

**EXPLAINING LEGITIMACY TRANSFER FROM THE
GERMAN FEDERAL CONSTITUTIONAL COURT TO
THE EUROPEAN COURT OF JUSTICE –
FOCUS GROUP EVIDENCE FROM EAST AND WEST**

PRELIMINARY RESULTS – DO NOT CITE WITHOUT AUTHOR’S PERMISSION!!!

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ABSTRACT

As the power of constitutional courts all over the world is increasing, we still know very little about support for emergent courts and especially support for supranational courts develops. So in order to better understand the development of support for constitutional courts, this paper compares the sources of confidence in constitutional courts in four cases. The comparison extends both cross-nationally and cross-institutionally by contrasting public support a well-established constitutional court —the Federal Constitutional Court or *Bundesverfassungsgericht* in West Germany — to support for three emergent courts — the *Bundesverfassungsgericht* in East Germany and the European Court of Justice in both West and East Germany.

Building on previous research that demonstrated a link between support for the national and the supranational link, the legitimacy transfer hypothesis is tested against additional evidence. The previous part of this study was based on representative survey data. Therefore the results were high on external validity. However, the exact nature of the link between support for the national and supranational court could only be hypothesized due to a lack of in-depth data.

The present study supplements the first part of the research with qualitative data obtained from focus group interviews. Based on preliminary results from a series of focus groups conducted in West Germany (the East German focus groups will follow soon), people do indeed make a functional connection between the national and the supranational court. Unlike the other institutions of government both courts are seen as neutral, technical arbiters of the law that are fundamentally trustworthy. The European Court of Justice is considered as the functional equivalent of the Federal Constitutional Court at a different level of government. Even though the results are still preliminary (the East German focus groups have yet to be conducted), the evidence corroborates the legitimacy transfer hypothesis.

INTRODUCTION

As we enter the 21st century, the power of constitutional courts is increasing all over the world. As the judicialization of politics continues, the question of how constitutional courts can maintain public support while making highly controversial decisions becomes more pressing. In Europe, the judicialization of politics has even taken on a second, unprecedented dimension: member states of the European Union such as Germany are subject to the rule of not just one, but two high courts with the power to invalidate legislative acts on constitutional grounds: the Federal Constitutional Court and the European Court of Justice. Understanding how support for any court, and in particular for a supranational court, builds up and how it can be maintained has thus become an important research question. Unfortunately, our current understanding of the sources of support for constitutional courts is quite limited. This paper helps fill the gaps by presenting a rich qualitative analysis of the link between support for a national and a supranational court.¹

Intensifying comparative research on constitutional courts over the past fifteen years or so has expanded our knowledge of well-established and powerful national constitutional courts in a variety of countries (see for example Stone 1992, Shapiro, 1993 #176; Volcansek 1992; Shapiro and Stone 1994; Tate and Vallinder 1995; Volcansek 1997). There is also a large and growing literature on the powers of the European Court of Justice (see for example Stein 1981; Mancini 1989; Volcansek 1992; Alter and Meunier-Aitsahalia 1994; Weiler 1994; Alter 1996; Volcansek 1997; Slaughter, Sweet et al. 1998). However, other than the pathbreaking work of James Gibson and Greg Caldeira (Gibson and Caldeira 1993; Caldeira and Gibson 1995; Gibson and Caldeira 1995; Caldeira and Gibson 1997; Gibson and Caldeira 1998; Gibson, Caldeira et al. 1998), studies of support for the European Court of Justice remain rare.

One shared feature on the literature on support for national, as well as supranational courts is that little is known about how those powerful courts *built up* any support they enjoy today. The emergence of a powerful supranational court, the European Court of Justice, added another dimension to this question. How are *supranational* courts able to build a base of public support? Are they appreciably different from national courts in how they relate to public opinion? One strand of scholarship asserts a fundamental difference between the two types of courts (c.f. Gibson and Caldeira 1995; Gibson and Caldeira 1998). My own research, based on different data than Gibson and Caldeira's work, has come to the conclusion that similarities abound (c.f. Grosskopf 1998; Grosskopf 1999; Grosskopf 1999) and has advanced the legitimacy transfer hypothesis. If evidence supporting a legitimacy transfer from the national to the supranational level can be found, a major source of legitimacy for constitutional courts can be substantiated.

¹ This paper is not a finished research report but rather the preliminary result of work in progress.
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Unfortunately, previously analyzed data were not rich enough to provide conclusive evidence for or against the legitimacy transfer hypothesis. So in order to understand how mass publics come to tolerate and accept the rule of national and supranational constitutional courts, further in-depth study of support for supranational courts is necessary. This paper presents preliminary results from the first half of a focus group study analyzing support for the Federal Constitutional Court and the European Court of Justice in West Germany. The second half of the research, when finished, will provide comparative data from East Germany.

The Choice of Cases

Ideally, to learn how support for well-established courts builds up we would need to observe an emergent supreme court beginning with its earliest attempts to establish itself and then follow it over time and assess any changes in public support (Gibson and Caldeira 1998). Obviously, this presents a number of practical problems: we would need to study a large number of courts over a long period of time since we would not know in advance which courts would succeed in establishing themselves. In addition, given the scarcity of resources in public opinion research, it might be difficult to justify using valuable survey space to conduct such research on potentially inconsequential judicial institutions. Furthermore, courts are part of a very specialized legal discourse, which varies from country to country, making comparative studies extremely difficult (Shapiro and Stone 1994). As a result, emergent courts are understudied institutions.

One alternative strategy would be to compare supreme courts at various stages of institutional development and public approval. This approach, which typically involves large-scale comparison of support for high courts in various countries or support for the same court across many states (see for instance Caldeira and Gibson 1992; Caldeira and Gibson 1995; Gibson and Caldeira 1995; Gibson and Caldeira 1996; Caldeira and Gibson 1997; Gibson and Caldeira 1998), bears another risk. There might be certain national traditions and peculiarities that render comparison fundamentally questionable.² While it would be better to study two samples of the same underlying population subject to the rule of two political regimes identical except for how well-established their supreme courts are, it is practically impossible. Studying one population which is subject to the rule of TWO different courts, though, may well be the next best alternative.

Nevertheless, the process of accumulating support may well be fundamentally different for national and supranational institutions. Therefore it is instructive to compare within the same sample how support for an emergent *national* institutions differs (or does not differ) from that of an emergent *supranational* institution. The case of Germany provides the opportunity to undertake all of these comparisons. The West of the country allows a comparison of support for an established national supreme court, the *Bundesverfassungsgericht*, with support for an emergent supranational court, the European Court of Justice. Given the unique history of the divided Germany, post-unification East Germany was confronted with the task of adopting both a national and a supranational court at the same

² As the various terms used to refer to high courts indicate (see fn. 2 above), the functions of supreme courts, differ in various respects: the U.S. Supreme Court is not only the final arbiter of constitutional conflict, but also the highest court of appeal. The German *Bundesverfassungsgericht*, on the other hand, shares the function of exercising binding constitutional review of legislation, but does **not** operate as the ultimate appeals court in non-constitutional matters.

time. The East of the country therefore allows a comparison between an emerging national supreme court, in this case the *Bundesverfassungsgericht*, and an emergent supranational court, the European Court of Justice. One country, recently reunited, and two courts thus provide four distinct cases in a quasi-experimental two-by-two design.

THEORETICAL PERSPECTIVES ON SUPPORT FOR CONSTITUTIONAL COURTS

Before delving into the question of the sources of support for constitutional courts, the concept of support itself needs to be defined. At the core of this inquiry is the question of how a supranational court could possibly engender compliance with controversial decisions. Hence the analysis focuses on diffuse support, or institutional legitimacy, as conceptualized by Easton (1965; 1975). By Easton's definition, every institution needs a certain store of diffuse support, or a "reservoir of favorable attitudes or good will that helps members to accept or tolerate outputs to which they are opposed or the effects of which they see as damaging to their wants" (Easton 1965: 273). In contrast to specific, performance-related support, "diffuse support is directed towards offices themselves as well as toward their individual occupants" (Easton 1975: 445).

Since diffuse support is thought to arise from childhood and adult socialization, as well as from direct experience with the institution (Easton 1975: 445-46) some general expectations about the levels of support for the courts analyzed can be derived. Diffuse support for the *Bundesverfassungsgericht* in West Germany should be the highest, since the court was established fifty years ago and now has been respected as a powerful player in the German political system for more than thirty years (see Brinkmann 1981; Gibson and Caldeira 1998). Diffuse support for the *Bundesverfassungsgericht* in East Germany, however, should be somewhat lower due to the fact that until unification in 1990 the East of the country had not been ruled by the institutions of the Federal Republic of Germany.

The European Court of Justice is also expected to enjoy relatively lower levels of diffuse support than the *Bundesverfassungsgericht* in West Germany, and possibly even lower than its levels of support in East Germany. It is not quite clear why we should expect lower levels of support and just how low we should expect those levels to be. The literature suggests a number of reasons why and under which circumstances we should expect low levels of support. The literature on support for the European Court of Justice, however, argues that as a supranational court, the European Court of Justice faces additional legitimacy handicaps which lower its support (Caldeira and Gibson 1997; Gibson and Caldeira 1998; Gibson, Caldeira et al. 1998). I argue below that this assertion is largely based on erroneous assumptions that are not borne out by the empirical evidence. A review of the legitimacy handicaps of constitutional courts will facilitate a better understanding of what levels of support to expect for the supranational constitutional court and what reasons these are based upon.

Legitimacy Handicaps of Constitutional Courts

Constitutional courts in general are thought to be at the mercy of the public's goodwill. There are three factors or "handicaps" that are typically cited to account for the vulnerability of constitutional courts as compared to parliaments. First of all, judicial institutions are deprived of the legitimacy

provided by a direct electoral connection (see table 1). Support for parliaments is thought to derive from the fact that citizens are able to decide its composition and that there is a possibility to punish elected representatives for poor performance.

Constitutional courts, on the other hand, just like most judicial institutions in Europe, are consciously insulated from electoral pressures. While in some countries, most notably the United States, some lower court judges are elected, this practice is uncommon in other nations. Judges on a constitutional court typically have to undergo a confirmation process that involves the approval of the legislature. Neither the Federal Constitutional Court nor the European Court of Justice are an exception to this rule. Half of the judges on the Federal Constitutional Court are elected by the *Bundestag*; half are elected by the *Bundesrat* (Kommers 1976: 89); judges on the European Court of Justice are appointed by “common accord of the member states” (c.f. Weatherill and Beaumont 1993: 132), which amounts to approval of the legislative body, the Council of Ministers. Beyond the initial approval process, however, constitutional courts tend to be independent from legislative bodies for their long terms of tenure. This removes the judges from political pressure, but it also means that one chief source of legitimacy and public support is unavailable to them.

**TABLE 1:
LEGITIMACY HANDICAPS AND THEIR ASSOCIATED CLASSES OF JUDICIAL INSTITUTIONS**

	National Constitutional Courts	New/Emergent Constitutional Courts	Supranational Constitutional Courts
1. Lack of a <i>direct</i> electoral connection	x	x	x
2. Potentially anti-majoritarian	x	x	x
3. No own enforcement powers	x	x	x
4. No association with tradition/constitution		x	?
5. No national “presumption of legitimacy”			x

A second legitimacy handicap that all constitutional courts face is their ability (and duty) to invalidate unconstitutional laws passed by a popularly elected majority. Courts are potentially counter-majoritarian institutions³. In that sense they can easily be diametrically opposed to the electorate and its elected representatives, forcing a clash of its own legitimacy with that of parliament. Given that the

³ This judgment obviously depends on how you define a majority. While the courts’ counter-majoritarian potential is universally acknowledged, there is considerable debate over whether the actual behavior of courts such as the U. S. Supreme Court is counter-majoritarian or not Dahl, R. (1957). “Decision-Making in a Democracy: the Supreme Court as a National Policy Maker.” *Journal of Public Law* 6: 279-295..

legitimacy derived from direct elections is considered supreme in a democracy, we would expect the legitimacy of the court to fare poorly in comparison.

The third legitimacy handicap constitutional courts have to contend with is the fact that they lack the power of either “the purse or the sword” (Hamilton, Madison et al. 1961), i.e. their own enforcement powers. In order to have its judgments enforced, courts depend on the government to send in the troops if all else fails. Due to these three reasons, constitutional courts are sometimes considered the “least dangerous branch” of government (Bickel 1962), but also one that we would not expect to have much legitimacy. One of the main purposes of this inquiry is to determine whether supranational courts face different problems of legitimacy than national courts. So far, the literature agrees that a supranational constitutional court would identical legitimacy handicaps

New constitutional courts, however, may fall short on another source of legitimacy. Association with a cherished constitution and a tradition of defending it are often cited in attempts to explain the power and respect the U. S. Supreme Court enjoys. New courts that cannot associate themselves with such a revered constitution lack access to this fourth source of legitimacy. Supranational courts, on the other hand, may or may not boast a connection with a constitution. Theoretically they can and do associate themselves with a constitution, as the example of the European Court of Justice demonstrates. After all, the court “constitutionalized” the founding treaties of the European Union (see for instance Mancini 1989). Whether they are able to make this association or not, however, crucially depends on whether there is any supranational constitution they are charged with upholding and on whether the court is ‘old’ enough to associate itself with this constitution. It is therefore not a handicap of a supranational court as such, but that of a new or emergent court.

Analyses of support for the European Court of Justice even take their argument one step further, by asserting that “transnational institutions of all kinds face special problems of legitimacy. These institutions cannot rely upon the ‘presumption of legitimacy’ associated with national institutions” (see also Caldeira and Gibson 1995: 358; Gibson and Caldeira 1995: 464). It is unclear what this national “presumption of legitimacy” is, though and where it emanates from. What is clear is that according to this argument, the European Court of Justice would therefore be subject to two additional factors (handicaps 4 and 5) preventing high support. This would expect us to expect *much* lower levels of support for the European Court of Justice than for any national constitutional court, established or emergent.

As I have argued previously (Grosskopf 1998; Grosskopf 1999; Grosskopf 1999), Gibson and Caldeira discount a credible alternative hypothesis. The European Court of Justice might be able to rely only on relatively lower levels of support not simply because it is a supranational court, but to a large degree because it is a relatively new court in the eyes of most citizens. By the admission of the same authors, the European Court of Justice operated in virtual anonymity and obscurity until the late 1980s,⁴

⁴ The earliest available survey data indicate that the Court was relatively well known in 1992 Caldeira, G. A. and J. L. Gibson (1995). “The Legitimacy of the Court of Justice in the European Union: Models of Institutional Support.” American Political Science Review 89(2): 356-376.

Gibson, J. L. and G. A. Caldeira (1995). “The Legitimacy of Transnational Legal Institutions: Compliance, Support, and the European Court of Justice.” American Journal of Political Science 89(2): 459-489., meaning it must have ‘emerged’ prior to that date. How much longer is impossible to say, but circumstantial evidence suggests that it was

which is the functional equivalent of nonexistence with regard to the development of support for that institution (Gibson and Caldeira 1998).

In addition, even if we concede that the supranational court may lack a 'presumption of legitimacy' (however defined), another viable source of support remains. My previous research suggests that a supranational court is even able to tap a source of support unavailable to national courts: a transfer of legitimacy from the national level (Grosskopf 1998; Grosskopf 1999; Grosskopf 1999).

In my various investigations of the sources of support for constitutional courts (for example Grosskopf 1998; Grosskopf 1999; Grosskopf 1999) I found the notion of an interconnected support universe particularly promising for explaining support for supranational courts. This hypothesis was first discussed by David Easton in one of his lesser-known articles (Easton 1976). In his conceptualization of diffuse support, Easton clearly rejects the notion that it is justifiable to regard support for one institution as independent of support for other institutions within the system, and for the system as a whole. There is no theoretical reason to believe that support is "summative" (Easton 1976: 445). Alternatively, he suggests a "tightly interconnected support universe" in which support for one institution depends on support for other institutions of government. While Easton's considerations were exclusively theoretical, there is empirical evidence from the United States that support for Congress and the Presidency does influence support for the Supreme Court (Luck 1984), a phenomenon sometimes referred to as the "presidential association" (see for instance Casey 1975).

Easton bases his argument mainly on common sense arguments. There is little hard evidence to bolster a claim of disconnectedness between support for the different branches of government. Quite to the contrary, effects such as presidential coattails are well-documented in the voting literature. Practically suggesting a connection, even theories of legitimacy handicaps point out that constitutional courts are dependent on another branch of government to enforce its rulings. It is thus logical to take the argument one step further and assume a support connection between the two institutions.⁵ Extending Easton's logic, I argued that there might be a close connection between constitutional courts that the two levels for the very reason that trust in courts is different from trust in other institutions. After all, their legitimacy does not derive from elections but from their special relationship with the law. This is a notion that is not bound to the nation-state but a functional connection.

My empirical findings (Grosskopf 1998; Grosskopf 1999; Grosskopf 1999) bore out my theoretical expectations. Based on analysis of the German *Allgemeine Bevölkerungsumfrage der*

NOT as early as the 1960s, when the Court began the „constitutionalization” of the European Community Stein, E. (1981). "Lawyers, Judges, and the Making of a Transnational Constitution." American Journal of International Law 75(1): 1-27.

Mancini, F. (1989). "The Making of a Constitution for Europe." Common Market Law Review 26: 595-614.

Weiler, J. H. H. (1991). "The Transformation of Europe." Yale Law Journal 100: 2403-2483..

⁵ Easton calls one of his models of association the combinatorial model Easton, D. (1976). "Theoretical Approaches to Political Support." Canadian Journal of Political Science 9: 431-448., suggesting that combinations of support for certain institutions might matter.

Sozialwissenschaften (ALLBUS) 1994⁶ survey I came to the three main conclusions summarized in Table 2.

TABLE 2:
FINDINGS FROM ANALYSIS OF 1994 ALLBUS SURVEY DATA:

1. Institutions inhabit an **interconnected support universe**.
2. The **strongest links** within the support universe are **between various courts**, regardless of level of government.
3. The support universe **extends beyond the nation-state** (at least for courts)

The empirical data suggested that like Easton had suspected, institutions do indeed inhabit an interconnected support universe. We need to examine support for all institutions in order to understand support for any one of them (finding 1). However, not all links within this support universe proved to be equally strong. Differences within institutions proved to be predominantly within functional categories (similar institutions with regard to their functions, as well as their age), rather than within a given level of government (finding 2). This is why I found the strongest support connections within the support universe between the various courts. This led me to my third conclusion (finding 3) that – at least in the case of courts – the support universe extends beyond the nation state. A legitimacy transfer appears to be taking place. This opens up a new understanding of the sources of support of constitutional courts, as it means that support might be much more resilient than previously thought.

Due to the nature of the survey data analysed, I was unable to answer a number of important related questions. A necessary precondition for testing the legitimacy transfer hypothesis was to have a dataset with identical questions tapping support for the national and supranational courts, as well as the other institutions. Few such datasets are available. Those that are available typically do not have very in-depth questions on support for courts that would allow the researcher to determine what really drives support. While I was able to demonstrate the types of connections consistent with the notion of an interconnected support universe, I was unable to determine what exactly in people's minds drives this connection. The functional connection between support for the national and supranational court thus could only be conjectured but not shown. Table 3 summarizes the main open points that remain to be answered.

⁶ The data were made available by the *Zentralarchiv für Empirische Sozialforschung* (ZA) in Cologne, Germany. The dataset and related documentation are available from the ZA under study no. 2400.

TABLE 3:

OPEN QUESTIONS CONCERNING THE LEGITIMACY TRANSFER HYPOTHESIS:

1. **Why** do people trust constitutional courts so much **more** than they trust the other institutions of government?
2. **How** and **why** do people make the connection between national and supranational courts?
3. What **differences** (if any) are there between the nature of the trust connection in East and West Germany?

Of these three remaining questions I will only address the first two in this paper, as the focus groups in Germany have not yet been conducted. The focus of the following analysis will therefore be on two related questions. First, why do people trust constitutional courts that much more than they trust the other institutions of government? In other words, why are courts different in the public's mind? Second, how and why do people make the connection between national and supranational courts?

There are two main possibilities that are not mutually exclusive. First the link may be functional. Once people have accepted the rule of constitutional courts it will not matter any more whether the court is national or supranational, provided that the polity the court is a part of is considered generally legitimate. Under this scenario, the acceptance of laws as binding and the acceptance of constitutional courts as the final interpreters of law provide the link from the national to the supranational level.

A second link explaining legitimacy transfer might stem from cognitive sources. Easton (1976) does not explicitly point this connection out, but he alludes to it in two of his models of interconnectedness: the saliency model and the sequential model. The former model suggest that support for the most salient institution will partially determine support for the less salient ones. The latter assumes that the first institution a citizen will form attachments to will have a disproportionate impact on the other institutions of government. Ultimately, both of these models are based on the implicit assumption (after all, Easton wrote before the heyday of political cognition and information processing theories) that as cognitive misers, citizens will utilize cognitive shortcuts or heuristics. It is reasonable to assume that to the average citizen with limited interest and information, all governmental institutions are part of *government* and are partially evaluated as such, regardless of specific information.

METHODOLOGY

Such complex questions are not easily answered. Survey questions, in particular, are poorly suited to investigating such complex and subliminal connections. Survey questions are good at answering **if** a connection exists – they are high in external validity. They are notoriously weak at telling us **why** respondents make certain links, as their internal validity tends to be low. Consequently, a different approach is needed. Focus groups, on the other hand, are low on external validity. They cannot tell the researcher whether the discovered connection holds up within the entire population. Their

internal validity is very high, though. Therefore they are ideally suited to explaining why people make connections in their minds.

The focus group technique goes back to the work of the social scientist Robert Merton, who used it to analyze audience reactions to World War II morale films (Stewart and Shamdasani 1990). It is essentially a reaction to the forced structure that surveys and highly structured interviews imposed on respondents. Its primary advantage is that it allows participants to freely define the meaning of her or his comments. Through group interactions, respondents are able and supposed to influence each other in order to reveal underlying meaning and connections that they make. As Lewis (Lewis 1995: 2) put it: "It (the focus group interview, A.G.) taps into human tendencies where attitudes and perceptions are developed through interaction with other people. During a group discussion, individuals may shift due to the influence of other comments."

Focus groups are especially useful as part of a multi-method approach. They are then used, as in this case, to provide additional data against which a hypothesis is tested. While care must be taken in interpreting the results in order to avoid overstating external validity (Merton, Fiske et al. 1990: xxi), they are well suited following up previous research with very specific open questions. According to (Denzin and Lincoln 1994: 365) this is exactly the type of research situation that Merton coined the phrase "focus group" for. Hibbing and Theiss-Morse (1995) have provided maybe the most famous example of the usefulness of such an approach in their study of how and why the public perceives Congress.

In a focus group, a small group (6-10 people) of homogeneous participants is convened. It is important that participants feel comfortable enough with the other participants to become a part of the group. Therefore members need to be relatively homogeneous. The researcher has designed a discussion guide outlining the questions that will be asked. This guide is then used by the interviewer to lead the discussion. Deviations from the guide almost always occur, as discussion takes on its own dynamics.

For this research project, two separate focus groups were conducted with political science students⁷ at the University of Mainz, Germany, on February 1, 2001. Each session lasted roughly 135 minutes (one and three quarter hours) and was conducted in a seminar room at the University. Participants were volunteers who were recruited from a compulsory class for political science students called "Grundkurs Internationale Beziehungen," an introductory international relations class. The session took place during the regular class time and seminar room, in lieu of the regular session, which had been cancelled due to the instructor's travel plans.

Out of a class of roughly thirty students each, volunteers were solicited in a presentation by the researcher that emphasized the fun of discussion and the opportunity to actively participate in genuine social science research. Students were promised food by the researcher (doughnuts and coffee for the morning group, pizza and soda for the noon group) but were not offered any financial incentive. The instructors, Professor Dittgen and Dr. Peters also offered to count students' participation in the project

⁷ -A note: WHY STUDENTS?

First of all, it is advantageous to have articulate, well-educated participants that are effectively able to engage in the necessary introspection to produce interesting and insightful discussion. Secondly, they are plentiful, relatively easy to motivate and therefore easily available. Thirdly, they tend to be a homogeneous enough group to enable the free flow of discussion.

towards their class participation, particularly in cases where students would otherwise end up between grades.

All students were further informed that they needed to be German citizens in order to participate, and that they needed to be born and raised in the old German states. These requirements were necessary, as only citizens' views towards their political system were of interest. In addition, it is expected that citizens in the new German states will exhibit quite different results and will have significantly different opinions from their Western counterparts. Hence, separate focus groups will be conducted in the new German states (in Berlin or Jena). In order for participants to feel free enough to share their views and feelings, it is imperative that groups be as homogenous as possible. Thus it was not advisable to mix students from the old and new German states in one focus group. Rather, they should be interviewed separately.

Recruitment efforts yielded a list of fifteen students from Prof. Dittgen's course and eight students from Dr. Peters' class. Those students that had given contact information when they first indicated their interest were contacted the day before the focus group in order to remind them to come. Unfortunately, a large number of students in Prof. Dittgen's course had not provided sufficient information to be contacted. Thus it was not surprising that in the morning course (Dr. Peters) all but one of those students who had initially expressed interest actually did appear at the focus group meeting. For the noon meeting, however, only five out of fifteen did eventually participate in the research.

When participants arrived for the group discussion, they were greeted by the researcher and were offered food and drink. After they had settled in for a bit, they were handed a short survey form that elicited their levels in trust in various institutions, as well as their level of political interest and some general background information. All personal information was collected from those surveys.

The final focus group turnout was predominantly male, as a total of 8 males and 4 females participated. Their average age was 22.25 with an average of slightly more than four semesters of study behind them. One third of students (4) were political science majors, while two thirds (8) were minors, typically in conjunction with a second minor. Virtually all of them had a middle class to upper middle class background. They reported a very high level of political interest (an average of 4.17 on a five point scale).

After the participants had filled out their forms, they were seated around a large table in an informal setup designed to facilitate interaction with other group members. Then the researcher, who acted as moderator, gave a five minute introductory speech explaining the problem and laying out the ground rules of group discussion. Participants were reassured that discussion would be entirely confidential and that no individuating information would be used in the research report. Participants were also alerted to the fact that the session was being tape-recorded and videoed. Group members were then asked to introduce themselves.

Finally, the group discussion began with the first question and was opened to the floor. The moderator followed a discussion outline that had been prepared in advance. Though not all questions were asked in the same order in each group, depending on the discussion dynamics, almost all of the questions were covered by both groups at one point or another. A copy of the moderated discussion outline can be obtained from the author upon request. Both discussions began by exploring what

respondents are proud of as Germans and then proceeded to what they thought the institutions should be doing right now and whether they are doing it or not. In a next step, participants were asked to evaluate which institution had the most power. Then, discussion proceeded to evaluations of trust in the Federal Constitutional Court compared to the other institutions. This same structure was then repeated for the European institutions, including the European Court of Justice.

ANALYSIS

Discussion in the groups was quite lively. Even though both groups reacted to the questions in slightly different ways, a number of common themes emerged from the discussions. The first complex of communalities concerns the way participants perceived government and parliament. It was quite evident that all participants had clear ideas of which problems they wanted the Federal Government and Parliament to tackle. A number of current buzzwords of the political debate ranging from right wing extremism, unemployment, pension reform, all the way to trust in government and the food crisis (mad cow disease) were brought up.

Constitutional Court v the Other Institutions

It was striking during discussion, though, that participants did not see the government and parliament tackling these problems effectively. They did see activities regarding these problems, but they were generally judged to be blind and mindless activism. Ideological differences and partisan squabbles and mudslinging with an eye to the next election are seen as preventing consensus that would lead to true solutions to the problems. Ironically enough, the mechanics of democracy and the ensuing discussions are being held against these institutions. Instead of representing interests, participants mainly expected leadership and problem solving capabilities from the overtly political institutions. Maybe it is unsurprising that this image squares quite well with Hibbing and Theiss-Morse's findings on the U.S. Congress (Hibbing and Theiss-Morse 1995).

A second complex of communalities emerged around perceptions of the Federal Constitutional Court. The Court was seen as quite a contrast to the other, squabbling institutions of government. Participants cited four main interrelated reasons for their trust. First, the institution is viewed as passive/reactive and only potentially and temporarily powerful. Comments relating to this point are well represented by the following two remarks:⁸

Participant 11 (male): "It is not its task to exercise power."

Participant 9 (male): "Power in a political sense is not vested in the Court by the constitution, so you need to exclude that aspect."

Second, the Constitutional Court is seen as staffed with highly competent professionals and good democrats. The following sampling of comments illustrates this line of argument well:

Participant 1 (male): "They (the Federal Constitutional Court, A.G.) are a multifaceted institution where everybody specializes on a particular type of law. They are specialists."

Participant 5 (male): "They have a high level of competence."

⁸ All translations are the author's own work, based on the focus groups transcript.

Third, the Court is viewed as non-political/non-partisan since it is insulated from political and/or public pressures. A few representative comments illustrate this point. A female participant (participant 2) succinctly summed the core of the argument up as "It stays out of small fights and party squabbles."

Fourth, the Federal Constitutional Court is seen as constrained by the constitution and therefore as linked to the common good. One participant put it thus:

Participant 7 (male): "There is, well, let me say, a concrete body of rules, right? They (the justices, A.G.) need to come to their judgments based on the, well, constitution. In parties it is the cases that they represent certain opinions. The Federal Constitutional Court doesn't have that. They must not be subjective, but objective, right? There are rules, and they are being applied to cases and, well, it is simply a logical chain of argument."

Amazingly, this firm belief in the myth of judicial neutrality even holds up to direct challenge from another participant. Even when the participant is alerted to the fact that decisions change and that court decisions are a matter of interpretation, he still insists on trusting the court.

Participant 3 (female) interjects:

"Excuse me. I think it is a bit subjective because if you compare ... uh ... decisions, for instance, from ... I don't know ... well from the past, then there have well been different decisions."

Participant 7 (male) replies: "Yeah sure, of course, some leeway is certainly there, but it is always the case that you can say, ok, well *this is the law and we based our decision on that and that you can follow that*. And for – in politics there are certain opinions, that you say it is liberal, somewhat conservative, and well, you cannot really label it right or wrong, but it is always the degree to which it coincides with yourself and your inclinations are being valued more." (Emphasis added)

Trust in the Federal Constitutional Court emerges here as socialized trust. Participants' judgments are not necessarily based on actual knowledge, however, as participants admit with surprising candor. Almost everybody keeps repeating, "at least I hope so..." It is interesting to note that due to the respondents' socialized basic propensity for trust, the absence of negative news is taken as an affirmation of their basic trust.

Participant 8 (male): His trust in the FCC is highest of the three institutions "perhaps because you hardly ever hear of it." (...) "Your really never hear of failures."

Furthermore, it is interesting that to note that participants are quite aware of the fact that their trust is related to the nature of the court:

Participant 4 (female): "Well, I somehow have a kind of ... I don't know ... some kind of basic trust in the Federal Constitutional Court and I don't necessarily have that in the parties because they simply – well, uhm – I basically assume that the Justices of the Federal Constitutional Court, well that they succeed (in staying non-political and true to the constitution, A.G.). I can't control them, either, but if they really are like this, if they really are democratic, and then they really make their decisions so that they would be best for the people. And for parties I do not assume that because I currently see that some parties completely oppose my views, for instance. And so it cannot possibly be, well, the best for everyone. But I connect it (the Federal Constitutional Court, A.G.) much more with such democratic values than I connect parties because some parties exist that don't stand for democratic values, or for values that I don't suit me. And – it is quite obvious, because the Federal ... the parties – they are – they articulate actively and the Federal Constitutional Court is only passive. That means it is only called

upon and so there are many more opportunities for me to be cross with those parties somehow. But somehow it cannot really be justified.” ...

The participants’ deeply internalized, socialized trust in the Constitutional Court appears close to unshakable. When asked to imagine the worst possible decision the Court could make, they had difficulties to imagine the Court making ANY kind of bad decision. For as long as they could find some sort of halfway reasonable interpretation of constitutional provisions, they were willing to acquiesce to any kind of judgment. Only if the Court openly disregarded fundamental human rights would they be willing to stand up to it and protest. In contrast to the Federal Constitutional Court, however, the other institutions of government were seen as slaves of the voter and the media. Table 4 summarizes the findings for the German national institutions of government.

**TABLE 4:
FACTORS EXPLAINING TRUST IN THE FEDERAL CONSTITUTIONAL COURT
RELATIVE TO TRUST IN THE FEDERAL GOVERNMENT AND PARLIAMENT**

Perceived characteristics of the Federal Government and Parliament	Perceived characteristics of the Federal Constitutional Court
Active Leadership expected	Passive/reactive Leadership expected in crisis
Staffed with people just like you and me (who are fallible)	Staffed with highly competent professionals (who are infallible)
Political/partisan Subject to external pressure	Non-political/non-partisan Independent
Constrained only by ideology Self-interested	Constrained by constitution Interested in common good

European Court of Justice v Federal Constitutional Court

In spite of varied opinions within the groups, it was striking to note that virtually all participants, regardless of their level of trust in the European Court of Justice, DID make the functional connection between the national and supranational constitutional court. However, the strength of the connection did vary across individuals. The tenor of opinion was that overall, members of the ECJ are seen as

judges and are consequently accorded trust. There was SOME DEGREE of legitimacy transfer for ALL participants, but it varied according to the interaction of two factors (see Table 5):

- 1) The perceived differences between themselves and the rest of Europe and
- 2) mitigating factors that allowed participants to tolerate difference.

**TABLE 5:
FACTORS EXPLAINING TRUST IN THE EUROPEAN COURT OF JUSTICE
RELATIVE TO TRUST IN THE FEDERAL CONSTITUTIONAL COURT**

Degree of Experience and Information	Perceived difference between self/Germans and Europeans	Mitigating Factors	Trust in European Court of Justice Relative to Trust in Federal Constitutional Court
Low	Strong	NONE	LOWER
Low	Medium to Strong	Support for European integration	Equal
Low	Irrelevant	Competence/Skills of Justices	Higher

Respondents who generally view the values represented in the Court and other European systems and cultures as alien and remote trust the ECJ less than even the national government. Participant 7 (male): "The problem with the European institutions is that they do not only take German values, and -- yeah, German priorities into account, but that you always have to find some compromise which is somehow acceptable for all European member states. And because of that I find myself saying that I trust the Federal Government more because I know that they only take into account traditional values and the -- whatever -- basic ethical rules with which I can somehow identify, that are dominant in our culture. There are certain differences within Europe, after all. "

Other participants clearly recognized differences to other Europeans, but their overriding support for European integration enables them to tolerate displeasing outcomes. Participant 8 (male): "I have equally strong trust (in both courts, A.G.) because I, well, think that there, too, decisions are being made based on the law and secured through the law. Only I have to say yes, there sometimes are decisions that the Germans brought to the Court, I mean a case that the Germans have taken to court, which is then being decided for the benefit of Germany, or it corresponds more to

Germany's point of view. Sometimes the result corresponds more closely to the views of the Mediterranean countries or something like that. Then you have to, as he said, give in to that or you even have to acquiesce to it, yes. But viewed in the long run, this is certainly good, because everyone gains and loses sometime, uhm, and only in this fashion can a way to integration be found. I have complete trust in that."

Another striking finding was the extreme to which some students were willing to push the skills argument. Those individuals who had most internalized the view that the justices' competence was the primary reason for trusting them were even willing to trust the European Court of Justice more than the Federal Constitutional Court. Those participants did not even bother to mention differences.

Participant 3 (female): "Well, if you extend the Federal Constitutional Court – that the best judges in Germany are on the Federal Constitutional Court, then the European Court of Justice would have to have the best judges of all of Europe. And then, I would personally say, I trust the European Court of Justice more than the Federal Government. As for (the trust comparison with, A.G.) the Federal Constitutional Court, well, I'm not quite sure right now, perhaps, yes, equally or similarly, because I simply think that – it is untouchable. The government are, well, I don't know, completely normal people like you and me, I think, well, they are just human, but for me, the judges are more like, well for me somehow on a higher level. (...) As I said, I'm not well-informed enough in order to really say. It is simply a kind of feeling, but I don't have real information." (...)

Participants also made it clear, however, that similarly to the national court, their thoughts were not necessarily based on detailed knowledge. This is a strong indicator that trust in the European Court of Justice grows out of the deeply socialized trust in the Federal Constitutional Court. In that sense, both the functional and the cognitive hypothesis appear to apply.

CONCLUSION

Based on the focus group data presented above it is quite clear that people do make a functional connection between the two levels of courts. This is due to the fact that courts are perceived as different, and most importantly, as more successful institutions than the more overtly political ones. In a way, expectations towards courts are lower than they are towards the government and parliament. After all, one important difference participants cited was that courts do not often have to deal with political problems. When they do, participants tended to blame this fact on the failure of the political process that was originally designed to take care of the problem. Different sets of expectations lead to different evaluations. Based on this evidence, the findings of a legitimacy transfer from the national to the supranational level were not a methodological artefact.

It is also evident that people do not know much about the European Court of Justice. This might mean that their support does not signify much. By the same token, however, participants freely admitted that they knew very little about the Federal Constitutional Court. Yet for the Federal Court, no researcher is willing to claim that its legitimacy is seriously endangered at this time. There may be a cognitive shortcut operating here, but it enables the supranational court to tap a national source of legitimacy.

Whether participants ended up according the European Court of Justice as much trust as the Federal Constitutional Court depended upon a number of mitigating factors, though: the perceived degree of sameness between other Europeans and Germans matters. But clearly, as a court, the European Court of Justice has *some* presumption of legitimacy. Even people who do not trust it that much now see the potential of trusting it in the future, *since it is staffed with judges*. Currently, they are just afraid that the legal norms those judges represent are not compatible with German notions of law and appropriateness.

Since the research project is not yet complete – the set of focus groups in East Germany has not yet been conducted – the third open question remains unanswered. It remains to be seen how East Germans results will compare to those in West-Germany. I expect that East German youth will exhibit much less internalized trust in the political system, including the courts. Even though they were politically socialized into the current political system, their parents were not. Therefore, one source that children receive their socialized beliefs from was unavailable or at least greatly diminished. Therefore the identification with the constitution should be less prevalent.

However, the analysis of the survey data suggested that East Germans, too, trust Courts more than the political institutions. So I would expect the findings to replicate to some extent. Particularly with respect to the European Court of Justice I expect to find fewer differences between evaluations at the national and the supranational level, as trust is typically lower. At the same time there is a distinct possibility that the courts will be seen as more political and less neutral due to the mixed record of judgments relating to East Germany (Grosskopf 2000 pp. 48-54). The really interesting questions have yet to be answered. Nevertheless, the project has produced fascinating insights into people's perceptions of the institutions of government already. More work lies ahead, though.

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