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Procedural Politics Revisited: Institutional Incentives and Jurisdictional Ambiguity in EU Competence Disputes

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Abstract

Over 15 years ago Joseph Jupille articulated the conditions under which actors clash over, rather than merely within, political institutions. He showed that between 1987 and 1997 the theory of procedural politics helped explain why and when EU institutions contested the legal basis of EU legislation. The two key determinants in the theory are jurisdictional ambiguity and actors' desire to maximize their own procedural influence. This article examines the theory's ongoing relevance by putting it through a fresh test with 20 years' worth of new data. Although I find robust evidence of the theory's explanatory value beyond 1997, the phenomenon of procedural politics appears currently at its tail end, largely consistent with Jupille's prediction that treaty change increases the probability of institutional contestation.

Keywords: procedural politics; institutionalism; ambiguity; legal basis; European Union

Introduction

In 2004 Joseph Jupille published *Procedural Politics: Issues, Influence, and Institutional Choice in the European Union*. In this seminal book, he proposed and tested a theoretical framework geared towards explaining a phenomenon that gained considerable traction in the EU during the 1990s. EU institutions, notably the Commission, Parliament and Council, developed a habit of contesting the legal basis of EU legislation which, according to the European Court of Justice (ECJ) doctrine, should determine the applicable legislative procedure.

Whereas we normally think of politics as taking place *given* a set of institutional constraints (higher order rules), procedural politics is about acting *with respect to* the seemingly immovable rules of the (legislative) game (Jupille, 2004, p. 15). Assuming that institutional actors are interested in maximizing their influence in the legislative process, they actively seek procedural advantages where such opportunities arise in what has also been termed diplomacy by other means (Cullen and Charlesworth, 1999). More specifically, they exploit ambiguous boundaries between the jurisdictions of different procedural rules. Although procedural politics is primarily associated with legislative inefficiency, it was also shown to enable the EU to escape joint-decision traps in sensitive issue areas traditionally ruled by Council unanimity (Martinsen and Falkner, 2011, p. 132). While Jupille found empirical evidence supporting his theory – drawing on a dataset spanning from 1987 to 1997 – he also suggested that ‘further tests on more extensive data should be undertaken’ (Jupille, 2007, p. 315).

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Procedural rules and their issue coverage are typically defined in a constitutional document. While the EU does not have a constitution, it has treaties, which fulfil a similar function. Jupille hypothesized that treaty change should make procedural disputes more likely, as the new constellation of competences and procedures is vulnerable to creative interpretation by enterprising actors. This expectation was particularly apposite when Jupille was conducting his research and writing his book: between 1987 and 2004, the EU treaties underwent four major revisions. As it turns out, this pace of change would not be sustained in the years that followed.

This article revisits the theory of procedural politics in order to gauge its relevance and validity in light of data subsequent to Jupille's research. Although some recent research utilizes aspects of Jupille's theory (Engel, 2018; Hartlapp, 2018) it does not test its core tenets. This exercise is particularly pertinent in the wake of the entry into force of the Lisbon Treaty, which simplified the procedural landscape by ostensibly widening the application of the co-decision procedure under the new name of the ordinary legislative procedure. One could therefore logically expect this procedural simplification to reduce the number of legal basis conflicts between EU institutions.

The article proceeds with a short explanation of the concept of a legal basis in EU law, followed by an elaboration of the theoretical conditions of procedural politics. To test the resulting hypotheses, I construct an original dataset of ECJ legal basis disputes, along with measures of procedural incentives and jurisdictional ambiguity in EU legislative files. Using a logistic regression model, I find that both incentives and ambiguity remain important predictors of procedural disputes. Nonetheless, the window of heightened opportunity provided by the Lisbon Treaty revision appears to be closing.

Legal Basis of EU Legislation

As in any institutional system, the EU has developed its own vocabulary for competence disputes and it revolves around the term 'legal basis'. The concept of a legal basis can be broadly understood as denoting the idea that actions established under public law must be based on an existing legal provision. According to this general reading, the concept plays an obvious role in controlling the legality of the exercise of public powers. Indeed, the core of this idea, known as the principle of legality, forms a well-established part of criminal law (a branch of public law), associated human rights norms (Article 47 of the Charter of Fundamental Rights, Article 7 ECHR) and both thin and thick notions of the rule of law (Tamanaha, 2004).

In the EU, the concept of a legal basis takes on a more specialized meaning connected with the realm of international organizations and multilevel governance more generally. This concept is understood as the idea that any legal act defined in Article 288 of the Treaty on the Functioning of the European Union (TFEU) can be adopted only in accordance with a pre-existing provision of EU law conferring the necessary competence for that purpose (the principle of conferral).¹ Thus, legal bases embody not only horizontal but also vertical distributions of power in the EU.

¹ Article 5(2) TEU: 'Under the principle of conferral, the Union shall act only within the limits of the competences conferred upon it by the Member States in the Treaties to attain the objectives set out therein. Competences not conferred upon the Union in the Treaties remain with the Member States'.

Although implicitly operating in the EU legal order from the very first days of European integration,² the concept of legal basis remains a ubiquitous and central feature of EU law. The ECJ has pronounced the choice of legal basis to be of ‘constitutional significance’.³ For three decades the ECJ has repeated the opinion that

“the choice of the legal basis for a measure may not depend simply on an institution’s conviction as to the objective pursued but must be based on objective factors which are amenable to judicial review.”⁴

This line of case law defines the primary ‘choice rule’ that governs the process of determining the legal basis of EU legislation. The objective factors the Court talks about include ‘in particular, the aim and content of the measure’.⁵ The ECJ frequently draws on the content of legislative preambles to establish what the aim and content are.

In the vast majority of cases, the Commission is the first actor to choose a legal basis for its proposal. The proposal, including the choice of legal basis, is subsequently debated and potentially amended by the Council and, depending on the procedure, the EP. Crucially, the applicable legislative procedure depends on the choice of legal basis. The legal basis can either describe the procedure directly (such as in ‘the Council shall, acting unanimously on a proposal from the Commission and after consulting the European Parliament’) or refer to another article describing the applicable procedure (such as Article 294 TFEU in the case of ordinary legislative procedure). Legal bases also contain additional conditions attached to their exercise concerning the substantive scope, instrument choice or possibility of harmonization. For example, a minority of legal bases constrains the legislator’s discretion by prescribing the use of either regulations (such as Article 75(1) TFEU) or directives (such as Article 53(1) TFEU) (Hurka and Steinbach, 2020).

If any of the actors is dissatisfied with the choice of legal basis in the act adopted, it can ask the ECJ to annul the act on the ground that its legal basis is wrong. The Court then applies its doctrine to verify whether the aim and content of the act correspond to the EU competence selected as the legal basis. If the legal basis is inappropriate the ECJ annuls the act, unless there is no procedural difference between the selected legal basis and an alternative one, in which case the error is deemed ‘a purely formal defect’ that does not necessitate annulment (which is rare).⁶

Legal basis disputes revolve most often around the issue of which of two or more alternatives legal bases is the more appropriate for the act in question. In such cases, the institution that adopted the act – most frequently the Council – defends the chosen legal basis, while the plaintiff argues that another legal basis – capable of altering the adoption process – should have been used. In the typical example of this type of dispute the Parliament challenges a legal basis that diminishes its role in the legislative process.⁷ In some

²The very first legal acts of the European Coal and Steel Community start with sentences whose form has survived practically unchanged until today: ‘the High Authority, having regard to Articles 49 and 50 of the Treaty; having regard to Articles 6 and 7 of the Convention (...), decides’.

³Opinion 2/00 [2001] ECLI:EU:C:2001:664 (62000CV0002), para 5.

⁴Case 45/86 *Commission of the European Communities v Council of the European Communities* [1987] ECLI:EU:C:1987:163 (61986CJ0045), para 11.

⁵Opinion 2/00, para 22.

⁶Case C-81/13 *United Kingdom of Great Britain and Northern Ireland v Council of the European Union* [2014] ECLI:EU:C:2014:2449 (62013CJ0081), para 67.

⁷See Case C-48/14 *European Parliament v Council of the European Union* [2015] ECLI:EU:C:2015:91 (62014CJ0048).

cases member states argue that the EU has no competence whatsoever to adopt the disputed act. For reasons of parsimony we can think of this set of cases as an extension of the first type. Arguing that a legal basis is insufficient to support a given act is a more extreme position than arguing in favour of a legal basis requiring Council unanimity, but in both cases the argument would have the effect of enabling member states to avoid an undesired piece of legislation or prevent EU ‘competence creep’ (Garben, 2017; Weatherill, 2004).

Theoretical Conditions

The maintenance of a light-touch judicial doctrine leaves space aplenty for inter-institutional politics, including the strategic recourse to litigation for the sake of maximizing procedural influence. The theoretical propositions of procedural politics as derived by Jupille in his 2004 book thus remain in principle relevant today. I return to his original hypotheses both because the underlying logic of his institutionalist account is rigorous and because more recent, and in any case scarce, scholarship has not attempted to develop the theory or elaborate alternative testable hypotheses (Engel, 2018; Hartlapp, 2018; Leino-Sandberg, 2017). The two core determinants of procedural politics stipulated by Jupille are jurisdictional ambiguity and procedural incentives. I explicate each in turn.

Jurisdictional Ambiguity

In an institutional system such as the EU, where a catalogue of legal bases for different policy areas exists, jurisdictional boundaries provide opportunities for contestation (Jupille, 2004, p. 20). In principle, as few as two different competence remits are sufficient for disputes to arise, but a longer catalogue is more likely to generate more friction between the substantive scopes of different competences. Where different actors are allocated responsibility over a subset of issue areas, as in US congressional committees, turf wars result directly from each actor’s interest in controlling a greater share of legislation than before (King, 1997). Jupille transposed the notion of jurisdictional conflict to the EU inter-institutional setting, the most contested and consequential political arena in the EU.

Contestation can occur because legislation does not always unambiguously map onto just one competence. In other words, issues can be ‘jurisdictionally ambiguous’ (Jupille, 2004; King, 1997). Jupille (2004, p. 20) defined jurisdictional ambiguity as the ‘correspondence between political issues and the rules used to process them’. Where such correspondence is high, ambiguity is low to non-existent and vice versa. The example given by Jupille is an EU-wide road toll: would it belong to the transport or tax competence (or both)? Many other examples can be found in ECJ case law. Are environmental sanctions governed by environmental or criminal policy?⁸ Is the regulation of tobacco advertisement a matter for health policy or for internal market harmonization?⁹ Conceptually, the same kind of ambiguity is at play when considering whether an issue falls

⁸Case C-176/03 *Commission of the European Communities v Council of the European Union* [2005] ECLI:EU:C:2005:542 (62003CJ0176).

⁹Case C-376/98 *Federal Republic of Germany v European Parliament and Council of the European Union* [2000] ECLI:EU:C:2000:544 (61998CJ0376).

within or outside any competence. Can firearms regulation be classified as an internal market measure or not?¹⁰ Even if the question is answered in the negative, the reservoir power (Article 352 TFEU) makes it possible for the EU to legislate – under onerous procedural conditions – when none of the regular competences is interpreted as a being possible legal basis (Bungenberg, 1999; Schwartz, 1976).

Sources of jurisdictional ambiguity can be manifold. At the very basic level, a degree of legal interpretation is involved in connecting a proposed legislative initiative with an appropriate competence, because even the most obvious correspondence between the two does not flow directly from the higher order rule. Second, competences can be specified in more or less precision (Tsebelis and Hahm, 2014). For example, Article 91(1)(c) TFEU provides for the possibility to ‘lay down [...] measures to improve transport safety’ and paragraph (d) of the same even enables the adoption of ‘any other appropriate provisions’. The range of legislation that can be passed under these competences is arguably broad and imprecisely defined (Garben, 2015).¹¹ A contrasting example is Article 78(2)(c) TFEU under which the EU can establish a ‘a common system of temporary protection for displaced persons in the event of a massive inflow’. This legal basis is narrow and less open-ended, making it less likely to contribute to jurisdictional ambiguity.¹² Third, legislation, especially complex legislation, may contain various components that fall under different competences. In these cases, a ‘centre of gravity’ test is applied (in both the EU and the USA) to determine the preponderant competence (Engel, 2018, p. 96). Difficulty in determining the preponderant competence is indicative of jurisdictional ambiguity.¹³

On the basis of the foregoing we hypothesize that

H1 Jurisdictionally ambiguous legislation should be more prone to procedural contestation than jurisdictionally unambiguous legislation.

Procedural Incentives

Jurisdictional ambiguity is not a sufficient condition for procedural politics. Weak correspondence between proposed lower order rules and governing higher order rules does not in itself give actors a reason to contest legislation. There must be an incentive to engage in potentially costly behaviour. Incentives in the form of procedural influence constitute the demand side of procedural politics (Jupille, 2007, p. 305). Procedural incentives imply the existence of at least two different procedures in an institutional system (Jupille, 2004, p. 19): ‘If only one rule is available, no possibility for institutional selection exists. The availability of multiple institutional alternatives opens up space for choice and for procedural politics’.

¹⁰Case C-482/17 *Czech Republic v European Parliament and Council of the European Union* [2019] ECLI:EU:C:2019:1035 (62017CJ0482).

¹¹For a concrete manifestation see Case C-43/12 *European Commission v European Parliament and Council of the European Union* [2014] ECLI:EU:C:2014:298 (62012CJ0043).

¹²Garben (2015, p. 74) draws the distinction between functional and sector-specific competences. Certainly, the different ways in which competences are specified contributes to jurisdictional ambiguity.

¹³Some scholars are sceptical about the very possibility of dividing competences effectively into mutually exclusive categories (Resnik, 2001, p. 620; Schütze, 2009, p. 346).

Consider the following setting: a catalogue of competences enumerates ten different areas in which an international organization can take measures. Some measures taken or planned by the organization will be jurisdictionally ambiguous, meaning that it will not be always clear which area of competence is applicable. However, if all competences are to be exercised in accordance with the same procedure, arguments about competence will be purely a matter of legal exactitude. For actors to invest their scarce resources the choice of higher order rule must have tangible institutional consequences.

Why would actors care about the choice of procedure? The short answer is ‘because institutions matter’ (Jupille, 2004, p. 17). This is a well-established point that does not require belabouring (Pollack, 2008), as it may have been when the ‘new institutionalist’ tradition of scholarship was emerging and consolidating (Armstrong and Bulmer, 1998; Hall and Taylor, 1996; March and Olsen, 1983; Rosamond, 2000). We are agnostic about the specific interest involved in procedural contestation. Regardless of whether actors care only about a specific piece of legislation or pursue a long-term political project (by deepening European integration), institutions are means to these diverse ends. Dozens of studies analysing the impact of majorities, vetoes, parliamentary power, trilogues and so on in EU studies alone supply evidence of the importance of institutions in general and law-making procedures in particular. Yet even though institutions matter this notion is too vague a basis for analysing actor behaviour. What is it exactly that should spur actors into action? Jupille (2004, p. 17) explains:

Since institutions matter, actors should have derived preferences over them as a function of their preferences for the ‘goods’ (budgets, policies, level of integration, etc.) that they produce. The qualifier ‘derived’ suggests that actors place no intrinsic value on rules, valuing instead institutionally conditioned outcomes.

Put differently, if actors believe in the connection between procedural rules and outcomes (goods), ‘preferences over policies [are transformed] into preferences over institutions’ (Tsebelis, 1990, p. 98) and as long as actors’ preferences over outcomes differ, preferences over available procedural alternatives are likely to as well. The individual pursuance of each actor’s preferences thus ultimately results in conflict.

Assuming actors are interested in maximizing their preferences, we would expect them to pursue procedures that give them as much influence over law-making as possible. The incentive to engage in procedural politics should grow in step with the attractiveness of the procedural alternative. For example, relative to having no influence at all, the co-decision procedure should constitute more of an incentive for the EP than the possibility of being consulted on legislation.

Historically, the EU has seen a wealth of decision-making procedures govern its law-making. Prior to the Single European Act (SEA), the Council adopted legislation on a proposal of the Commission either by a unanimous vote or by a qualified majority (QMV) and either with or without consulting the EP. The rule that the Council could amend the Commission proposal only by a unanimous vote meant that procedures with QMV constituted a distinctly tantalizing prospect for the Commission. Under QMV, the Commission could propose legislation that would split the unanimous voice in the Council and achieve outcomes closer to its ideal. At the same time, this agenda-setting power depends on the ability of decision-makers to actually agree on some change to the status quo (Tsebelis, 2002). Hence the expansion of the EP’s role in law-making – jump-started

Table 1: Ranked procedural preferences by actor

	<i>Commission</i>	<i>European Parliament</i>
Most desirable	0-majority CNS-majority SYN-majority COD-majority assent-majority 0-unanimity CNS-unanimity assent-unanimity	COD-majority SYN-majority COD-unanimity assent-majority assent-unanimity CNS-majority CNS-unanimity 0-majority
Least desirable	COD-unanimity	0-unanimity

The first term denotes the involvement of the Parliament; the second term indicates the decision-making rule in the Council. 0, no role; CNS, consultation; COD, co-decision; SYN, cooperation

by the introduction of the cooperation procedure in the SEA (Tsebelis, 1994; Westlake, 1994, p. 137) – brought about a decrease in the Commission's power by constraining the space for winning proposals. Tsebelis *et al.* (2001) have shown that the Commission's role declined further as the cooperation procedure became gradually replaced by the co-decision procedure.

To formulate concrete expectations about actors' behaviour we can establish an idealized¹⁴ hierarchy of procedural preferences for the Commission and the Parliament, but cannot do so convincingly for the Council. Although none of these three actors is truly unitary, when it comes to competences and procedural preferences the heterogeneity of the member states in the Council is much more consequential than the internal divisions in the Commission and the Parliament. The ultimate reason, as Jupille (2004, p. 26) succinctly summarized it, is that for the two supranational actors EU competences are 'the only game in town', which usually pushes aside whatever internal heterogeneity there is within for when more influence can be secured. Member states, apart from having more diverse and less stable institutional preferences, can turn to the domestic or other international political venues. Moreover, member states are not reliant on the Council to initiate litigation and can therefore pursue their (diverse) preferences before the Court autonomously.

Table 1 ranks the procedural preferences found in the treaties over the entire period of EU integration according to how much influence the three institutions have under them. The ranking mirrors Jupille's assessment (2004, p. 62) – which, in turn, is based on previous formal theoretical work (Crombez, 1997; Moser, 1996; Scully, 1997; Steunenberg, 1994; Tsebelis, 1994) – with the addition of the assent-majority procedure that did not exist at the time. The main difference between the Commission and the EP are that, while the latter tries to always maximize its involvement (COD > SYN > assent > CNS > 0) and maximize the available win-sets in the Council (majority > unanimity), the Commission draws more influence from legislating without the EP if possible, while still

¹⁴The procedural ranking is idealized, because actors are probably never in a position to actually choose from among such a wide menu of procedures. But the ranking is a useful device for comparing all procedures as part of a single framework.

seeking Council majority voting rules (Tsebelis and Garrett, 1997).¹⁵ Unanimous decision-making in the Council is in any case undesirable for the Commission and the EP, as it enables in principle even a single member state to preserve the status quo. In summary, we derive the following hypothesis:

H2 Actors' attempts to maximize their procedural influence on EU legislation make disputes more likely.

In some cases actors may argue about legal bases without a procedural motivation. The selected legal basis frames to some extent the substance of the legal act in question and may influence the interpretation of the ECJ. Thus, for example, the EP may prefer an environmental legal basis over an internal market one to make the legislation or its interpretation greener. However, while this motivation may occasionally result in the change of a legal basis, it is not sufficient for procedural politics because it cannot be backed up by (the threat of) litigation. In the absence of a procedural consequence, the Court considers the 'wrong' legal basis a 'purely formal defect' not warranting annulment.¹⁶ If this substantive motivation nonetheless were to drive legal basis litigation we would expect to find evidence against H2.¹⁷

Temporal Variation

Jupille (2004, p. 86) additionally hypothesized that periods of constitutional change should be associated with more procedural political contestation. This expectation fits with the theoretical model and the two core determinants, jurisdictional ambiguity and procedural incentives. Procedural politics operate interstitially (Farrell and Héritier, 2007) between bouts of constitutional change, which means jurisdictional boundaries and the degree of procedural variety are set by the applicable higher order rules at any given moment.

Alterations to the opportunity structure, which in the EU occur through treaty change, create uncertainty about how the new jurisdictional boundaries are going to operate. This period of uncertainty should begin already at the moment when a new treaty is agreed (signed), as the impending changes become likely to enter into force thereafter. Heightened uncertainty about jurisdictional boundaries should induce actors to attempt to increase their procedural power where possible. Once the conflicts have been fought out – and presumably settled by the ECJ – and actors adjust to the new circumstances

¹⁵Note that the preference ranking rhetorically exaggerates the undesirability of Commission–EP cooperation. In reality, it is often a matter of course that the co-decision or another procedure is used – when there are no plausible alternatives and no ambiguity – and the theory of procedural politics does not presume that actors are unwilling to cooperate under such circumstances. It is merely when the theoretical conditions are fulfilled that actors may act on procedural opportunities that drive them towards inter-institutional conflict.

¹⁶Case C-81/13 *United Kingdom of Great Britain and Northern Ireland v Council of the European Union* [2014] ECLI:EU:C:2014:2449 (62013CJ0081), para 67.

¹⁷I consider the alternative that procedural litigation would serve merely as pretext for disputing substantively undesirable legal bases implausible. An actor's substantive and procedural interest in an alternative legal basis would need to coincide for a judicial action to even be an option. Moreover, Jupille (2004, p. 162) showed that when the substantive and procedural motivation conflicted during the 1990s, actors (such as the normally relatively pro-environmental EP) would prefer a legal basis conferring a procedural rather than a substantive advantage.

(Tsebelis *et al.*, 2001, p. 589), contestation should abate (in relative terms) until the next amendment of the opportunity structure.

H3 Uncertainty created by changes to higher-order rules should produce more procedural contestation

However, we could articulate a theoretically consistent alternative hypothesis regarding specifically the treaty regime instituted by the Lisbon Treaty. The Lisbon Treaty not only continued an overall supranationalization of legislative procedures in the EU but also made one mode of decision-making – the co-decision procedure – more widely applicable (Biesenbender, 2011). As a result, the broader prevalence of a single procedure means that there should be fewer relevant procedural alternatives capable of conferring a procedural advantage on one or the other actor. After all, procedural variation is a necessary condition of the procedural politics that took off only after the cooperation procedure was added to the procedural menu in 1987 by the SEA (Jupille, 2004, p. 86).¹⁸ Similarly, Emiliou (1994, p. 507) explicitly anticipated that the procedural diversification introduced by the Maastricht Treaty would cause ‘a dramatic increase in litigation concerning the question of legal basis before the Court’. Following the same logic, the simplification brought about by the Lisbon Treaty may have a countervailing effect to the one predicted by H3. In addition, the increasing use of trilogues and early agreements, connected with the proliferation of co-decision triggered by the Lisbon Treaty, may enhance this countervailing effect, as trilogues have intensified and informalized inter-institutional relations (Roederer-Rynning and Greenwood, 2015).

Empirical Strategy

I use logistic regression to test the first two hypotheses and visual comparison of smoothed trendlines to examine the third hypothesis. In the regression model I estimate the unknown coefficients β_x from the following equation:

$$\log \frac{P(\text{dispute}_i)}{1 - P(\text{dispute}_i)} = \beta_0 + \beta_1 \text{ambiguity}_i + \beta_2 \text{incentive}_i + \beta_{(3,k)} Z_{i,k} \quad (1)$$

where β_0 is the intercept, β_1 is the estimated effect of jurisdictional ambiguity, β_2 is the estimated effect procedural incentives and $\beta_{(3,k)}$ is a vector of coefficients for k control variables contained in matrix Z , including treaty fixed effects. We expect a positive sign on β_1 – higher ambiguity makes disputes more likely – and a negative sign on β_2 – the less the final procedural choice aligns with an actor’s preference relative to the preference over the proposal, the higher their incentive to challenge it. In the following section I elaborate on the operationalization of the variables in the model.

¹⁸This is not to say that procedural politics was completely absent during the first 30 years of the Rome Treaty. Legal scholars have occasionally remarked on procedural-political discussions relating to some legislative files (Costonis, 1968; Dubois, 1974; Esch, 1965; Everling, 1967). Nonetheless, these discussions only rarely escalated to the judicial plane, with the *European Road Transport Agreement* case offering an early competence skirmish before the ECJ (Hartlapp, 2018; Winter, 1971). In addition to the lower degree of procedural diversification during this period, the Parliament’s lack of standing contributed to more limited institutional contestation. The EP’s achievement of a right to bring annulment proceedings coincided with the creation of the cooperation procedure in the late 1980s (Bradley, 1988b).

Dependent Variable

The dependent variable in the procedural-political model are inter-institutional disputes. But the question what constitutes a procedural dispute and how to measure it is trickier than might seem. Jupille combed through databases and archival records and spoke to people in Brussels to identify disputed legislative files between 1987 and 1997. Due to my limited ability to verify every source consulted by Jupille on this journey I cannot establish with exactitude the reliability of his coding. Moreover, any dataset produced in the same manner would have raised the same issues. There is also the question of where to draw the line: what kind of an utterance found in some text constitutes evidence of a dispute and how many such utterances are sufficient to qualify an entire legislative file as procedurally disputed?

Instead I operationalize the dependent variable by identifying judicial challenges of EU legislation on the grounds of wrongly chosen legal basis. Court cases are the most reliable instantiation of procedural conflicts, because there is no doubt that the litigated files were disputed. Legal basis disputes typically play out through the avenue of annulment proceedings, but a minority related to international agreements is also litigated via the formally non-contentious opinion procedure of Article 218(11) TFEU. Under Article 263 TFEU the three main EU institutions of interest – the Commission, the Parliament and the Council – as well as all the member states have the power to request the ECJ to examine the validity of EU legislation. The defendants in these cases are the institutions adopting the disputed law.¹⁹ An action for annulment must be filed within three months from the adoption of the contested legal act. Under Article 218(11) the same institutions ‘may obtain the opinion of the Court of Justice as to whether an agreement envisaged is compatible with the Treaties’.

Although there have been hundreds of annulment cases between two or more EU institutions or member states – going back as far as 1953²⁰ – and dozens of opinions, of primary theoretical interest is the subset of cases dealing with legal basis disputes.²¹ I construct a dataset of relevant court cases by specifying a set of criteria that a case must fulfil in order to warrant inclusion in the sample. First, I look only at annulment and opinion cases because preliminary references cannot be directly brought by EU institutions. Legal basis disputes are in any case only rarely litigated outside the annulment and opinion procedure. Second, the parties to a case must be institutional actors within the EU system, as these are the main protagonists in any game of procedural politics. Only EU institutions and member states fully satisfy this criterion. Third, only cases concerning the choice of legal basis are eligible. The choice of legal basis shapes the applicable law-making procedure and thus constitutes the main expression of procedural politics in the EU system. The ECJ is tasked with adjudicating the different positions of the EU institutions and has developed a specialized doctrine for this purpose (Barents, 1993; Bradley, 1988a; Klamert, 2010). The sampling strategy yields a total of 135 disputes spanning from 1970 to 2019.

¹⁹For example, in the case of laws adopted in accordance with the co-decision procedure, the defendants are both the Council and the Parliament.

²⁰Case 3/53 *France v High Authority*, case withdrawn by France.

²¹There is a trade-off between sample size and its composition. A wider look at annulment cases would lead to a larger sample of disputes but depart from the theoretical focus of this study. I refer to Adam *et al.*, 2020 for a broader treatment of annulment litigation.

Independent Variables

The two main independent variables of interest are jurisdictional ambiguity and procedural incentives. In addition, I countenance the effect of Council heterogeneity, while controlling for type of legislative act and treaty regime.

First, I measure jurisdictional ambiguity on the basis of a comparison of legislative preambles with treaty provisions.²² Because the concept of jurisdictional ambiguity is about the imprecise mapping of legislation on procedural structures (in this case treaty legal bases), the operationalization of the variable should reflect variation in both legislative and treaty texts. I calculate the cosine similarity between each treaty legal basis ($n = 2,120$) and legislative preamble ($n = 172,504$), yielding a matrix with 182,854,240 unique cells.²³ This matrix is trimmed by specifying the condition that only legal bases applicable at the time the law was adopted should be retained, which introduces treaty-dependent variation that needs to be later controlled for. The resulting similarity values are validated by showing that they are statistically significant predictors of the choice of legal basis, which is consistent with how the ECJ adjudicates legal basis disagreements (in response to which political actors adjust their drafting behaviour). The measure of jurisdictional ambiguity is then constructed as an additive inverse of the proportion of zero-valued observations in the distribution of similarity values of each preamble-legal basis vector, the coefficient of variance of non-zero-valued observations and normalized distance between highest-scoring treaty articles. The reason for reversing the sign is that each of the components actually measures what we theoretically perceive as the opposite of ambiguity. The higher the share of zero-valued observations, the less likely that ambiguity arises, as fewer values are in contention. The higher the coefficient of variance, the greater the dispersion of non-zero values. Dispersion is an indicator of ambiguity of the lack of ambiguity because the higher the distance between values, the less likely it is that they constitute viable jurisdictional alternatives. In order to underline this mechanism in the measure, normalized distance additionally contributes to how far apart the top two values (the most likely contenders for legal basis) are.

Second, I measure an actor's procedural incentive to dispute an act by the rank difference between their preference over the procedure entailed by the Commission's proposal and their preference over the procedure actually used to adopt an act. Although in the majority of legislative files this rank difference will equal zero – because there is no change in the proposed and actual procedure – we expect procedural disputes to be driven by the Commission and Parliament feeling procedurally short-changed. Thus, procedural incentives should be higher the larger the rank difference to the detriment of an actor. For ease of interpretation, we can think of the measurement of this variable as the net relative satisfaction with the chosen procedure. The lower the satisfaction, the higher the incentive to dispute an act. The dissatisfaction score for both the EP and the Commission is calculated for all available proposal legislation pairs on the basis of the theoretical preference ranking shown in Table 1.

²²Preambles typically condense the main features of the law into a shorter, more compact piece of text. As such, they are less noisy than the legalese-ridden bodies of laws. Moreover, they are particularly relevant in the choice of legal basis, as the ECJ uses them to adjudicate disputes.

²³Texts are pre-processed in a minimalistic manner by splitting them into word tokens and setting them in lowercase.

Table 2: Summary Statistics of Variables in the Regression Model

<i>Variable</i>	<i>Type</i>	<i>Mean</i>	<i>SD.</i>	<i>Min</i>	<i>Max</i>
Dispute	Binary	0.012	0.107	0	1
Jurisdictional ambiguity	Continuous	−3.003	0.258	−4.186	−2.339
Commission satisfaction	Continuous	−0.011	0.831	−7	7
Parliament satisfaction	Continuous	0.052	1.127	−7	7
Council heterogeneity	Continuous	56.34	14.24	38.74	83.28
Act type	Categorical				
Legal basis	Categorical				

As the diversity of member states' preferences precludes us from obtaining a meaningful preference ranking for the Council as a whole, I include Council heterogeneity as an additional variable in the model. The degree to which the member states' preferences are heterogeneous influences the Council's ability to attain unanimity. Unanimity allows the Council to change the legal basis proposed by the Commission, which should increase the likelihood of disputes, as the Commission and the Parliament could protest that they are being procedurally short-changed by the Council. Conversely, the more heterogeneous the preferences in the Council, the less likely it is that unanimity can be reached and the less likely that the procedure is changed to the detriment of the Commission or the Parliament. Disputes should be therefore be less likely when the Council has a heterogeneous composition. Following König (2001) and Jupille (2004), I measure Council heterogeneity as the maximum left–right distance between any two member states at any given moment in time, using data from the Comparative Manifesto Project (CMP) which codes quasi-sentences in the manifestos of political parties (Volkens, 2019).²⁴

Additionally, I control for the applicable treaty regime, type of act (directive, regulation or decision) and most active areas of EU activity (agriculture, trade, environment and internal market)²⁵ to ensure other legislative characteristics do not confound the procedural-political model. Table 2 provides a summary of the variables.

Results

I estimate four models of procedural politics, adding control variables in a stepwise fashion to unpack the robustness of the effects of the hypothesized independent variables. Table 3 reports the resulting logistic regression coefficients.

We find evidence against the null hypotheses for all theorized independent variables. Both Commission and Parliament dissatisfaction with procedural changes increases the probability of a dispute. Similarly, jurisdictionally ambiguous legislation is more likely to be contested. Conversely, Council heterogeneity with the associated difficulty of obtaining unanimity to amend the legal basis at will decreases the probability of a dispute

²⁴The CMP's RILE (Right-Left) score is calculated as the difference between the percentage of right-wing and left-wing quasi-sentences found in a political manifesto. This measure is mapped onto each member state government between 1993 and 2018 with the help of the ParlGov dataset (Döring and Manow, 2019) by seat-weighting the cabinet parties' left–right positions. I rely on a dataset combining CMP and ParlGov data prepared by Wratil (2020).

²⁵These policy areas account for most EU legislative activity and therefore serve as an efficient way of checking model robustness to the specification of an issue-area variable without overburdening the model with the dozens possible legal bases.

Table 3: Log-odds of a Legal Basis Case Being Brought against EU Legislation in Light of Procedural-political Factors

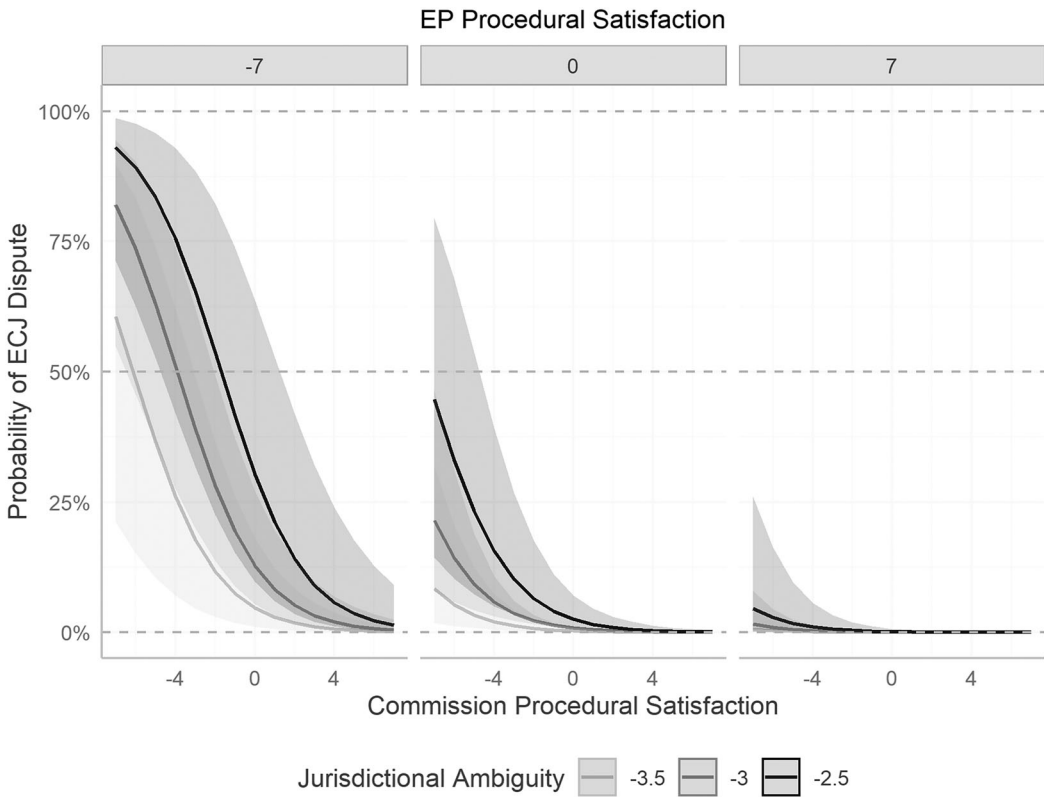
	<i>Dependent variable:</i>			
	<i>Court dispute</i>			
	<i>M1</i>	<i>M2</i>	<i>M3</i>	<i>M4</i>
Commission satisfaction	−0.520*** (0.069)	−0.491*** (0.088)	−0.491*** (0.087)	−0.442*** (0.094)
Parliament satisfaction	−0.411*** (0.065)	−0.403*** (0.070)	−0.405*** (0.070)	−0.418*** (0.073)
Jurisdictional ambiguity	2.148** (1.024)	2.172** (1.125)	2.677** (1.259)	2.100** (1.258)
Council heterogeneity		−0.018** (0.010)	−0.019** (0.010)	−0.020** (0.010)
Act				
Directive			−0.044 (0.356)	−0.520* (0.382)
Regulation			−0.491* (0.304)	−0.482* (0.306)
Legal basis				
Internal market				0.565 (0.460)
Environment				0.465 (0.513)
Agriculture				−0.427 (0.492)
International trade				−1.317** (0.587)
Other				−0.201 (0.437)
Constant	−0.072 (2.579)	1.820 (2.880)	3.391 (3.293)	2.288 (3.273)
Treaty Fixed Effects	Yes	Yes	Yes	Yes
Observations	8,760	6,004	6,004	6,004
Log likelihood	−428.308	−345.872	−344.203	−336.524
AIC	872.617	709.743	710.407	705.048

Note: AIC, Akaike information criterion. * $P < 0.1$; ** $P < 0.05$; *** $P < 0.01$.

arising. The results are robust to controlling for different treaty regimes, type of legislation and policy area. The inclusion of a treaty fixed effect, in particular, makes this a more severe test than that conducted by Jupille in his original study. All the hypothesized effects are significant at $P < 0.05$.

To get a better grasp of the results, in Figure 1 I plot the marginal effects of the main predictor variables. The logistic curves give us a holistic view of how effect sizes change at different values. A decrease from 0 (unchanged procedure) to −5 (change from QMV to unanimity in the Council, for example) in Commission satisfaction increases the probability of a dispute by 18.9 per cent. A decrease of the same magnitude in EP satisfaction makes disputes more probable by only 7.2 per cent. Nonetheless, if the Parliament suffers a more significant loss of procedural influence in the legislative process – such as going from co-decision to consultation – the probability of a dispute rises by 11 to 15 per cent compared with the baseline scenario of no change. Conversely, contestation becomes highly unlikely when the Commission and the Parliament benefit from a procedural change. The effect of Council heterogeneity is comparatively miniscule at 3 per cent, but it, too, is robust and statistically significant across different specifications. As expected, jurisdictional ambiguity also makes disputes more likely; increasing ambiguity from −3.5 to −2.5 raises the probability by 11.3 per cent. The observed effect sizes are broadly consonant with Jupille (2004, p. 110) who found that ‘at higher levels of ambiguity disputes become highly probable when the EP faces a strongly unfavourable rule’.

Figure 1: Marginal Effects of Procedural Political Predictors. The Three Panels Show Variation Depending on EP Satisfaction, while the X-axis Describes Variation in Commission Satisfaction. *Note:* ECJ, European Court of Justice; EP, European Parliament.



I now turn to examining H3 concerning the temporal trend in legal basis disputes. We hypothesized that treaty revisions should increase the relative incidence of disputes, as the new rule regime creates uncertainty about future use of legal bases through changes in scope of existing provisions and addition of new alternatives. While amended treaty rules can be invoked before the Court by actors only once the new treaty is in force, we should allow for the possibility that actors would (not) litigate in anticipation of the new regime. From the moment a new treaty is signed actors can reasonably expect that in the foreseeable future the applicable rules will change accordingly.²⁶

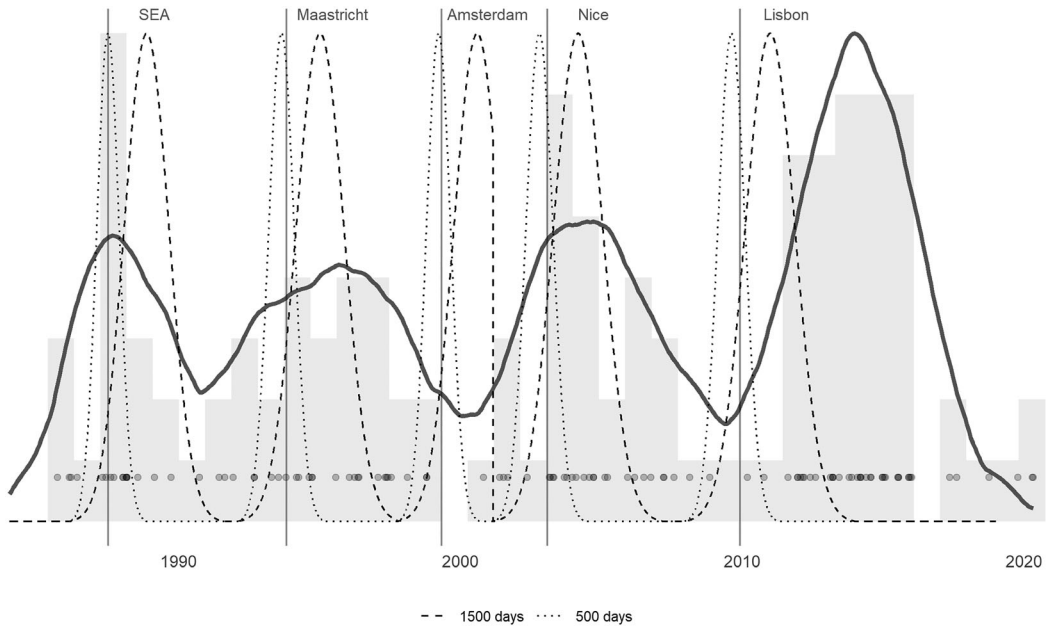
I operationalize the hypothesis by specifying a time window of heightened opportunity. I assume that while some disputes are brought in anticipation of change during the period between signing and entry into force of a Treaty, most are brought in the months after. I model the time window as a normal distribution over the vector $d_1, \dots, d_t, \dots, d_{t+1,500}$ where d_1 is the day a treaty revision is signed and d_t is the day the treaty

²⁶Of course, it is always possible that a Treaty would not be ratified and thus not come into force, which is what happened in the case of the Constitutional Treaty.

Figure 2: The Temporal Pattern of Legal Basis Disputes in Light of Treaty Revision. The solid line shows the Epanechnikov kernel density estimate with one-third bandwidth. The dotted lines stand for minimum and maximum model expectations, meaning that distributions falling between the two dotted lines are also deemed theoretically acceptable. The shaded background shows the histogram. All data are scaled to a 0–1 interval for comparability. We are interested in the extent of overlap between the solid line (density estimate from the event data) and the dotted lines (theorized variation). Vertical lines indicate the date of entry into force of treaty amendments.

Note: I reduced the bandwidth to prevent the line from being over-smoothed. Alternative kernels and bandwidths yield comparable results.

SEA, Single European Act.



enters into force and I conservatively assume the period of heightened opportunity lasts at least 500 days and at most 1,500 days (four years) after its entry into force. If the hypothesis is correct, the observed temporal pattern of legal basis disputes should approximately correspond to the model expectations. The empirical trendline is obtained from discrete data (day of case submission) via kernel density estimation (Figure 2). As opposed to simply grouping observations by year, this method enables us to leverage the specific date of case submissions, which provides a relevant level of detail because EU treaties have not entered into force on 1 January.

To begin with, the expectation that the simplification of the procedural menu by the Lisbon Treaty (or the related proliferation of trilogues) might stem the incidence of inter-institutional competence conflicts finds no support in the data. On the contrary, the Lisbon Treaty regime led to the largest rise in disputes on record: 33 cases were lodged between 2012 and 2015 alone. The Lisbon era accounts for 35 per cent (43 out of 123) of all disputes in the dataset. This result suggests that the distribution of procedural alternatives in the higher order system of rules matters less than the mere fact that

alternatives are available. The procedural streamlining carried out as part of the Lisbon revision did nothing to dissuade actors from bringing even more cases than before.

In terms of the overall temporal trend, three treaty revisions correspond clearly to the hypothesized cyclical model of procedural politics.²⁷ The SEA, Maastricht and Nice changes were accompanied by an increase in the number of legal basis disputes during the expected time frame. The Amsterdam Treaty, however, led to no new disputes being filed. The density curve shows a trough between 1999 and 2001, whereas the model expects a peak. The Lisbon Treaty resulted in the largest rise in disputes of all treaty revisions, but the bulk of the increase took place later than 1,500 days after its entry into force. The original model does not account for this additional delay, which may plausibly be explained by declining legislative output, as there were fewer acts for EU institutions to challenge following the Lisbon revision compared with previous treaty amendments. Nonetheless, the fact that the delayed Lisbon-era peak is followed by a continuing decline makes the overall cycle of peaks and troughs as a function of treaty revision a plausible model of the temporal variation of procedural politics.

Indeed, with no major treaty revision on the horizon, the data suggest that we have already entered the post-revision era of low procedural contestation. From the perspective of procedural politics, the current era therefore resembles the pre-SEA period, when the near-absence of procedural variation in the treaty produced few conflicts (Jupille, 2004, p. 86). Although the model predicts the relative infrequency of disputes will continue, this does not mean that we should expect no legal basis challenges whatsoever. For example, in an ongoing case, the EP is contesting the Council's power to determine unilaterally on the basis of Article 341 TFEU the seat of decentralized EU agencies.²⁸ The EP argues that instead it should have been involved in the decision to establish the European Labour Authority in Bratislava as part of the negotiations on the agency's overall mandate, which took place in the context of a co-decision procedure on the basis of Articles 46 and 48 TFEU.

Conclusion

Frequently, theories in political science are formulated and tested once at their outset. As time passes, doubt about the ongoing validity of the model grows. For numerous reasons, theories are liable to become obsolete over time and there are no guarantees against their loss of relevance or explanatory power. Subjecting existing theories to tests against new data is the only scientifically acceptable way of maintaining and renewing confidence in our stock of knowledge about the social world. Arguably, there are many theoretical candidates in the political science canon whose re-testing is overdue.

With this goal in mind, I revisited Joseph Jupille's theory of procedural politics in the EU. I found his theory has so far stood the test of time and new data from the foregoing two decades largely conform to the theoretical conditions promulgated by Jupille in 2004. Actors are more likely to engage in procedural politics when the legislation in question is jurisdictionally ambiguous and when they stand to gain considerable procedural

²⁷I reduce the bandwidth to prevent the line from being over-smoothed. Alternative kernels and bandwidths yield comparable results.

²⁸The results appear overall consistent with the findings of Adam *et al.*, 2020 (p. 100) who, however, use a more diverse sample of annulment actions.

²⁹Case C-743/19 *European Parliament v Council of the European Union*.

influence. Jupille's temporal model on the cyclical relative incidence of procedural disputes as a function of treaty revisions remains, similarly, a reasonable approximation of the observed behaviour of EU institutions. The theory therefore continues to provide both a valid explanation for a part of EU politics and a falsifiable prediction about the prevalence – or, rather, absence – of procedural contestation at the current stage of European integration.

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Supporting Information

Additional supporting information may be found online in the Supporting Information section at the end of the article.

Table S1: EU Treaties Used as Reference Texts for Measurement Purposes

Table S2: Cosine Similarity as an Indicator of Legal Basis

Table S3: Cosine Similarity as an Indicator of Legal Basis (0s adjusted)

Table S4: Alternative Dependent Variable (Plaintiff)

Figure S1: Number of EU Legislative Texts by Year and Type.

Figure S2: Length of Pre-processed Preambles (Dashed, Left) and Number of Legislative Documents (Solid, Right) over Time.

Figure S3: Probability Density Function of 104154268 Cosine Similarity Values Calculated from a Preamble-Article Matrix.

Figure S4: Difference between Base and Adjusted Similarity Measure in Matching Legal Basis.

Figure S5: Distribution of Similarity Values of a Random Sample of Legislation.

Figure S6: Distribution of Jurisdictional Ambiguity Values over all EU Legislation.

Figure S7: Temporal Variation in the Text-based Measure of Jurisdictional Ambiguity of EU Legislation.