty of Amsterdam rules, if the policy position of the sitting President of the Commission is in region I in the figure the EP would accept the Council's candidate as this candidate is closer to the EP's ideal position than is the position of the sitting president.

However, if under the Amsterdam rules the policy position of the sitting president is in region II, the EP would threaten to veto any candidate who is not closer to its ideal point than the sitting president. In this situation, the best the Council could do is to propose a candidate at exactly the same policy position as the sitting president. Hence, in this scenario, the new President of the Commission (on the *Y*-axis) would be at exactly the same policy position as the existing President of the Commission – as any change from this position would be worse for either the EP or the Council. Furthermore, if the policy position of the sitting president is in region III, under the Amsterdam rules the Council would be forced to propose a candidate between the positions of the two institutions (unless the sitting president is further to the 'left' of the EP than the Council's ideal position is to the 'right' of the EP, in which case the EP would prefer the Council's ideal candidate to the SQ).

In sum, in the Treaty of Amsterdam, the EU governments, acting unanimously, voluntarily increased the ability of the EP to influence legislation and the EU executive, at the expense of collective agreements in the Council. The question, then, is why did the governments do this?

WEAKNESS OF EXISTING EXPLANATIONS

There are two recent attempts to explain the Amsterdam changes to the EP's powers.

Explanation 1: Ideological Commitment to Reducing the Democratic Deficit

A common claim is that EU governments increased the powers of the EP in the Treaty of Amsterdam in response to citizens' concerns about the lack of democratic accountability in the EU, which were expressed in the process of ratifying the Treaty of Maastricht.¹⁵ For example, Mark Pollack argues that 'the member states were clearly motivated primarily by democratic ideology in their decision to delegate new powers to the Parliament at Amsterdam', just as they had done in the Treaty of Maastricht negotiations.¹⁶ The question of the 'democratic deficit' had been discussed at several European Council summits

¹⁵ E.g. Duff, *The Treaty of Amsterdam*; Nentwich and Falkner, 'The Treaty of Amsterdam: Towards a New Institutional Balance'.

¹⁶ Mark A. Pollack, 'Delegation, Agency and Agenda Setting in the Treaty of Amsterdam', *European Integration On-line Papers*, 3 (1999), <http://eiop.or.at/eiop/texte/1999-006a.htm>, p. 10. Also Pollack, 'Delegation, Agency and Agenda Setting in the European Community'.

prior to the Amsterdam Intergovernmental Conference (IGC), and during the treaty negotiations opinion polls showed that the public identified the issue of the democratic deficit as a key concern of the treaty reforms.¹⁷ Furthermore, despite the fact that in most member states the public is not well informed about the EP, polls show that a majority of EU citizens ‘trust’ the EP to defend their interests.¹⁸

This argument is plausible but incomplete. These may be the necessary conditions for governments to act on this issue, but they are not sufficient to explain the specific Amsterdam reforms. The outcome at Amsterdam was a major redistribution of power in the EU system: a loss for the governments and a gain for the EP. If governments are rational office-seeking actors, the governments would only be willing to allow these losses in their powers at the European level if this would lead to electoral gains in the domestic arena. Although the public might support an increase in powers for the EP, this support is not strong enough and the issue is not salient enough for governments to use this to their electoral advantage.¹⁹

Put another way, voters are unlikely to change their party choices in domestic electoral competition because their government decides to increase the powers of the EP. The issue is simply not significant enough for either voters or parties: in election manifestos, parties rarely mention issues relating to the EU and almost never discuss institutional reform;²⁰ and even in statements by the transnational Euro-parties, the democratic deficit and the EP’s powers are rarely discussed.²¹

Explanation 2: Delegation by Centre-Left Governments to a Centre-Left Majority in the EP

Andrew Moravcsik and Kalypso Nicolaïdis propose an alternative explanation.²² They too point to the importance of addressing the democratic deficit for some member states, but argue that there was not a consensus on this issue:

[There is] a long-standing tendency of countries to support or oppose strengthening the EP on the basis of its perceived connection with their own democratic institutions. Before Amsterdam, this typically generated characteristic ideological

¹⁷ European Commission, *Eurobarometer No. 48 – Autumn 1997* (Brussels: European Commission, 1998).

¹⁸ Oskar Niedermayer and Richard Sinnott, ‘Democratic Legitimacy and the European Parliament’, in Oskar Niedermayer and Richard Sinnott, eds, *Public Opinion and Internationalized Governance* (Oxford: Oxford University Press, 1995), 277–306.

¹⁹ E.g. Niedermayer and Sinnott, ‘Democratic Legitimacy and the European Parliament’.

²⁰ Cf. Clifford Carrubba, ‘The Electoral Connection in European Union Politics’ (presented at the annual meeting of the European Public Choice Society, Lisbon, 1999).

²¹ Simon Hix, ‘Dimensions and Alignments in European Union Politics: Cognitive Constraints and Partisan Responses’, *European Journal of Political Research*, 35 (1999), 69–106.

²² Andrew Moravcsik and Kalypso Nicolaïdis, ‘Explaining the Treaty of Amsterdam: Interests, Influence, Institutions’, *Journal of Common Market Studies*, 37 (1999), 59–86.

cleavages pitting the French, British, Danes and Greeks – all opposed to greater [European] parliamentary powers – and others against the Germans, Dutch, Italians and Belgians.²³

For example, several member states wanted the EP to be a full participant in the Treaty of Amsterdam negotiations, but this was opposed by the British and French governments.

Moravcsik and Nicolaïdis claim that consensus emerged at Amsterdam because in the middle of the IGC negotiations, centre-left parties won national elections in France and Britain – the two most anti-EP member states. As Moravcsik and Nicolaïdis argue, there is a ‘tendency for Social Democrat parties to support increases in EP powers ... [because there is] a Social Democratic majority in that body’.²⁴ Since the Council now shared the same policy preferences as the centre-left majority in the EP, increasing the powers of the EP relative to the Council would not lead to any redistributive loss for most EU governments. The current Council wanted to avoid the possibility of a future centre-right Council imposing its policy preferences on the centre-left in the EP. Hence, the centre-left majority in the Council during the Amsterdam negotiations had an incentive to delegate powers to the EP in order to ‘lock in’ their policy preferences.

However, centre-left governments cannot assume that the majority in the EP will always share their policy preferences. In fact, because of the way the EP is elected, majorities in the EP and the Council are likely to have opposing policy preferences. EP elections are ‘second-order national contests’.²⁵ Because there is less at stake in these elections, national political parties fight EP elections as referendums on the performance of the parties who won the last national government elections (the ‘first-order contests’). Consequently, EP elections tend to be won by opposition parties, since government supporters abstain in high numbers and many citizens use EP elections to punish governing parties (by voting for opposition parties) or express other preferences (by voting for issue-specific parties, such as the Greens or anti-immigration parties).

For example, in the 1989 and 1994 EP elections, when centre-right parties were in power in most member states, the Party of European Socialists (PES) emerged as the largest party group in the EP. The reverse occurred in the 1999 EP elections: the centre-left parties in power in most member states lost badly, and the centre-right European People’s Party easily replaced the PES as the largest party in the EP. When the Treaty of Amsterdam entered into force on 1 May 1999, there was a centre-left majority in the EP. But on 13 June 1999 the centre-right swept to power in the EP elections.

²³ Moravcsik and Nicolaïdis, ‘Explaining the Treaty of Amsterdam’, p. 81.

²⁴ Moravcsik and Nicolaïdis, ‘Explaining the Treaty of Amsterdam’, p. 80.

²⁵ Cees van der Eijk and Mark Franklin, eds, *Choosing Europe? The European Electorate and National Politics in the Face of Union* (Ann Arbor: University of Michigan Press, 1996); Michael Marsh, ‘Testing the Second-Order Election Model after Four European Elections’, *British Journal of Political Science*, 18 (1998), 75–100.

Ironically, by strengthening the EP’s power, the centre-left governments increased the likelihood of centre-right policies at the European level. Hence, this explanation only holds if it includes the assumption that the governments negotiating the Treaty of Amsterdam made a major miscalculation about the future political make-up of the EP.

AN ALTERNATIVE THEORY: CONSTITUTIONAL AGENDA-SETTING THROUGH DISCRETION IN RULE INTERPRETATION

If we consider that the design of treaties or constitutions is in many ways little different to the design of legislation, then we can base an explanation of EU treaty outcomes on the general theory of legislative bargaining, delegation and discretion.

The General Theory of Delegation and Discretion

In the general theory of delegation to independent agents, one of the main driving forces behind ‘agency drift’ is incomplete information about the ideal policy preferences of institutions.²⁶ This is illustrated in Figure 3. In the figure, where the axis represents a generic single-issue policy dimension, P_1 and P_2 are legislators and A is an independent agent, which has a role in shaping final legislative outcomes, for example through implementation or adjudication. If P_1 and P_2 agree a legislative outcome at position X , A can move the final policy outcome to position Y (which is much closer to its ideal position than X). At position Y , P_1 will not introduce new legislation (as Y is at its ideal point), and P_1 would veto any attempt by P_2 to move the outcome back towards X . If A tried to move the outcome any closer to its ideal point (beyond the P_1 – P_2 win-set), P_1 would propose a reform of the existing legislation at point Y , which P_2 would then accept as it is closer to its ideal point than anything to the left of P_1 .

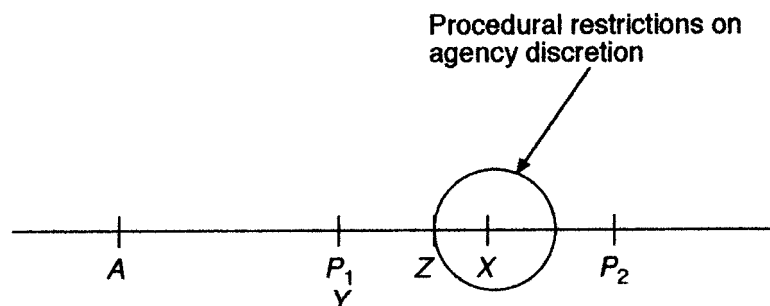


Figure 3. *The General Theory of Delegation, Discretion and Agency Drift*

Notes: A = position of the agency (e.g. a bureaucracy, a court or a parliament); P_1, P_2 = positions of legislators (or constitutional designers); X = position of a policy agreement by P_1 and P_2 .

However, if P_2 has a clear understanding of the policy location and powers

²⁶ E.g. Weingast and Moran, ‘Bureaucratic Discretion or Congressional Control?’

of the actors, it will try to restrict the ability of *A* to move the outcome from *X*.²⁷ Such restrictions could be *ex ante*, such as specifying the legislation more carefully to limit the amount of discretion in interpretation of the meaning of the law, or *ex post*, such as specifying that the agent must justify its actions to the principals in the light of the initial legislative intention.

With perfect information, then, *P*₂ will demand certain procedural restrictions, which *P*₁ would resist. In our example, these procedures (as represented by the circle) limit *A*'s discretion to moving the final outcome to somewhere along the segment inside the circle. Under these constraints, *A* is only able to move the final policy outcome to *Z*, which is the closest position to its ideal policy it can achieve within the boundary of the restrictions.

Delegation and Discretion in the Specification and Operation of the EP's Powers

The process of reforming the EU treaties is similar to this general story. When reforming the EU Treaty, powers are divided and delegated between the EU's institutions – the Council, the Commission, the ECJ and the EP. These institutions are responsible for interpreting the powers delegated to them. As with delegation through secondary legislation, these institutions have a certain degree of discretion in the implementation of these primary constitutional commitments. How far the EU institutions are able to shape final policy outcomes depends partly on whether the governments have complete information or incomplete information about the degree of discretion that the EU institutions can exercise.²⁸

For example, if the EU governments have perfect information about how far the EU institutions are able to exercise this discretion, the governments will be very careful about which powers are delegated to the institutions. In this situation, final policy outcomes will reflect bargains between the EU governments rather than the policy preferences of the supranational EU institutions, as the intergovernmentalists predict. However, if the EU governments have incomplete or asymmetric information about how far the EU institutions are able to exercise discretion, the EU institutions will be able to shape final policy outcomes beyond the original intention of the EU governments, as the neo-functionalists predict.

Put another way, incomplete information about the ultimate impact of the delegation of powers to the EU institutions often leads to consequences that were

²⁷ E.g. Matthew D. McCubbins and Thomas Schwartz, 'Congressional Oversight Overlooked: Police Patrols versus Fire Alarms', *American Journal of Political Science*, 28 (1984), 165–79; Terry Moe, 'The Politics of Bureaucratic Structure', in John Chubb and Paul Peterson, eds, *Can the Government Govern?* (Washington, DC: The Brookings Institution, 1989), pp. 267–325; D. Roderick Kiewiet and Matthew D. McCubbins, *The Logic of Delegation: Congressional Parties and the Appropriations Process* (Chicago: University of Chicago Press, 1991).

²⁸ George Tsebelis, 'Institutional Analyses of the European Union', *European Community Studies Association Newsletter*, Spring 1999.

‘unintended’ by the EU governments when they negotiated the treaties.²⁹ Whereas this assumption has been used to explain how the Commission and the ECJ have been able to shape policy outcomes, until now it has not been applied to how the EP can shape institutional outcomes. The following theory tries to go some way towards filling this gap.

The basic assumptions of this alternative explanation are as follows:

- (1) The formal decision-making procedures, as set out in the treaties, are ‘incomplete contracts’. This means that they cannot account for all possible circumstances – hence, the *de facto* operation of the procedures is not always the same as the *de jure* rules.
- (2) The EU governments have incomplete information about how exactly the EP will interpret the *de jure* rules (in fact, there is asymmetric information between the governments and the EP, as the EP has greater expertise on the operation of the procedures than the governments). As a result, the EP has a degree of discretion in interpreting how these contracts are completed.³⁰
- (3) In this process of interpretation (which the EP sets out in its ‘rules of procedure’), the EP will try to maximize its influence over outcomes.
- (4) The EP threatens non-cooperation with the governments unless they accept the EP’s interpretation. This is a credible threat because the EP is willing to lose in the short term in return for constitutional reforms that guarantee its interests in the longer term.
- (5) The governments will not amend the Treaty to enforce their original status quo, as Treaty amendments require unanimity and at least one government (the most integrationist) prefers the EP’s interpretation of the Treaty rules to the original status quo;
- (6) In the next round of Treaty negotiations, the EP proposes reforms to the

²⁹ Pierson, ‘The Path to European Integration’.

³⁰ The EP is treated as a unitary actor in this theory for two main reasons. First, this is a ‘constitutional politics game’ which, unlike day-to-day legislative politics, has uncertain long-term partisan policy implications. As a result, whereas Members of the European Parliament (MEPs) may have divergent preferences on individual legislative issues, they share common institutional preferences about the balance of power between the institutions – in other words, that the powers of the EP are increased in relation to the other institutions. This assumption is supported by evidence in surveys of MEPs’ opinions, which reveal a larger degree of variation on socio-economic preferences than on questions relating to the balance of power between the EU institutions – essentially, both left-wing and right-wing MEPs want more power for themselves. See, for example, Sören Holmberg, ‘Wishful Thinking Among European Parliamentarians’, in Hermann Schmitt and Jacques Thomassen, eds, *Political Representation in the European Union* (Oxford: Oxford University Press, 1999), pp. 237–51; and Mark N. Franklin and Susan E. Scarrow, ‘Making Europeans? The Socializing Power of the European Parliament’, in Richard S. Katz and Bernard Wessels, eds, *The European Parliament, National Parliaments, and European Integration* (Oxford: Oxford University Press, 1999), pp. 45–60. Second, by treating the EP as a unitary actor, this theory of the development of the powers of the EP is directly comparable to existing explanations of the development of the constitutional powers of the other supranational EU institutions – the Commission and the ECJ – most of which treat the EU institutions as unitary agents, whose powers are the subject of bargaining in a multi-member Council.

existing *de jure* rules that simply institutionalize the *de facto* operation of the old rules.

- (7) The EU governments accept the EP proposal if:
- (a) there is zero *redistributional* change in the balance of power between the EP and the Council under the proposed new *de jure* rules and the *de facto* operation of the old rules; and
 - (b) there are collective *efficiency* gains of greater transparency and simplicity in the operation of the procedures (which allow the governments to claim that they have reduced the democratic deficit without actually losing any power to the EP).
- (8) But the governments learn from this experience ('update their information') and so try to limit any further discretion by the EP – which leads to a growing specification of the *de jure* decision-making rules in the EU Treaty.

However, these assumptions suggest that the EP's chance to re-interpret the rules in the Treaty is a one-shot game. The EP can only hope to move the original constitutional bargain to the position of the most integrationist government. Once this position has been achieved, it will be very difficult for the EP to move the operation any further, as the most integrationist government would have an incentive to block any new re-interpretation.

Nevertheless, these assumptions lead to specific predictions about how the powers of the EP would develop from the Treaty of Maastricht to the Treaty of Amsterdam in three stages:

- (1) *Constitutional Design* (Treaty of Maastricht). The EU governments agree to reform the powers of the EP to increase the quality of legislation and to increase scrutiny of the Commission. The governments do not expect these new rules to redistribute power to the EP, as the governments expect to retain ultimate control under the legislative and executive appointment procedures (as we discussed above).
- (2) *Constitutional Operation*. The EP re-interprets how the new procedures work and threatens not to co-operate if the Council does not accept this interpretation. The governments cannot enforce the original status quo, as the most integrationist government is indifferent between the *de facto* operation and the *de jure* rules.
- (3) *Constitutional Reform* (Treaty of Amsterdam). In the next stage of constitutional reform, the EP proposes the institutionalization of the *de facto* operation. The most integrationist government (such as Ireland or the Netherlands in the case of the Amsterdam negotiations) accepts some of these ideas but recommends some moderate changes, to bring the outcome closer to their own ideal position. This outcome is then preferred by all the governments to the *de facto* operation, and is hence adopted.

Having proposed this theory and predicted a three-step process, these claims

need to be tested at an empirical level. Consequently, in the next two sections these claims are applied to both areas of reform of the EP's powers: (1) the end-game of the co-decision procedure, and (2) the procedure for investing the President of the Commission. These 'analytic narratives'³¹ illustrate how the EP exercised independent discretion in interpreting the Treaty of Maastricht rules, why these interpretations became the *de facto* rules, and why the governments then decided to institutionalize these *de facto* practices in the subsequent changes in the Treaty of Amsterdam.

THE EUROPEAN PARLIAMENT'S LEGISLATIVE POWERS

EP Discretion in Interpreting the Co-decision I End-Game: The EP's Rule 78

Following the Treaty of Maastricht, the EP updated its own Rules of Procedure to specify how the EP should operate under the new decision-making rules. In this process, the EP was eager to maximize its influence under the new co-decision procedure (co-decision I). In Rule 78 in its procedures, the EP set out how it interpreted the new third reading:

1. Where no agreement is reached on a joint text within the Conciliation Committee, the [EP] President shall invite the Commission to withdraw its proposal, and invite the Council not to adopt under any circumstances a position pursuant to Article 189b(6) of the EC Treaty. Should the Council nonetheless confirm its common position, the President of the Council shall be invited to justify the decision before the Parliament in plenary sitting. The matter shall automatically be placed on the agenda of the last part-session to fall within six or, if extended, eight weeks of the confirmation by the Council ...

[...]

3. No amendments may be tabled to the Council text.

4. The Council text as a whole shall be the subject of a single vote. Parliament shall vote on a motion to reject the Council text. If this motion receives the votes of a majority of the component Members of Parliament, the [EP] President shall declare the proposed act not adopted.

This was a clear attempt by the EP to exercise discretion over how the new legislative procedure would work in practice. Even if a majority in the EP might prefer the Council's common position to no agreement (the status quo), Rule 78 introduced several mechanisms to reduce the likelihood that the Council would re-affirm its common position. First, the Council President-in-Office would have to explain to full EP plenary why they were re-affirming the common position – in full view of the press. This gave an extra incentive to the foreign minister of the member state holding the Council Presidency to try to compromise with the EP in the Conciliation Committee, or not to re-affirm the

³¹ Robert H. Bates, Avner Greif, Margaret Levi, Jean-Laurent Rosenthal and Barry R. Weingast, *Analytic Narratives* (Princeton, NJ: Princeton University Press, 1998).

position if conciliation breaks down. Secondly, and linked to this issue, by ensuring that the item would be in the last possible plenary session in the allowed time, the Rule gave the Council President the maximum possible opportunity to reconsider a decision to re-affirm the common position.

Thirdly, and most significantly, if the Council refused to back down, paragraph 3 of Rule 78 forced the EP leadership to recommend a ‘motion to reject’ and the EP to hold a single vote on this text. Like Ulysses and the Sirens, this ‘binds the hands’ of the EP leadership in the event that they might be tempted by a re-affirmed Council offer.

De Facto Operation of the Legislative End-Game: The ONP Precedent and Council Acceptance

Even if the Council could not have predicted this EP effort to re-interpret the rules, the Council could still have regarded Rule 78 as simply ‘cheap talk’. As we discussed in relation to Figure 1, if the proposal from the Council is between the EP position and the position of the SQ, the EP would accept the Council’s proposal and hence not exercise its new veto power. Consequently, since this scenario exists in many areas of EU legislation,³² the Council’s best strategy under the new procedure would be to allow the Conciliation Committee to break down, and then reaffirm its common position. In most circumstances the EP would prefer this offer to the status quo and so accept legislation at the Council’s ideal point.

But, on the first occasion that the Council used its right to re-affirm its common position, the EP rejected the common position. In July 1994, in the first plenary session of the new parliament, the EP voted by an absolute majority to reject the Council’s common position on the draft directive on open network provision in voice telephony (ONP).³³ This vote revealed that Rule 78, backed by the EP leadership’s institutional preferences, was in fact a credible threat. The EP leadership was more interested in securing the institutional precedent that ‘co-decision actually meant co-decision’ than short-term legislative gains. Given a choice between the status quo and legislation that did not incorporate some of its key proposal, the EP actually rejected the Council’s offer.

This strategy paid off, as it established compromise in the conciliation committee as the actual game equilibrium. Following the ONP vote,

³² For example, this preference-structure usually exists when new EU-wide regulations of goods, services and capital are proposed by the Commission, where the status quo is ‘no policy integration’, the Council wants a moderate amount of EU-wide regulations and the European Parliament, as a supranational institution, wants a much higher level of policy integration.

³³ On the history of the draft directive on Open Network Provision (ONP) voice telephony, see the following documents: the original Commission proposal (COM(92)0247), the original EP report (A3-0064/93) and first reading opinion (R3-0064/93), the Commission’s modified proposal (COM(93)0182), the Council common position (6957/1/93), the EP second reading decision (R3-0006/94), the Council confirmation of the common position (C4-056/94), and the EP recommendation for a rejection (A4-0001/94) and third reading decision (R4-0001/94).

the Council did not re-affirm its common position on any occasion. In almost all cases, the Council compromised in the Conciliation Committee, which allowed the EP to secure more amendments under co-decision I than under the old co-operation procedure.³⁴ On the one occasion that a joint text could not be agreed in conciliation (on the draft directive on investment firms, credit institutions: capacity adequacy, securities field in 1998), the Council decided not to re-affirm its common position.³⁵

Amsterdam: The EP Suggestion, the Governments' Response, and Growing Procedural Specification (the 'Ken Collins Amendment')

In the IGC on the reform of the Maastricht Treaty, the EP proposed *inter alia* that the co-decision procedure be reformed, and that part of this reform should be the abolition of the Council's right to reaffirm its common position.³⁶ The EP argued that since this had only ever been used once, when the EP had rejected the common position, this change would have no net *redistributional* effect on the balance of power between the Council and the EP. Furthermore, and here was the crux, by institutionalizing the *de facto* operation of the procedure in the *de jure* procedures, the EP argued that there would be a collective *efficiency* gain, as the procedure would be simplified and more transparent.

Most governments accepted this argument. Britain and France, the least integrationist governments, were initially reluctant; but they agreed to the reform in the end. This was not because they desired to reduce the democratic deficit, as the publics of Britain and France were not very favourable towards the EP, nor because deleting the third reading would increase the power of a centre-left majority in the EP. Instead, the EU governments accepted the proposal because they were indifferent between the likely location of policy outcomes under the proposed *de jure* rules and the existing location of policy outcomes under the *de facto* operation of the old rules.

Nevertheless, the EU governments had learnt from their lack of complete information in the Treaty of Maastricht reforms. If they were not

³⁴ European Parliament, *Progress Report, 1 August 1996 to 31 July 1997, on the Delegations to the Conciliation Committee (Fontaine, Imbeni, Verde i Aldea)* (Brussels: European Parliament, 1997); European Parliament, *(Co-) Governing After Maastricht: The European Parliament's Institutional Performance 1994–1998 – Lessons for the Implementation of the Treaty of Amsterdam*, Political Series POLI 104.EN (Brussels: European Parliament – Directorate-General for Research, 1998); George Tsebelis, Christian B. Jensen, Anastassios Kalandrakis and Amie Kreppel, 'Legislative Procedures in the European Union: An Empirical Analysis' (paper presented at the Sixth Biennial Conference of the European Community Studies Association, Pittsburgh, 1999).

³⁵ On the history of the draft directive on investment firms, credit institutions: capital adequacy, securities field (amending Directive 93/6/EEC, 93/22/EEC), see the following documents: the original Commission proposal (COM(95)0360), the original EP report (A4–0034/96) and first reading opinion (R4–0034/96), the Commission's modified proposal (COM(96)0292), the Council common position (7898/1/96), and the EP second reading decision (R4–0093/97).

³⁶ European Parliament, *Report on the Functioning of the Treaty on European Union with a View to the 1996 Intergovernmental Conferences* (Brussels: European Parliament, 1995).

careful, the EP would again be able to exercise discretion in interpreting these new rules. To prevent this, the governments could adopt *ex ante* restrictions on the EP's discretion.

The clearest example of this is the so-called 'Ken Collins amendment' to the Treaty.³⁷ In the Treaty paragraph on the Conciliation Committee (Article 251, para. 3 [ex 189b]), the governments added the phrase: 'The Conciliation Committee shall address the common position on the basis of the amendments proposed by the European Parliament'. This was a conscious response to the fact that when negotiating on environmental legislation, Ken Collins (Chair of the EP's Environment Committee) repeatedly introduced new amendments at the conciliation stage, to use as bargaining chips or to change the dimensionality of negotiations. Collins pointed out that there was nothing in the Treaty to prevent this interpretation of the rules. However, by specifying that conciliation negotiations are restricted to the EP and Council positions at second reading, the governments restricted any further EP interpretation of the rules to its advantage on this issue.

THE EUROPEAN PARLIAMENT'S EXECUTIVE APPOINTMENT POWERS

EP Discretion in Interpreting the Investiture Procedure: The EP's Rule 32

When the Treaty of Maastricht was adopted, most commentators expected that under the new rules governing the investiture of the Commission, the EP would not have the right to veto the governments' nominee for President of the Commission.³⁸ Since the EP need only be 'consulted' by the Council when choosing a candidate, the designers of the Treaty assumed that the EP would simply issue an 'opinion' on the prospective candidate, which the governments' could then ignore at no cost.

But, again, this was not how the EP saw it. In Rule 32 of its new Rules of Procedure following the Treaty of Maastricht, the EP decided to implement the President of the Commission investiture procedure as follows:

1. When the governments of the Member States have agreed on a nomination for the President of the Commission, the [EP] President shall request the nominee to make a statement to Parliament ...
2. Parliament shall approve or reject the nomination by a majority of the votes cast. The vote shall be taken by roll call ...
4. If the result of the vote in Parliament ... is negative, the [EP] President shall request the governments of the Member States to withdraw their nomination and submit a new nomination to Parliament.

Under this interpretation, the Treaty of Maastricht gave the EP a right to vote

³⁷ I would like to thank Francis Jacobs, from the EP secretariat, for bringing this change in the Treaty to my attention and for calling it the 'Ken Collins amendment'.

³⁸ Richard Corbett, *The Treaty of Maastricht – From Conception to Ratification: A Comprehensive Reference Guide* (London: Longman, 1993).

on the governments' nominee for President of the Commission. This had more weight than an 'opinion'. First, the Council President-in-Office would have to openly flout the negative vote of the majority in the EP, and to resist the request of the EP President to withdraw the nomination. Secondly, in the face of a negative vote in the EP, the proposed candidate would probably be reluctant to accept the Council's reaffirmed nomination.

De Facto Operation of the Investiture Procedure: EP Acceptance of Jacques Santer

The new President of the Commission investiture procedure was used for the first time in the nomination of the successor to Jacques Delors, following the June 1994 European elections. After a considerable battle in the European Council, the EU governments collectively nominated Jacques Santer.

Accepting the EP's interpretation of the procedure, Jacques Santer duly agreed to present himself to the first plenary session of the new EP, in July 1994, for a formal vote on his nomination. Giving evidence to the EP, Klaus Kinkel, the German foreign minister and President-in-Office of the Council, agreed that if the EP voted against the governments' nominee the nominee would be withdrawn. This was reinforced when in separate presentations to the two largest party groups in the EP – the Party of European Socialists and the European People's Party – Santer stated that he would withdraw his candidacy if the EP did not approve him by a simple majority.

As it turned out, the EP narrowly voted to accept Santer as the new President of the Commission, by 260 votes for to 238 votes against. Nonetheless, as Francis Jacobs, a prominent institutional expert in the EP's secretariat, pointed out:

If Santer had been rejected, the member states could have maintained their nomination, since the European Parliament was merely consulted under the terms of the Maastricht Treaty. In practice, however, the nomination would almost certainly have been killed off, since German Chancellor Kohl for one had indicated that he would respect the European Parliament's decision, and the nominee himself would not have wanted to take up office under these circumstances.³⁹

Although the EP only had a *de jure* right to be 'consulted', the EP's interpretation of the procedure and the precedent set by the debate and vote on Santer meant that under the Treaty of Maastricht the EP had a *de facto* veto over the proposed EU chief executive.

This interpretation of the procedure, and the subsequent precedent set by the Santer vote, considerably changed the structure of the President of the Commission investiture game between the Council and the EP. When negotiating the Treaty of Maastricht, the governments resisted the EP's

³⁹ Francis Jacobs, 'Nominations and Appointments: An Evolving EU Model' (paper presented at the Sixth Biennial Conference of the European Community Studies Association, Pittsburgh, 1999), p. 7.

demands for a right to vote on the nomination for President of the Commission. Instead, they opted for the weaker power of ‘consultation’, in the expectation that this would allow the governments to force the EP to accept a candidate closer to the consensus position in the European Council than the more integrationist position of the majority in the EP – as was shown in the above discussion of Figure 2.

However, as a result of the EP’s re-interpretation, in practice the EP had a choice whether to accept or reject the Council’s nominee. If the EP rejected the nominee, the governments would not be able to confirm their candidate as President of the Commission: either one of the more integrationist member states would veto a decision to go against the majority in the EP, or the candidate would withdraw from the race. Faced with this prospect, the best strategy for the governments would be to nominate a candidate somewhere between the Council’s ideal position and the ideal position of the majority in the EP, which the EP would be likely to accept. If the governments fail to do this, they risk the majority in the EP preferring the status quo (or a new nomination) to the proposed candidate, on the grounds that this would be better than setting the precedent of being ‘railroaded’ by the governments.

Amsterdam: The EP Suggestion and the Governments’ Response

In the Treaty of Amsterdam negotiations, the EP duly proposed that the governments reform the Treaty to institutionalise the EP’s interpretation of the Maastricht investiture procedure. As with the EP’s proposed reform of the co-decision procedure, the EP argued that this was a relatively simple step to undertake, as this is how the procedure operated in practice. Moreover, this change would increase the transparency of the procedure, by formally recognizing the practice of the EP’s right to veto the President of the Commission.⁴⁰ In other words, this would have zero redistributive impact on the existing balance of power between the EP and the Council, but would allow the governments to claim that they had responded to voters’ concerns about the democratic deficit in the EU. How could the governments resist this logic?

As a result, not a single government opposed reforming the Treaty to give the EP the right to veto their candidate for President of the Commission. This practice had worked with the investiture of Jacques Santer, and there was no reason to suggest that it would not work in the future.

However, unlike the reform of the co-decision procedure, there is no evidence that the governments tried to restrict any future re-interpretation of the executive appointment rules by the EP. Presumably, as this procedure is used so rarely, and the rules are now very clear, the governments assumed that the ability of the EP to exercise any further discretion when interpreting these rules would be limited. But the EP immediately exercised further discretion when interpreting

⁴⁰ European Parliament, *Report on the Functioning of the Treaty on European Union with a View to the 1996 Intergovernmental Conferences*.

how this new procedure would work. In September 1999, in the process of appointing the new President of the Commission (Romano Prodi), the EP forced the new President to agree to sack individual Commissioners who no longer commanded the support of the EP. This was certainly not the intention of the governments when they made the changes at Amsterdam.

CONCLUSION: PARLIAMENTARIZATION – THE EU AND THE GENERAL PHENOMENON

The theory presented here constitutes a very different interpretation of why the EU governments voluntarily agreed in the Treaty of Amsterdam to take a major step towards a parliamentary model of democracy at the European level. The EU governments did not do this in response to electoral demands to increase the EP's powers at the Council's expense. Nor did the Social Democratic governments agree to do it because they believed (wrongly) that there is an in-built centre-left majority in the EP. Instead, the EU governments undertook the Treaty of Amsterdam reforms because they were in fact only institutionalizing existing practices. What has been perceived as a giant leap, was in reality only a small step.

The real transformation in the powers of the European Parliament came in the practical operation of the rules of the Treaty of Maastricht. At Maastricht, the governments had not been able to predict how exactly the EP would behave under the new legislative and executive appointment rules, as the contracts seemed relatively complete. Nevertheless, the EP was able to exercise discretion in interpreting these rules, and to force the governments through new institutional rules and strategic behaviour to accept this interpretation. The result was considerably more practical power for the EP under the Treaty of Maastricht than either the governments or many political scientists had predicted.

When it came to the Amsterdam negotiations, the EP proposed to the governments to institutionalize how the old rules had worked in practice. The governments were willing to do this for two reasons. First, the changes would mean no net redistribution of powers between the Council and the EP. Secondly, the changes would lead to collective efficiency gains, as a result of simplifying the decision-making procedures. As a result, this was an almost cost-free way of responding to demands to reduce the democratic deficit in the EU. The governments would not have reduced the democratic deficit if the required changes had been costly for the Council.

This theory is in line with several existing explanations of the gradual accretion of powers by the other supranational institutions in the EU. In particular, this theory is close to Pierson's explanation of how governments cannot predict the precise consequences of delegating powers to the Commission and the European Court of Justice, as a result of discretion in rule interpretation and strategic behaviour by these institutions.⁴¹ However, Pierson

⁴¹ Pierson, 'The Path to European Integration'.

did not apply the same logic to the EP's powers. Moreover, whereas Pierson's theory draws from the 'historical institutionalist' school in comparative politics, I have highlighted the connection between my theory and general 'rational choice institutionalist' explanations of delegation to independent agencies under incomplete information.⁴²

Finally, this theory has implications for our general understanding of how parliaments have forced reluctant sovereigns to transfer legislative and executive appointment powers to elected institutions. In the study of the development of democratization at the domestic level, we have always assumed that unelected sovereigns have transferred powers to elected parliaments in response to public pressures. But there are many occasions when this is an insufficient explanation, as the benefits for sovereigns of this transfer (such as increased legitimacy) are too small to outweigh the reduced ability of sovereigns to influence policy outcomes.

The history of democratization is full of small constitutional steps that have ended up being major advances for parliamentary government. This theory offers some understanding of why this tends to be the case. When parliamentary powers are initially established, such as the power to approve the budget, these are usually limited. However, parliaments invariably utilize these powers to the maximum extent possible, and far beyond anything that was originally intended in the initial transfer of authority. When it then comes to changing the constitution, these *de facto* interpretations are codified, and so on.

For example, an interesting test case of this is the developing powers of the Scottish Parliament. The Edinburgh Parliament came into existence in 1999 after an Act of the British Parliament in Westminster. This Act specifies the powers of the Scottish Parliament but gives plenty of room for the Scottish Parliament to exercise discretion in interpreting the rules. As a result, when the Act is reformed (or codified in a written constitution) it will be difficult for the majority in Westminster to resist codifying the new *de facto* powers (although easier than in the EU, where unanimity is required to amend the constitutional design).

As with the delegation of powers to independent courts, regulators and central banks, the delegation of legislative and executive appointment powers to elected parliaments tends to be one-way traffic. Once democracy is established, there is no going back within the bounds of the existing constitutional norms. This is as true at the European level as it is in the general study of constitutional design, delegation and reform.

⁴² In particular, see Robert H. Bates, Avner Greif, Margaret Levi, Jean-Laurent Rosenthal and Barry R. Weingast 'Conclusion', in Bates, Greif, Levi, Rosenthal and Weingast, *Analytic Narratives*, pp. 231–8.