

Constitutional Re-Engineering in the EU: The Impact of Informal Interinstitutional Dynamics

Abstract

This paper explores the impact of 'informal interinstitutional dynamics' on the policy-making process of the European Union (EU). It argues that the informal conventions brokered by the EU's primary institutions—the crux of interinstitutional dynamics—engender both institutionalization (an entrenchment of norms) *and* integration (a redistribution of power among the institutions), which in turn have resulted in a re-engineering of the EU's *de facto* constitution. An evolution of informal conventions is traced, a taxonomy of informal conventions is constructed, and their impact on the wider scope of European integration is considered in detail.

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Introduction¹

Confined largely to issues and policies related to the three main institutions of the European Union (EU), the literature on European integration is narrowly focused.² In the conventional view, institutional activity transpires solely in the 'formal' sphere of European integration, i.e. the *acquis communautaire*.³ Although scholars of European integration have recently begun to illuminate integration in less salient spheres—the legal sphere in particular⁴—scant attention has been paid to the 'informal' sphere: institutional activity taking place outside the formal framework, including the customs, routines, and various ad-hoc procedures which complement, but are not a part of, the *acquis*.⁵

The critical components of the increasingly active informal sphere are ad-hoc agreements, i.e. conventions brokered by the EU's primary policy-making institutions: the Council of Ministers, the European Commission, and the European Parliament.⁶ Sometimes serving to enhance the formal

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²The terms 'European Union,' 'European Community,' and 'Community' will be used interchangeably throughout; in addition, the term 'Treaty' shall refer to the Treaty establishing the European Economic Community as amended by the Single European Act to become the Treaty establishing the European Community, which was further amended by the Maastricht Treaty on European Union.

³The *acquis communautaire* consists of the cumulative Treaty (the Treaty of Rome and the subsequent amending treaties negotiated by Member State governments) along with the complete collection of laws, rules, regulations, and legal judgments of the European Community that have the Treaty as their sole source.

⁴Integration in the legal sphere has received much attention of late. See *inter alia* Geoffrey Garret, "The Politics of Legal Integration in the European Union," *International Organization* 49 (1995): 171-181; Walter Mattli and Anne-Marie Burley, "Europe Before the Court: A Political Theory of Legal Integration," *International Organization* 47 (1993): 41-76; Mattli and Slaughter, "Law and Politics in the European Union," *International Organization* 49 (1995): 183-190; Martin Shapiro, "The European Court of Justice," in Alberta Sbragia, ed., *Euro-Politics: Institutions and Policymaking in the New European Community* (Washington, D.C.: Brookings Institutions, 1991); and Alec Stone, "Constitutional Dialogues in the European Community," (European University Institute, Florence, working paper, 1996).

⁵For a similar distinction between 'formal' and 'informal' see David Judge, David Earnshaw, and Ngaire Cowan, "Ripples or Waves: the European Parliament in the European Community Policy Process," *Journal of European Public Policy* 1 (1994): 45.

⁶For the purposes of this paper, the term 'institutions' shall refer to highly structured formal organizations, e.g. bureaucratic agencies. This conception of institutions is a more traditional 'old institutionalist' conception than the more amorphous conception offered by Peter Hall, "the formal rules, compliance procedures, and standard operating practices that structure the relationship between individuals in various units of the polity and the economy," or the narrower conception offered by Douglas North, "informal constraints and formal rules and . . . their enforcement characteristics." See Peter A. Hall, *Governing the Economy: The Politics of State Intervention in Britain and France*, (Oxford: Polity, 1986) and Douglas North *Institutions, Institutional Change and Economic Performance*, (Cambridge: Cambridge University Press, 1990).

sphere, at other times to modify it, these conventions constitute the crux of the EU's 'informal interinstitutional dynamics.'

After roughly four decades of political science efforts to ascertain the nature of the beast—i.e. the European Economic Community, the European Community, and now the European Union—it may (or may not) come as something of a surprise that virtually the only scholar who seems to have shed much light on the EU's dimly lit informal sphere is a historian. Keith Middlemas captures the essence of informal interinstitutional dynamics in the following passage from *Orchestrating Europe*:

The Treaties lay down what has been agreed by the sovereign players and what therefore will be. But that is a higher fiction: in the gaps between what the law says and what actually takes place, between the public version of how authority operates and the reality, lie the [EU's informal dynamics] Although its *acquis* builds up steadily, it is not a true community and its institutions have constantly to renegotiate large areas of their authority if the *acquis* is to be fully binding—that is, to be *internalized* in patterns of thought and behavior Informal activities, and the rules and conventions which control them, have a greater impact at the Community level even than in nation states, where political systems have matured over centuries This was true from the beginning, and informal characteristics have become a Community hallmark.⁷ [emphasis in the original]

Although vague at times about what he means by informal, Middlemas grasps the crucial notion that by focusing solely on the formal aspects of European Integration, observers of the EU are condemned to misconstruing this colossal chameleon.

In this paper I examine the significance of the interinstitutional dynamics operating in the informal sphere of EU policy-making. These dynamics involve a tension between prescription and convention in the EU, i.e. a disparity between what is supposed to happen and what actually happens. The *central question* I seek to answer is to what extent the informal sphere of EU policy-making involves institutionalization on the one hand (an entrenchment of norms), or integration on the other (a redistribution of power), essentially a parameter for determining whether departures from the prescribed policy process amount to anything of significance.

In terms of the argument, my *central hypothesis* holds that informal agreements between the EU's institutions engender both institutionalization *and* integration (I will set out the meanings of these terms below). In testing the hypothesis by examining the effect of informal conventions, I am able to confirm it. I thereby argue that the EU's informal interinstitutional dynamics have altered the

⁷ Keith Middlemas, *Orchestrating Europe: the Informal Politics of the European Union, 1973-95* (London: Fontana Press, 1995), 668-677.

previous status quo by effecting shifts in power relations between the EU's institutions, the results of which not only alter EU policies but also the overall framework in which policies are made. I shall conclude that informal interinstitutional dynamics have given rise to a 're-engineering' of the *acquis*, Europe's quasi-constitution.

This paper is divided into four sections. Following the rest of the first section, Section 2 will probe informal conventions more deeply, exploring why they are needed, the sources from which they originate, and the different types they appear in—including some examples. Section 3 will assess the impact of informal interinstitutional dynamics, and Section 4 will consider some conclusions emerging from the study.

The Interinstitutional Context

Aside from the rather obvious fact that the constituent parts of the EU are nation-states instead of sub-national regions or county-like districts, one of the few other fundamental distinctions between the EU and national political systems involves how the functions of the two primary branches of government—executive and the legislative—are split unevenly between three distinct institutions, as opposed to being discharged by only two in the national context. As a result, the dynamics of interinstitutional relations in the EU are qualitatively different.

In recent years, the Single European Act (SEA) and the TEU significantly altered the EU's interinstitutional balance of power. Nonetheless, the balance remains tilted toward the Council. With ongoing changes in the allocation of power between them, the dynamics of triangular relations between EU institutions are marked by fragility and discord, which extend beyond the traditional scenario in national political systems. Although interinstitutional relations in most any advanced industrial nation-state are by their very nature cacophonous, at the national level a considerable degree of institutionalization of practices, procedures, and rules is the norm. Quite simply, interinstitutional relations have become firmly embedded in the *modus operandi* of their respective political systems—sometimes over centuries.

By contrast, at the supranational level in the EU, relations between the executive and legislative branches of the political system remain embryonic, as they have yet to congeal in a manner akin to their national counterparts. On the one hand, to a certain degree this is due to the system's relatively short-lived existence, while on the other hand, the flexible nature of the treaty-based institutional framework allows ample room for institutional maneuvering, unlike that which is found in national systems. Still more important, however, is the fact that EU interinstitutional relations have not only been constitutionally recast on two occasions in the past twelve years, but they continue to evolve—and may very well be recast again at the conclusion of the current Intergovernmental Conference (IGC).

The pattern of Member States gathering together intermittently to broker an amending treaty has engendered the expectation that interinstitutional relations will be altered *de novo* on a fairly regular basis, for treaties normally rearrange the allocations of legislative and administrative power among the institutions. This particular dynamic, unique in political science terms, conditions less powerful institutions to exploit all political and legal means available to maximize their impact on the policy-making process; more powerful institutions are concurrently conditioned to be acutely sensitive to the need to defend their respective bases of authority and ward off power bids of the others.

The EU's conflict-ridden interinstitutional milieu stems quite simply from disagreement among the institutional actors about how Europe's supranational political system should work, i.e. who should have the power to do what to whom. In fact, the chasm between institutional perspectives remains wide enough that even a semblance of agreement about the organization of their relations continues to be elusive.

Notwithstanding this intrinsic discord, in the belief that institutional configurations are likely to change *ex ante*, EU officials across the institutions share a general verisimilitude that, in the course of formal reconfigurations, the Parliament's power will gradually increase, while the power of the Commission, as well as the Council, will gradually decrease, (though to what extent is entirely moot).⁸ Although it would be fatuous for the Parliament to entertain prospects of becoming as or more

⁸EU official, interview by the author, European Commission, Brussels, July 17, 1994; EU official interview by the author, Council of Ministers, Brussels, July 25, 1994.

powerful than the Council (indeed, it does not do so), as we shall see later there is considerable pressure on the Council to capitulate to some of Parliament's demands.

In any case, instead of idly awaiting the next formal intergovernmental bargain, the Parliament believes it has everything to gain and nothing to lose from using all means at its disposal to actuate transfers of power *in between* formal bargains.⁹ Informal conventions thus offer it a means of garnering increased influence within the *existing* framework, by going beyond the Treaty but without outrightly contradicting it. According to Monar, "it is the growing assertiveness and political role of the European Parliament which has paved the way for I IAs [interinstitutional agreements] to become a standing feature of the Community system."¹⁰

The Theoretical Framework

The informal interinstitutional dynamics which I examine in this paper function both as a dependent variable and, in turn, an independent variable in the study. In other words, I seek to explain not only what dynamics surrounding informal conventions are an outcome of, but also what outcomes emanate from these dynamics. That is to say, on one level I shall illuminate the causal factors that account for informal conventions, while on another level I will attempt to show how informal conventions may have altered the EU's policy framework and in the process re-engineered Europe's quasi-constitution. Thus, informal interinstitutional dynamics can be construed as an intervening variable which, far from being epiphenominal, exercises clear causal force with regard to the scope and direction of the ongoing unification of Europe.

The question is whether the overall outcome is that of institutionalization or integration. For the purposes of this study 'institutionalization' shall refer to the reinforcement of particular procedures through the entrenchment of behavioral norms. For example, the principle of

⁹During the 1970s and early 1980s, prior to the so-called 'relaunch' of European integration, the Parliament and the Commission in fact had little confidence that Member States would soon engage in substantial revision of the Treaty. They viewed such as a rather arduous prospect, involving protracted negotiations and a tortuous ratification process that would prove too prohibitive. Hence, given their desires for altering the Community's constitutional framework, the informal route appeared more auspicious. This point was impressed upon me in a joint interview of two Commission officials on July 11, 1994. A Parliamentary official corroborated in a July 27, 1994, interview.

¹⁰Jorg Monar, "Institutional Agreements: The Phenomenon and its New Dynamics After Maastricht," *Common Market Law Review* 31 (1994): 695.

'subsidiarity' as enshrined in the Maastricht Treaty on European Union (TEU)—governing as closely to the citizenry as possible— might become institutionalized via a certain practice of the Commission becoming entrenched through consistent usage over time, e.g. its making a specific determination of whether or not each of its legislative proposals would be better dealt with at the national level.

With regard to the EU, this definitional concept captures a basic evolutionary pattern of constitutional engineering involving any of a series of institutional adjustments which alter the policy process but do not alter the relative power relations between the institutions: practice does not diverge from prescription. This static balance of institutional power stands in sharp contrast to a scenario involving institutional-based integration.

'Integration' shall refer to a pattern of change in the EU policy-making process which produces a discernible shift in the institutional balance of power.¹¹ This type of integration is measured according to whether or not a given informal convention results in a uni-directional shift in relations between the institutions, viz. a direct transfer of legislative power from the Council to either the Parliament or the Commission, or both institutions. In other words, a gain in one of the weaker institution's powers must come at the expense of the ability of at least one of the other institutions to dictate the policy process according to its designs.

Integration therefore differs from institutionalization in that it involves changes in the rules of institutional conduct—encapsulated in informal conventions—which do not cohere with the provisions of the Treaty and the spirit underpinning them. Although the law remains the same, the rules prescribed by it become altered by informal means. In this scenario, dynamics in the informal sphere modify the formal *acquis*, resulting in *de facto* change in both the policy-making framework

¹¹For other definitions of 'integration' see Ernst B. Haas, *The Uniting of Europe* (Stanford: Stanford University Press, 1958), 16; Haas, "The Study of Regional Integration: Reflections on the Joys and Anguish of Pretheorizing," in Lindberg and Stuart A. Scheingold (eds.), *Regional Integration: Theory and Research* (Cambridge: Harvard University Press, 1971), 6; Brigid Laffan, *Integration and Cooperation in Europe* (London: Routledge, 1992), 5-6; Leon N. Lindberg, *The Political Dynamics of European Economic Integration* (Stanford: Stanford University Press, 1963), 5; Lindberg, "Political Integration as a Multidimensional Phenomenon Requiring Multivariate Measurement," *Journal of Common Market Studies* 24 (1970): 649-50; James G. March and Johan P. Olsen, *Rediscovering Institutions: The Organizational Basis of Politics* (New York: Macmillan, 1990) 43; Charles Pentland, *International Theory and European Integration* (London: Faber and Faber, 1973), 70; John Pinder, "Positive Integration and Negative Integration: Some Problems of Economic Union in the EC," in Michael Hodges (ed.), *European Integration* (Harmondsworth: Penguin, 1970), 124-150; and William Wallace, "Introduction: the Dynamics of European Integration," in W. Wallace (ed.), *The Dynamics of European Integration* (London: Pinter, 1990), 9.

(the rules of behavior) and the policy process (behavior on the institutions). Thus, with regard to constitutional engineering in the EU, integration stemming from informal interinstitutional dynamics would actually change the EU's 'constitution,' albeit *outside* the formal sphere.

On the assumption that this analytical framework will allow me to gain sufficient leverage on both the origin and the impact of the phenomenon in question—informal interinstitutional dynamics—in this paper I do not propose to offer a conventional theoretical framework. Instead, I intend to utilize the institutionalization-integration parameter to gauge the empirical effect of informal conventions in the EU, supplemented by a simple model which I shall outline below. Although the larger study I am conducting, of which this paper is a part, has perhaps some distinctive contributions to make to the theorizing of European integration, International Organization, and the role of institutions more generally, due to space limitations I must necessarily limit the theoretical considerations to be explored here.

In this light, I propose a simple model of the impact of informal interinstitutional dynamics.¹² My model follows a standard social scientific format, involving a mere three components: 1) specifying the preferences of political actors 2) identifying the constraints these actors confront in the pursuit of their preferences, and 3) generating outcomes of their political competition in terms of changes in the constraints that they face. The key to the model is thus the effect of changes in the constraints on the behavior of the EU's institutional actors. These changes help to account for the pace and scope of the outcomes effected by informal interinstitutional dynamics.

They are the Council, the Commission, and the Parliament, who together are engaged in a two-tier political competition at the supra-national level of Europe. On one tier, each of them is vying to shape the policies generated by the Community's legislative process in accordance with their own policy preferences. On a second tier, all three are attempting to attain/retain policy-making

¹²This model is loosely based on the new institutional economics and new economics of organization approaches. See *inter alia* Gary S. Becker, *The Economic Approach to Human Behavior* (Chicago: University of Chicago Press, 1976); Becker and George J. Stigler, "De Gustibus Non Est Disputandum," *American Economic Review* 67 (1977): 76-90; Thrainn Eggertsson *Economic Behavior and Institutions* (Cambridge: Cambridge University Press, 1990); Douglass C. North, "The new Institutional Economics," *Journal of Institutional and Theoretical Economics* 142 (1986): 230-237; Barry R. Weingast and William J. Marshall, "The Industrial Organization of Congress; or, Why Legislatures, Like Firms, Are Not Organized as Markets," *Journal of Political Economy* 96 (1988): 132-163; and Oliver Williamson *The Economic Institutions of Capitalism* (New York: The Free Press, 1985), esp. Chapters 1-3.

powers that directly contribute to their success on the first tier.¹³ Due to space considerations, I will devote the bulk of my analysis to the second, or higher, tier.

Regarding preferences, which the previous sub-section helps to illuminate, not surprisingly the three institutional actors prefer to obtain and/or preserve the important powers in the Community's policy-making process. The Parliament, feeling squeezed by the Commission and the Council, prefers to garner literally as much power as it possibly can; given how impotent it is compared to many national parliaments, this is not an exaggerated claim. More specifically, the Parliament for example is desirous of achieving co-decision—i.e. basically equal powers with the Council—in all policy areas under Community competence.

Another salient example of its aims is to garner the right of policy initiative, which would necessarily circumscribe the Commission's possession of this power. In essence, having already 'gained' substantial powers relative to its early days as a purely consultative body, the Parliament is intent on gaining a further array of powers that would place it on par with the Council.

The Council, on the other hand, is equally intent on precluding this eventuality. With most of the cards in its hand already, its chief objective is to limit the Parliament's would-be capture of more cards for itself. Over time, the Council clearly has relinquished some of its power to the Parliament, particularly by amending the Treaty with the SEA and the TEU; however, its ethos (as represented by the officials in its Brussels secretariat) is to retain the most important policy-making powers for itself. While certain Member States like Germany favor increased powers for the Parliament (which would come at the Council's expense), as evidenced by the current IGC it is far from clear whether a majority of like-minded Member States will be assembled.

Concerning the making of policy, the Commission is constrained by the fact that it is highly unlikely to obtain virtually *any* substantial gains beyond the power of being the primary agenda setter of the EU. Because its possession of the sole 'right of policy initiative' is unique among executive bureaucracies the world over, in relative terms the Commission is already perhaps the most powerful

¹³For a discussion of this two-tier game, see B. Guy Peters, "Bureaucratic Politics and the Institutions of the European Community," in Alberta Sbragia (ed.), *Euro-Politics: Institutions and Policymaking in the "New" European Community* (Washington, D.C.: The Brookings Institutions, 1992).

bureaucratic agency in modern history. Hence, it is mostly concerned with holding onto this potentially precarious power, rather than attaining further powers at the expense of its institutional counterparts. In fact, among EU officials there is practically no expectation whatsoever that the Commission will augment its policy-making powers in either the near or long term.¹⁴ Thus, the Commission is not as central to the model as are the Council and the Parliament.¹⁵

The constraints on the three institutions are already at least partially clear. The Commission is highly constrained by its historically unique possession of power as an executive bureaucracy; the Parliament (at least in between formal EU bargains) is constrained by the Council's unwillingness to relinquish further power to it and general inefficacy stemming from its traditional lack of expertise and deficient leadership; and the Council is constrained by the Community's so-called 'democratic deficit' and the Parliament's incipient ability to be obstructionist. How these constraints have changed, why they have changed, and the consequences of such for outcomes of the tri-partite political competition among the Community's primary policy-making institutions, will be discussed in Section 3 and further reflected on in the Conclusion.

Quite obviously, this is a simple model of bureaucratic politics. It involves the ways in which the EU's counterparts to national bureaucratic agencies fight it out for influence over both the general course of policy-making and the specific content of policies. Unaware of any theories or models of bureaucratic politics outside studies of foreign policy-making—that is, any that are relevant to my topic of inquiry—this study takes me back all the way to my first political science class as an undergraduate and the oft-quoted, much-maligned model of bureaucratic politics presented by Graham Allison in *Essence of Decision*. Perhaps ironically, Allison's model is particularly pertinent to informal interinstitutional dynamics in the EU.

II. The Significance of Informal Conventions

¹⁴EU official, interview by the author, European Commission, Brussels, July 27, 1994.

¹⁵Regarding implementing and oversight powers, the Commission does indeed harbor aims of gaining greater influence—e.g. with respect to comitology—but in terms of the legislative process, its primary preference is to maintain its monopoly power of policy initiative.

This section further illuminates informal conventions.¹⁶ The first part describes the form and function of informal conventions, while the second part discusses the sources of informal conventions. The third part classifies the different types of conventions, and the fourth part examines a particularly important type of informal convention, viz. *interinstitutional agreements*.

Informal Conventions in the EU

Although, strictly speaking, the EU lacks a traditional constitution, the Treaty functions as its *de facto* constitution—if only in a legal sense—with the amending treaties taking the form of constitutional amendments.¹⁷ Constitutions perform several basic functions: to establish the different institutions and actors of a political system, to allocate power among them, and to define their various functions, the sum total of which determines the general policy-making framework. This is the case not only in the federal systems of the United States, Canada, Australia, Germany, and Switzerland, but in the EU as well.

However, in reaction to the often rather convoluted constitutionally prescribed policy process of a given political system, this process tends to take on something of a life of its own; in other words, how the system functions diverges considerably from constitutional prescription over time. As constitutional change tends to be rather infrequent, political systems must find alternative means of adjusting to the dissonance between constitutional design and altered circumstances.¹⁸

The primary means of making such adjustments is by changing the rules and procedures which govern the policy-making process. Such rules constitute the crux of day-to-day governance.

¹⁶Whereas Monar's article is light on theoretical contributions (though empirically very useful), Martin Westlake is one of the few scholars of European Integration who takes note of the significance of informal conventions; hence, the absence of a literature review. See especially M. Westlake, *The Commission and the Parliament: Partners and Rivals in the European Policy-making Process* (London: Butterworths, 1994).

¹⁷Geoffrey Garrett and Barry R. Weingast, "Ideas, Interests, and Institutions" in Judith Goldstein and Robert O. Keohane (eds.), *Ideas and Foreign Policy: Beliefs, Institutions, and Political Change* (Ithaca: Cornell University Press, 1993), 195; G. Federico Mancini, "The Making of a Constitution for Europe," in Keohane and Hoffman, 1991, 178; Mattli and Burley, 42; Eric Stein, "Lawyers, Judges, and the Making of a Transnational Constitution," *American Journal of International Law* 75 (1981), 27; William Wallace, *Regional Integration: The West European Experience* (Washington, D.C.: The Brookings Institution, 1994), 39; and Joseph Weiler, "The Community System: The Dual Character of Supranationalism," *Yearbook of European Law*, Vol. 1 (Oxford: Oxford University Press, 1992), 267-306.

¹⁸Despite the recent spate of constitutional change in such countries as Belgium and Italy and the fairly frequent electoral system reform in France, constitutional change in western advanced industrial democracies is a relatively rare phenomenon.

National constitutions lay down a host of formal rules and procedures designed to make the legislative process work in a certain way. Where changes or additions to these rules do not stem from constitutional amendments, constitutional conventions are created.

Constitutional conventions are non-legal rules or unwritten principles that constrain behavior and oblige political actors to conduct themselves accordingly.¹⁹ Conventions rely on self-enforcement and are binding insofar as they are complied with, as breaking them has political but generally no legal or punitive consequences. They involve not only obligations between actors, but also rights, powers, and duties. Conventions arise in various ways: from behavioral precedents or evolving customs; from specific agreements among the actors concerned to adopt particular rules of conduct; and from widely acknowledged principles of government.²⁰

In slightly different fashion, I define 'informal conventions' as non-legal, unofficial agreements to arrange particular aspects of the EU's governing process in particular ways. They are agreed to by the institutions and are binding insofar as these political actors choose to uphold them—the penalty for noncompliance being political sanctions, which I will discuss below. This coheres with Weber's definition of a convention as "that part of custom . . . which is recognized as 'binding' and protected against violation by sanctions of disapproval."²¹ Informal conventions appear in multiple forms, including tacit understandings, oral bargains, uni-lateral declarations, exchanges of letters, joint communiqués, and elaborate written documents.²²

Brokered by the institutional actors, informal conventions are not altogether unlike constitutional conventions. Their principal effect is to restrict the freedom of action of the institutions, which leads them to support, refine, interpret, extend, and even alter aspects of the formal

¹⁹See Jon Elster, "Constitutional Conventions," unpublished paper delivered at Columbia University on Feb. 21, 1996 and Geoffrey Marshall, *Constitutional Conventions: The Rules and Forms of Political Accountability* (Oxford: Oxford University Press, 1984), 3-8. See also K.C. Wheare, *Modern Constitutions* (Oxford: Oxford University Press, 1966), 122 and O. Hood Phillips, *Constitutional and Administrative Law*, 6th ed., (Oxford: Oxford University Press, 1978) 104-5. Wheare defined a convention as a "rule of behavior accepted as obligatory by those concerned in the workings of the Constitution", and O. Hood Phillips defined them as "rules of political practice which are regarded as binding by those to whom they apply."

²⁰Marshall, 8-9.

²¹Max Weber *Economy and Society*, Vol I, Guenther Roth and Claus Wittich, eds. (Berkeley: University of California Press, 1978), 34.

²²For an informative discussion of informal agreements between states, see Charles Lipson, "Why are some international agreements informal?" *International Organization* 45 (1991).

sphere. Arguably the most important function is to reduce tension and interinstitutional conflict in the policy process. Limited adaptations of procedures and gradual shifts in the decision-making process achieved by conventions can reduce tension among the institutions by ensuring more constructive cooperation.²³

One of the fundamental operating premises of governance is that political actors on the whole need to avoid conflict, for conflict is costly—it impedes the achievement of the aims of political actors. Specific conflict among the EU's institutions has led to the rejection of several annual budgets, as well as the derailment of important policy reforms. The ability of conventions to redirect, channel, isolate, and even eliminate conflict between the institutions has served to reduce this cost. *Ipsa facto* conventions function as lubricants for reducing the inevitable friction when different parts of the policy machine come into contact. The EU policy machine thus relies on them in order to operate more smoothly than it otherwise would.

In a different sense, informal conventions act as the cement which binds the formal blocks of the EU's overall policy structure, while occasionally acting as building blocks of their own, adding on to the structure's walls or constructing new ones. Without a legal base of their own, however, their cement-like quality does not derive from law. Rather, EU institutions are bound to the commitments underlying informal conventions by the concept of political goodwill.

Political goodwill is nothing more than the equivalent of giving one's word, as opposed to signing a legal contract. If a person breaks her word, then those to whom she gave it are unlikely to trust her enough to enter into a future agreement with her. The same dynamics operate in the EU's informal sphere. By entering into an informal convention, the EU's institutions signify an intent to be bound by the commitments expressed therein, whether in oral or written form.

In essence, breaking an interinstitutional bargain, however informal it might be, is politically costly. This cost is measured in the loss of political goodwill, which prevents an institutional actor from deriving the benefits which would accrue from the future bargains now precluded by the goodwill squandered in the course of breaking an agreement. Loss of political goodwill has two

²³Monar, 695-96.

effects. First, by losing the trust of its counterparts, an institution incurs reputational costs. Without a reputation for compliance, such an institution is less likely to be able to persuade its counterparts to agree to a similar type of informal convention in the future.

Second, noncompliance with informal conventions commonly induces political sanctions, which are arguably worse than reputational costs. Political sanctions involve one institution intentionally causing difficulties for another such as delaying or blocking a piece of legislation it otherwise would have supported. Institutions invite this form of retaliation when they violate informal conventions. Political sanctions are less easily applied by states to other states, for states are not as closely tied together in the same sort of tight structural framework that the EU's institutional actors are. The equivalent among state actors are private diplomatic complaints or public demarches.

Without a legal base, informal conventions cannot be enforced by the European Court of Justice (ECJ). However, because of the Parliament's ardent efforts to ensure the other institutions comply with their informal commitments, noncompliance is rare enough that the question of whether the degree of costliness is proportional to the degree of formality is relatively inconsequential.²⁴ The Parliament's zeal for 'reminding' the others of their commitments stems from its being the chief beneficiary of informal conventions.²⁵

The Source of Informal Conventions

Informal conventions generally arise from the following scenario: When Member State governments agree to a new or amending EU treaty, they inevitably create a number of policy gray areas, for treaty language tends to specify the ends the signatories have in mind but not always the means—even the ends can be vague. Each time the Member States strike a grand bargain in the form

²⁴This 'enforcement' involves nothing more than the Parliament continually communicating its expectation that the Council and Commission comply with their commitments. The desire on the part of the Council and the Commission to maintain congenial relations with the Parliament (which is capable of scuppering their aims) explains why this means of enforcement is effective.

²⁵The Parliament has with some success used such commitments as foundations for striking further informal accords, with further modifications of the EU policy process being the result. By continually making still more demands immediately on the heels of having its demands accommodated, the Parliament has gradually ratcheted up its influence (later in this section I will deem this the 'ratchet effect').

of a treaty, they create a relatively hollow skeletal structure onto which the institutions must graft the flesh and muscle of policy-making specifications.

If policy-making is to function adequately—i.e. with at least a modicum of efficiency—then the structural gaps left after intergovernmental bargaining must be filled in relatively rapid fashion, preferably during a treaty's implementation phase. Without being fleshed out, treaty provisions fail to work as intended and the legislative process becomes congested. Similarly, a treaty provision may be problematic or unworkable, in which case the institutions must rectify the problem. Thus, treaties normally require not only being fleshed out, but fixed as well.

These two tasks are left to the institutions which, sometime after a treaty is ratified, undertake in accordance with its provisions to establish the rules and routines which will henceforth govern the minutiae of institutional interaction in the policy process. In the course of agreeing to a workable policy framework, the institutions enter into varying modes of negotiation. In areas of EU activity where a treaty's language is unambiguous and the institutional configurations are acceptable to each of the institutions, a rubber stamp mode of interinstitutional negotiation ensues. By contrast in areas where either the treaty language is ambiguous or the institutional configurations are not acceptable to one or more of the institutions, a more intense mode of negotiation ensues.²⁶

Informal conventions also arise from a scenario in which, separate from any questions of ambiguous or inapplicable treaty language, one or more of the institutions desire a change in the policy framework. Such constitutes a 'power bid' scenario. The institutions may very well interpret the treaty provisions concerning a certain aspect of interinstitutional relations in precisely the same manner; however, one or more of them may not be satisfied with the status quo as set out by the Treaty.

If an institution becomes dissatisfied with the prescribed division of power or the structure of the policy framework, it can seek to change it in one of two ways: 1) by trying to influence the negotiations of the next formal bargaining session involving an amending treaty, or 2) by seeking to

²⁶Less powerful institutions tend to try to compel the other institutions to interpret ambiguous provisions in the manner most advantageous to them.

alter the division of power via informal conventions. If no formal negotiations are in process, a reform-minded institution is likely to opt for the informal means.

Under the second scenario the Parliament will indicate to the Council that it wishes to initiate negotiations over an informal convention of a specific nature. The Council normally responds in one of three ways: by rejecting the Parliament's informal 'proposal' outright; by agreeing to discuss different options with the Parliament by setting up contacts at different levels; or by agreeing to enter into informal negotiations with the aim of brokering an informal accord. The deals made and bargains struck take the form of informal conventions.

The Different Types of EU Conventions

Informal conventions range from simple, low-level bargains at one end of the spectrum, to quasi-formal arrangements between the different institutions at the other end—a sizable continuum. They come in four different types: *basic*, *standard*, *procedural*, and *substantive*. With a rather low level of formality, *basic conventions* tend not to appear in written form, except perhaps in the Parliament's Rules of Procedure. The total number of basic conventions is unknown, for by their nature they are rather esoteric and possibly completely unknown outside the narrow circles in which they are used. Despite the difficulty of observing them, they are routinely adhered to as if at some stage they had in fact been officially codified by the institutions.

Basic conventions represent something akin to so-called 'gentlemen's agreements,' made with the shake of a hand and the wink of an eye. Depending on the circumstances, all that may be required for their creation is an official from one institution proposing a minor procedural change to an official in one of the other institutions. If the other agrees to the change, the status quo is henceforth altered as new rule is established, and general expectations of behavioral norms come into play.²⁷ For example, an understanding between a DG I Commission official and an official on the Parliament's Committee for External Economic Relations that, every time the Council informally

²⁷With regard to interinstitutional relations, basic conventions in fact are of little consequence, as even the Parliament gives little credence to them; the procedural changes they encompass are so marginal that no institutional leverage can be gained from them, i.e. they do not allow any of the institutions to accrue influence at another's expense.

requests the Commission to introduce new trade-related legislation, the former would alert the latter by telephone, would qualify as a basic convention.

Of somewhat greater consequence are *standard conventions*, informal conventions which fall closer to the center on the (in)formality continuum. Standard conventions are more widely known than basic conventions, though their role is confined to fleshing out unworkable treaty provisions and filling in the gaps of amending treaties. For example, the Treaty's stipulations pertaining to the *cooperation procedure* are vague with regard to the timing of one of its key elements. In response to the need to resolve the Treaty's failure to establish the precise point at which the Parliament's three month period to take action on the Council's common position actually begins, after ratification of the SEA the three institutions met informally and determined this juncture would be designated by the day on which the Parliament receives copies of the common position in all nine working languages.

Effectively, as a typically mundane standard convention, it does nothing more than establish a legislative rule for the purpose of filling in an obvious gap in the Treaty text: no powers or privileges are in any way altered or transferred. However, without this convention the institutions would be unable to agree when the clock starts ticking in this case, as the Parliament and the Council would jockey to interpret the Treaty in a manner detrimental to the other. But with this particular standard convention in place, conflicting interpretations of Article 189c are avoided, and the cooperation procedure runs more smoothly.²⁸

Procedural conventions represent the third type of informal convention. These conventions fall to the right of center on the (in)formality continuum. They involve more substantial changes in the rules governing interinstitutional relations than either basic or standard conventions. Instead of filling in gaps in amending treaties, procedural conventions adjust and enhance already existing rules. Whereas standard conventions create new rules—albeit entirely in keeping with the spirit of the related treaty provisions—procedural conventions alter long-standing rules. Moreover, they do so in

²⁸Despite a smooth appearance to the outsider, from time to time disagreement over when to start 'the clock ticking' have re-erupted; however, the Neunreither Group has handled them sufficiently so as to avoid escalations of conflict in each case.

a manner which often serves to violate the spirit of the Treaty, i.e. they organize interinstitutional relations contrary to the Treaty's prescription.²⁹

A classic example of a procedural convention is the 1964 Luns Procedure, the origin of which was a letter from the Council's President in Office (then Dutch foreign minister Joseph Luns) to the Parliament, which communicated the Council's willingness to hold a discussion with the Parliament prior to the opening of negotiations for Association Agreements, as well as a pledge to keep the Parliament informed of the developments throughout the negotiation. This is accomplished by an appearance of the Council's President in Office before the relevant parliamentary committees for the purpose of briefing them, confidentially, on the results of the negotiation.

There was no Treaty-based precedent for such an agreement; rather, the Parliament had for some time importuned the Council, and in 1964 the Council acceded to the Parliament's wishes by agreeing to this convention. Typical of procedural conventions, the Luns Procedure modifies the policy process with regard to the negotiation of external agreements in a manner unforeseen by the Treaty. The effect of this convention is in no way radical, but it does place the Parliament in a better position to influence the negotiations of Association Agreements. One would be hard pressed to demonstrate how either of the other institutions 'loses' in any significant way, but by the same token the Parliament has clearly 'gained' by being in a better position potentially to exercise influence over the Council and the Commission, and in certain cases it clearly has.

Interinstitutional Agreements

In recent years the institutions themselves have increasingly referred to the fourth type of informal conventions—i.e. *substantive conventions*—as 'interinstitutional agreements.' Interinstitutional agreements (IIAs) represent a quasi-formal type of decision-making instrument which, although more formal than the conventions described above, continue to be brokered separate from the Treaty.

²⁹Although technically correct, 'violate' is perhaps too strong a term; the departures from prescription which take place as a result of procedural conventions are sleight, so much so that while it is clear which institution benefits from them, it is often difficult to ascertain whether the non-benefiting institutions are actually aggrieved by them.

IAs are more consequential than the three other types of informal conventions for a variety of reasons: they have a discernible political effect due to the political commitments they encompass; they deal with more substantive matters than the other informal conventions; they are given considerable credence by the institutions; they involve specific negotiations between the institutions; they appear in written form and are published in the Official Journal; and they attract the attention of both the press and national parliaments.

Thus, there exists a wide continuum of informal conventions, ranging from the highly esoteric basic conventions at one end and the quasi-formal IAs at the other. This paper focuses primarily on the role of IAs—as opposed to the other less formal types of conventions—for by their nature they are more likely to have a greater impact on the changing nature of interinstitutional relations. Basic, procedural, and standard conventions rarely play a part in the constitutional re-engineering of the EU.

The past six years have provided ample evidence that IAs have become permanent fixtures on the EU landscape.³⁰ Without question, they have become a legitimate option when political actors are contemplating making changes in the policy process. In fact, with the advent of the TEU the Parliament's increased array of formal powers has only fueled its appetite for further informal accords. The reason is that there are more formal treaty provisions for the Parliament to 'sink its teeth into.' As its institutional appetite has yet to be satiated, its activity continues to defy the conventional wisdom that the more formal powers it receives in amending treaties, the less active it will need to be informally.³¹

In fact, in the wake of the TEU, the institutions have brokered six new IAs—far more in such a short period than had ever been previously agreed. As the Member States chose not to grant the Parliament all the new powers it had lobbied for in the run up to the TEU, in the words of one official, "Maastricht wasn't enough."³² The Parliament was not content to wait several years for the

³⁰Westlake, 1994a, 100.

³¹EU official, interview by the author, European Parliament, Brussels, July 27, 1994.

³²EU official, interview by the author, European Parliament, Brussels, July 13, 1994.

next IGC, especially given expectations at the time that the 1996 IGC might drag on for up to three years. The informal sphere was the obvious option for making further inroads.

Given their newfound legitimacy in the eyes of the three institutions, there is ample reason to believe that IIAs will continue to be opted for, if not always as mechanisms to flesh out treaties then as alternatives to treaty amendments when they prove too onerous for the Member States to negotiate and/or ratify.³³ Westlake offers the following interpretation of IIAs and their significance:

[T]reaty-based inter-institutional relations have been fleshed out by a large number of agreements with disparate scope and potentially far-reaching consequences. Though their exact legal and constitutional status remains unclear, most have resulted in generally-respected conventions, and many of these have proved important to the working of the Community's legislative procedures, particularly in the budgetary field and in facilitating the implementation of the Single European Act.³⁴

He goes on to declare "it is clear that the adoption of inter-institutional agreements has become an indispensable element, a sort of constitutional glue, used to fill in and flesh out the bare framework provided by the inter-governmental conferences."³⁵ As evidenced by the increasing formality of IIAs and the increasing rate at which they are negotiated, this institutional mechanism has gained substantial legitimacy in the eyes of the institutions.

Arguably the strongest indicator of the significance of IIAs and informal conventions in general is how often and to what extent the procedures they encompass, which are created in the informal sphere, are subsequently transferred to the formal sphere by way of being formally incorporated in an amending treaty. The TEU formalized a large number of these. All of them were created by conventions which had been used extensively prior to being 'swept up' in the amending treaty. Thus, in each case, Maastricht effectively enshrined already existing practices. In other words, as norms and rules they did not change, but their legitimacy increased dramatically as they were given greater stature and a definitive legal base. Whereas their legitimacy is now based on the Treaty, previously it had been based largely on either unilateral Council declarations or the Parliament's Rules of Procedure.

³³EU official, interview by the author, European Parliament, Brussels, August 1, 1996.

³⁴Westlake, 1994a, 62.

³⁵Ibid., 101.

A telling example of informal convention-based rules, procedures, and other precedents being swept up in amending treaties involves the Community's procedure for handling petitions from EU citizens. Neither the Treaty of Rome nor the SEA contained any provisions for petitions. Rather, their inception came with informal practices initiated in the 1950s by the Parliament, on the basis of its Rules of Procedure. The Commission began assisting the Parliament in this regard, and over the next couple of decades the informal procedure for handling petitions evolved. By the 1980s it had become part of the every day governance of the Community, and in 1989 the three institutions brokered the Petitions IIA. Having imbued the procedure with additional legitimacy, this paved the way for its being incorporated in drafts of the TEU. Then in 1991 it was formally swept up in the final text of Maastricht.

Thus, contrary to the conventional notion that the content of amending treaties is derived largely from Member State preferences, the origins—if not the impetus—of most changes in the EU's fluid constitutional regime are informal conventions. A vast number of the Treaty's provisions have informal conventions as their sole source. Informal conventions are, in essence, trial runs of treaty provisions. As the EU now appears to be in an ongoing mode of treaty revision, continual institutional reform is taking place; this greatly facilitates the 'sweeping up' process by providing more opportunities for it to take place.³⁶

By serving the above functions, the frequent effect of informal conventions is to render the policy process more operable and efficient. But it is their wider effect on the EU's policy process—and its constitutional re-engineering—which constitutes the most consequential result of what I refer to as informal interinstitutional dynamics. To what extent do informal conventions re-order interinstitutional relations? To what degree do they diverge from constitutional prescription? Do the resulting dynamics have a discernible impact on the direction of European integration? Should they change the way we think about European integration? Subsequent sections seek to provide the answers to these and other questions.

³⁶EU official, interview by the author, European Commission, Brussels, July 25, 1994.

III. The Impact of Informal Interinstitutional Dynamics³⁷

The first part of this section will seek to answer these questions by constructing a taxonomy of IIAs for the purpose of bringing some coherence to the diffuse nature of informal interinstitutional dynamics.³⁸ The second part will briefly take stock of the cumulative effect of informal conventions, evaluating what the Parliament has gained at the expense of the Council, while the third part will speculate as to what has caused the Council, given its superior policy-making power, to relinquish some of this power to the Parliament.

The primary reason for constructing a taxonomy is to impose a sense of order and tidiness on a confused or chaotic set of circumstances. Given the maladroit manner in which the EU's institutions have transacted IIAs, the wide-ranging terminology used to refer to them, and their many differences in form, content, and purpose, a proper analysis necessitates introducing a certain degree of order to them. Furthermore, because the sole academic study of IIAs approaches the issues involved from a largely legal perspective, there is a general need for a thorough classification and analysis of them.³⁹ While Monar's study is quite useful, a more rigorous classification will allow one to arrive a clearer understanding of informal interinstitutional dynamics.⁴⁰

The taxonomy of IIAs presented here will also consist of three categories. Category III is comprised of *substantive conventions*. The key to Category III agreements is that they create new procedural rules which alter the interinstitutional balance of power. Thus, they occupy the far right

³⁷If it appears to the reader that there is a gap between the previous section and the present section, it is because space requirements have prevented me from including the empirical sections from the larger work of which this paper is an abridged version. Hence, much of my assessment is based on empirical analysis that does not appear here. Most important among this material is my description/analysis of the four IIAs in the EU's budgetary sphere. Not only did *substantive conventions* first appear in this policy area, but these IIAs have also proved to be the lodestar of the Parliament's newly acquired policy-making influence. See my mimeo "The Impact of Informal Interinstitutional Dynamics in European Union Policy-making."

³⁸A *taxonomy* is an intermediate means of ordering things, something in between a *classification* and a *typology*. A *classification* orders items according to a single criterion, whereas a *typology* orders items according to two or more criteria, as in a two-by-two table. A *taxonomy* orders items by more than one criteria but less than two. For example, in my taxonomy I order interinstitutional agreements according to their degree of formality (one criterion) and the year in which they were created (not quite a second criterion, because time is not really a substantive means by which to order things). For a discussion of these matters, see Giovanni Sartori *Parties and Party Systems: A Framework for Analysis* (Cambridge: Cambridge University Press, 1976), fn 7.

³⁹Westlake, 1994a, 63.

⁴⁰Monar, 1994.

segment of the (in)formality continuum; hence their inclusion in the Official Journal.⁴¹ (See Figure 1a) These conventions represent 'quasi-formal' IIAs, in that the only reason they are not actually considered 'formal' is that they have not been subsumed under the Treaty. Hence, for this reason they must be characterized as informal, but in practice they are adhered to by the institutions as if they were in fact formal.

The second category also comprises *substantive conventions* which overhaul previous sets of rules, but Category II agreements effect a smaller degree of change than Category III agreements, i.e. they do not involve discernible shifts in the institutional balance. (See Figure 1b) The distinction is slight but important. Category II agreements occupy a segment of the (in)formality continuum to the immediate left of Category III agreements, i.e. they are more informal. Category II agreements sometimes create but more often adjust behavioral rules; they serve more to enhance the Parliament's current powers than to expand them. Category II agreements are also afforded a considerable amount of respect and adherence by the institutions, which is reflected in their inclusion in the Official Journal.

Whereas Category II agreements have less legitimacy in the eyes of the institutions than Category III agreements, the institutions are more committed to adhering to them than Category I agreements. Category I consists of *procedural conventions* (as described in the previous section) which are less formal than Category II and Category III agreements in that they involve more minor changes in the rules. (See Figure 1c) They do not so much overhaul and adjust interinstitutional rules of conduct as adapt and recalibrate them slightly.

Category I agreements occupy the center of the (in)formality continuum, further to the left of Category II and III agreements but to the right of *basic* and *standard conventions*. In fact, many Category I agreements cannot be considered true 'agreements' in that they are conventions resulting

⁴¹Whether or not an informal agreement is published in the Official Journal is decreasingly valuable as an indicator of its level of (in)formality. Whereas up until the late 1980s or so, anything that appeared in the OJ was considered to be relatively formal, this is no longer necessarily the case. The Council normally tried to avoid publishing an informal agreement or convention in the OJ, for fear of setting precedents. Around this time the Parliament discovered it had always had the legal right to have things published in the OJ and, for precisely the same reason the Council wished to avoid doing so, thereafter began to exercise the right as often as possible. Hence, now all agreements and conventions, irrespective of which of my categories they fall under, are likely to be published in the OJ, instead of only those in Category III and some in Category II.

from unilateral declarations by the Council or the Commission. Whereas Category II agreements are brokered by at least two of the institutions (and more likely three), Category I agreements normally take the form of either Council resolutions or exchanges of letters between the Presidents of the institutions. As they are afforded less legitimacy in the eyes of the institutions, they are not included in the Official Journal.

Figure 1a

| |
|----------------------------------|
| Category Three |
| 1994 Comitology I IA |
| 1993 Budgetary Discipline I IA |
| 1988 Budgetary Discipline I IA |
| 1982 Budgetary Joint Declaration |
| 1975 Budgetary Joint Declaration |

Figure 1b

| |
|---|
| Category Two |
| 1995 Code of Conduct |
| 1995 Commission Investiture |
| 1994 Committees of Inquiry I IA |
| 1994 Codification I IA |
| 1993 Co-decision I IA |
| 1993 Subsidiarity I IA |
| 1993 Ombudsman I IA |
| 1993 Declaration on Democracy, Transparency . . . |
| 1989 Petitions I IA |

Figure 1c

| |
|--|
| Category One |
| 1991 Transmission of Documents |
| 1990 Code of Conduct |
| 1990 Immigration/Free Movement Meetings |
| 1990 Multilateral Surveillance agreement |
| 1988 Comitology Committees (Plumb-Delors procedure) |
| 1984 Council Resolution re: budgetary relations |
| 1983 Stuttgart Solemn Declaration |
| 1981 Council Resolution re: Council-Parliament Relations |
| 1977 Council Declaration re: budgetary collaboration with the Parliament |
| 1977 Luns-Westerterp II Procedure |
| 1973 Improvement of Council-Parliament Relations |
| 1973 Luns-Westerterp Procedure |
| 1973 Improvement of Commission-Parliament Relations |
| 1970 Council Resolution re: budgetary collaboration with the Parliament |
| 1964 Luns Procedure |

⁴²
Figure 2

⁴²The curve in Figure 2 is mathematically weighted according to degree of formality, which is represented on the graph as Category I, II, or III (*Excel* software was used). Although not every agreement in the three tables in Figure 1 shows on the graph, each has been mathematically accounted for. For example, although the three agreements concluded in December of 1994 appear as a single cross on the graph, the curve reflects the fact that there are three there. Thus, the number of agreements is actually greater in Category II (both after 1987 and after mid-1993) than the cluster of crosses on the two-dimensional graph appears to demonstrate.

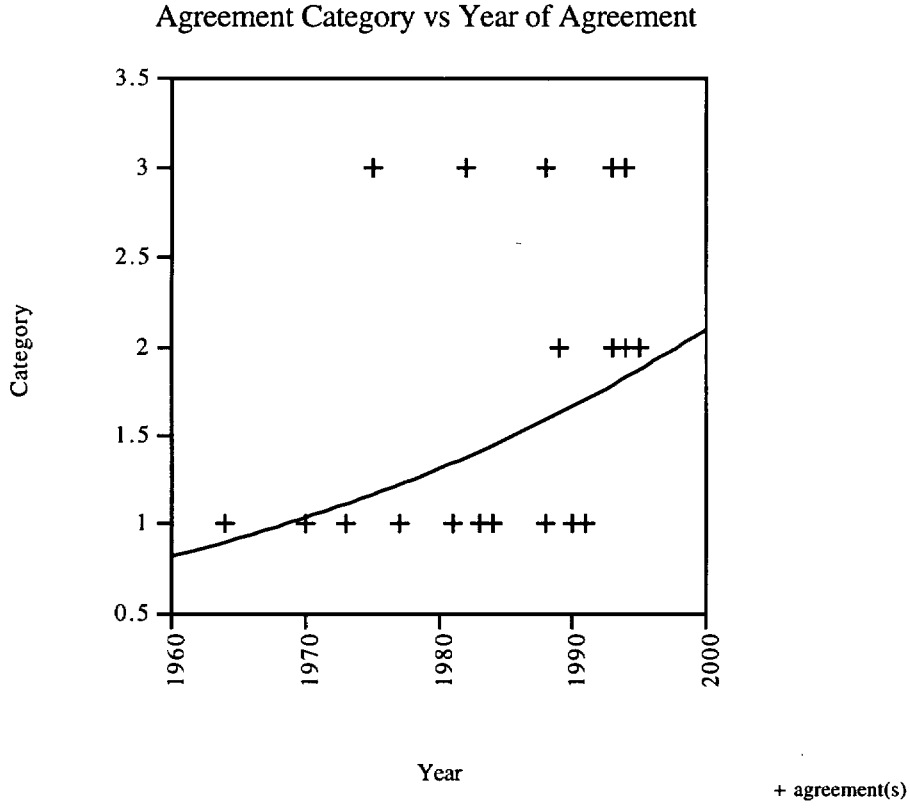


Figure 3

| Decade | Number of Agreements |
|--------|----------------------|
| 1960's | 1 |
| 1970's | 7 |
| 1980's | 7 |
| 1990's | 14 |

Figure 4

| Decade | Categories II and III |
|--------|-----------------------|
| 1960's | 0 |
| 1970's | 1 |
| 1980's | 3 |

| | |
|--------|----|
| 1990's | 11 |
|--------|----|

As indicated in Figures 1a, 1b, and 1c, there are five IIAs in Category III, nine in Category II, and twelve in Category I. By itself, this information reveals little. Figure 2, however, shows a clearer trend in the EU's informal sphere. Basically, the pattern in evidence provides a clear indication that IIAs have taken on increasing importance for the institutional actors. Over time the institutions have increasingly brokered more IIAs, which is demonstrated by Figure 3, while Figure 4 demonstrates that the nature of these IIAs has become increasingly formal.

The most conclusive evidence that formal bargains facilitate activity in the informal sphere is found in Figure 2. Subsequent to 1987, soon after the SEA came into force, the number *and* the degree of formality of IIAs increased. Likewise, following mid-1993, soon after the TEU came into force, again both the number and degree of formality of the agreements grew. Of particular importance, the rise in the level of formality indicates that the increased number of IIAs have been brokered for purposes other than merely filling in the Treaty's gaps and streamlining policy-making (the numerous informal conventions of other types not included in the above figures accomplished these tasks). This data appears to confirm my central hypothesis that more than institutionalization alone is in evidence.

According to the trends illuminated by these figures, informal interinstitutional dynamics are playing an increasingly important role in EU policy-making, both in terms of their growing number and their growing ability to shift the balance of interinstitutional relations. Whereas in the 1960s and 1970s scholars of European integration could ignore the significance of informal conventions, given how IIAs have gradually transformed the EU's policy-making framework over the past two decades, they can no longer do so.

What accounts for these consequential trends? To begin with, the institutions have become accustomed to organizing their relations informally. Early conventions in the budgetary and foreign relations spheres endured, as the institutions discovered they could rely on their counterparts to uphold the commitments underlying them.

Also, in accordance with its organizational ethos, the Parliament is naturally disinclined to deal with its institutional counterparts wholly on the basis of either *basic* or *standard conventions*. As a legislative body, it has a natural proclivity for openness, clarity, and acting on vote-based mandates, rather than negotiating secretly 'behind closed doors' on the basis of oral or tacit agreements. The Parliament thus prefers to organize relations with the Commission and the Council on the basis of procedural conventions and particularly IIAs, conventions which have a quasi-formal status. Hence, the Parliament's push for IIAs is also culture-driven.⁴³

More importantly, on the one hand the creation of an increased number of formal procedures under Treaty auspices has necessitated the creation of an increased number of informal arrangements to flesh them out. On the other hand, with each new formal bargain the Parliament is better positioned to pursue its strategy of persuading, cajoling, and even forcing the other institutions to accede to its own wide interpretation of its newly received powers. Since the 1985 SEA and the 1991 TEU, the Parliament has had many more formal powers in recent years to try to expand on informally.

Thus, in the process of 'clarifying' the gray areas in amending treaties, not only do the institutions iron out problems in the policy process, but the Parliament augments its position vis-a-vis the other institutions. Always trying to garner more power at the expense of its counterparts, the Parliament has learned that if it 'shoots for the moon' it is bound to end up with at least partially achieving its aims. By overcoming its long-standing fecklessness, the Parliament has proved increasingly deft at playing the informal game with its partners-rivals. In this sense, of its own accord the Parliament has changed one of the chief constraints on its ability to obtain its preferences, viz. the organizational ineptitude that plagued the Parliament in the first two decades of its existence.

More significant still, because constraints on the Council's preferences have changed, it is increasingly difficult for the Council to stonewall; moreover, the Council's own interests are increasingly served by brokering IIAs. With regard to the Commission, little has changed concerning its influence in the EU policy process, for the constraints on the pursuit of its preferences haven't

⁴³EU official, interview by the author, European Commission, Brussels, July 20, 1994.

changed. Or, put in a different way, the Commission has in fact achieved its primary aim, viz. maintaining its power of sole policy initiator.

Informal Dynamics and the Council

The Parliament's success begs several questions: Why has the Council acceded to the Parliament's wishes, if only on the odd occasion? Given its preference of maintaining the level of authority prescribed to it by the Treaty, what circumstances have caused the Council's to relinquish some of its authority? Are there certain changes in constraints that are likely to effect a further erosion of the Council's power vis-a-vis the other institutions?

Due to its more powerful position, the Council has always played a crucial role in the EU's informal interinstitutional dynamics and *ipso facto* the Parliament's ability to improve its position in the institutional hierarchy outside the formal sphere. Quite simply, unless the Council decides to give way, the Parliament's incessant pursuit of greater power is stymied. In fact, this has been the typical result of interinstitutional skirmishes: the Parliament demands changes in the rules governing its relations with the Council, and the Council roundly refuses.

Such an outcome is hardly surprising given the Council's preference for maintaining the interinstitutional balance of power and keeping its allotment of legislative powers intact. Accordingly, its official position has long been that the Treaty must be adhered to by the letter, without exception; hence, activity in the informal arena shall in no way alter the *acquis*.⁴⁴ Yet, as made clear in the above analysis, the Council has failed to achieve its preferences consistently, as the Parliament has made inroads in defiance of the Council's dictum.

Typically, the Council succumbs to the Parliament's wishes, if only partially, under one of two scenarios: either when the Council's interests dictate trade-offs that give the Parliament greater influence, or when the Parliament literally forces the Council into brokering an informal accord. Under the first scenario, in the interest of maintaining at least a semblance of amicable relations, the Council on occasion finds it necessary to make concessions to the Parliament. Prior to the advent of

⁴⁴EU official, interview by the author, Council of Ministers, Brussels, July 26, 1994.

direct elections in 1979, the Council was under little pressure to transfer policy-making powers to the Parliament. In the 1980s, however, buttressed by its newfound democratic legitimacy the Parliament became increasingly antagonistic in its demands of the other institutions. Only gradually did the Council begin to respond to this new dynamic.

Early on, in resolutely refusing to yield, the Council acted contrary to the unspoken rule of upholding the Community's consensus-based ethos. Initially unconcerned about decorum, the Council soon discovered that, unless the Parliament's demands were at least partially met—if only infrequently—then the Parliament proved to be highly obstructive, often going to considerable lengths to scuttle the Council's aims. On these occasions, the Council rightly accused the Parliament of putting politics above principle; nonetheless, with time the Parliament refused to relent.

The Parliament resisted the Council on many occasions, but the yearly budget negotiations were particularly beset by interinstitutional strife. Although more often than not the Council achieved its aims, rarely was it able to do so without expending prodigious time and resources, not to mention the considerable inconvenience of Council officials having to travel from Brussels to Strasbourg and spend the whole of their only night there in the throes of contentious negotiations. Exasperated, they felt it was "like going into the parlor of the EP spider to do the deal; we felt weak."⁴⁵ Moreover, with much more at stake at the supranational level after the SEA and then the TEU—in terms of both transferred sovereignty and policy competencies—the Council could not afford incessant strife.

Because rampant discord proved costly to the Council—the Parliament was growing increasingly adept at delaying and blocking legislation—it began seeking ways to appease the Parliament without sacrificing its primary objectives. Informal conventions provided a ready solution. As an indication of the Council's strenuous efforts to mitigate the budget-related dissension, it agreed to what at the time was the Community's most significant informal convention to date: the 1988 budgetary IIA, which the Council actually requested of the Parliament.

⁴⁵EU official, interview by the author, Council of Ministers, Brussels, July 25, 1994.

Another significant constraint on the Council's ability to achieve its preferences involves the pressure of the EU to become more transparent and democratic. Perceptions of EU citizens that Brussels officials are 'out of touch' as well as the bias of a mildly pro-Parliament international press core both contribute to this pressure. As a result, according to one senior Council official, when dealing with problems "the Council is driven by a 'be nice to Parliament' orthodoxy." "Because of its democratic legitimacy, "in an official or public position it is quite impossible to criticize the Parliament."⁴⁶ Officials in the Commission speak of an incipient post-Maastricht ratification conventional wisdom that one "needs to have the EP with you."⁴⁷

Thus, although the Council has rejected far more of the Parliament's demands than it has accommodated, over the past several decades the pace of its interinstitutional deal-making has increased markedly. Typically, the Council will negotiate informal conventions with the Parliament when its own interests necessitate striking a compromise—which *ipso facto* augments the Parliament's influence. The changing natures of two constraints have largely accounted for the increasing divergence of the Council's interests from its unchanged preferences, viz. the need to mitigate interinstitutional conflict and the pressure on the EU to become more transparent and democratic. Increasingly the Parliament is proving capable of enticing, and even forcing, the Council to enter into informal negotiations with it.

The Conclusion

Although not provided for in the Treaty of Rome, four decades later IIAs have established themselves as a permanent fixture on the EU's institutional landscape. IIAs clearly have "come of age."⁴⁸ As recently as the mid-1980's there was ample reason to view them in ephemeral terms, but, notwithstanding their different aims, the Parliament, Commission, and Council have come to recognize the utility of further fleshing out treaty-based interinstitutional relations. Moreover, in

⁴⁶Ibid.

⁴⁷EU official, interview by the author, European Commission, Brussels, July 20, 1994.

⁴⁸Westlake, 1995, 297.

adding informal conventions to its strategic repertoire, the Parliament has become deft at utilizing them as instruments for wresting power and influence from its institutional counterparts.

Indeed, the TEU has facilitated informal interinstitutional dynamics in three ways: first, it was a catalyst for the conclusion of informal accords between the institutions; second, it demonstrated that the 'life cycle' of informal conventions often culminates in their being 'swept up' into the Treaty; and third, for the first time an amending treaty actually called on the institutions to draw up specific IIAs, therein providing the most cogent testament to date of their novel attractiveness. That the Treaty is now directly mandating them has the effect of legitimating all existing IIAs, as well as the myriad less formal conventions.

The statistics in Section 3 indicate the institutions are increasingly reliant on more formal varieties of conventions, viz. IIAs, as devices for resolving policy problems and political conflicts in-between the grand formal bargains that take the form of treaty amendments. The number of IIAs has shot upward in recent years. The statistics also offer evidence that the average level of formality of IIAs is increasing. And IIAs are becoming increasingly sophisticated, as evidenced by the seriousness of the negotiations, the attention of the press, and the concerns being raised in Member State parliaments.

Less clear, however, is what sort of aggregate effect informal conventions—and IIAs in particular—are having (Section 3 sought to fill this lacuna). The evidence presented in this paper indicates that the impact of informal interinstitutional dynamics, when viewed as a whole, is modest. The central question of the study asked whether IIAs contribute to the institutionalization of the EU or integration or both. These two potential outcomes were delineated for the purpose of providing an appropriate analytical framework within which to interpret the findings of the study; they constitute the parameters within which the overall outcome is likely to lie. The empirical evidence presented above points to the conclusion that their effect actually lies somewhere in-between.

Neither Institutionalization Nor Integration

The effects of IIAs involve a fair amount of institutionalization—the entrenchment of existing procedural norms—but clearly something more significant is also taking place. Nonetheless, despite the increased activity in the informal sphere, the IIAs reached do not amount to hard and fast institutional-based integration—a redistribution of legislative power among the institutions—as very little direct legislative power has been transferred from one institution to another. Integration has occurred, but at the margins mainly.

It is more appropriate to speak of informal interinstitutional dynamics having engendered a slow, steady shift in the institutional balance of the EU, a shift which involves more than a mere entrenchment of the status quo but less than dramatic transfers of power. Thus, interspersed between the more notable large-scale institutional transformations brought about by formal treaty bargains, relations between the institutions are also changing as a result of informal bargains brokered separately.

This change is neither overt nor even deliberate at times; rather, it takes place gradually—sometimes over rather protracted periods—as new conventions require time to congeal into behavioral norms and rules. This phenomenon can be characterized as 'institutional displacement,' for the informal conventions serve to gradually displace previous interinstitutional frameworks with slightly altered frameworks. The relational change between the institutions occurs in haphazard series of small steps, as opposed to large leaps.

However gradual the displacement, informal conventions clearly involve 'history-making decisions' which have re-engineered the EU in constitutional terms. The cumulative effect of interinstitutional dynamics has been to make the Commission and the Council more accountable to the Parliament and to place the Parliament and the Council on slightly more equal terms.⁴⁹ The Parliament has augmented its scrutiny of and control over the Commission primarily by using informal conventions to build on its formal power of dismissal, as exemplified by inroads it made in

⁴⁹Westlake would appear to concur. See Westlake, 1994a, 38. However, as indicated earlier, informal conventions have not always served purely as vehicles for the power drives of the Parliament. Originally they were used strictly for the purpose of filling in gaps in the Treaty, i.e. acting as 'constitutional glue.' In the course of implementing the SEA the Parliament saw the potential for using informal conventions as negotiating tools and subsequently seized on the opportunity.

the process of appointing the Commission. However, the Parliament's primary game is being played with the Council, as most of its grievances are with that institution.

In the early days of the Community, the Parliament and the Council rarely came into contact with each other; in fact, the Treaty did not even grant the Parliament the power of asking the Council written questions. Now contact is frequent, routine, and on multiple levels, all of which has been directly contributed to by the series of informal conventions brokered in the wake of formal treaty implementations.

The more two different individual actors or competing groups come in contact with one another, the less likely it is that the more powerful individual or group will completely ignore the less powerful individual or group. "Whatever their 'bottom line' in terms of formal powers, MEPs also exert influence by their very presence in the discussions The fact that their formal rights in the legislative procedure have increased can only reinforce their informal role."⁵⁰ Hence, the Parliament is better positioned as a result of informal conventions to make use of its formal powers, which have also been increasing substantially over the past decade.

The Parliament has shown itself rather adept at exploiting the opportunities it receives to engage both the Council and the Commission. Generally speaking, in its negotiations with the other institutions the Parliament has had a fair degree of success in managing to secure at least a handful of concessions by pressuring its counterparts to grant it a lot more authority than it is likely to receive. This is the Parliament's 'shoot for the moon' strategy alluded to earlier: by bombarding its institutional counterparts with requests and demands, and with increasingly greater authority, the Parliament tends to attain some if not all of its objectives. In this scenario the other two institutions find themselves hard pressed not to give in to the Parliament in *some* way, if for no other reason than simply to appease it.⁵¹

Importantly, the ratchet effect ensures that once something is agreed, it won't be reversed in the future. Reversions are prevented because the binding nature of informal conventions, backed up

⁵⁰Jacobs et al., 203.

⁵¹EU official, interview by the author, Council of Ministers, Brussels, July 25, 1994.

by political goodwill and the specter of political sanctions, prevents any significant changes in the arrangements made unless mutually agreed to by the institutions. As the ratchet effect prevents any backsliding or unraveling of informal commitments made, there is a one-way direction to informal interinstitutional dynamics. This is not a teleological claim. My argument is not that there is an inexorable element to informal interinstitutional dynamics; rather, while there may or may not be further integration, there most certainly won't be any backsliding in the informal sphere. In fact, the ratchet effect not only locks in agreements, but also increases the likelihood that future conventions will be brokered.

With more formal powers, the Parliament is able to bring more pressure to bear on the Council and Commission. Moreover, as the Parliament has lived up to its end of IIAs and other types of informal conventions, its legitimacy in the eyes of the other institutions has grown considerably. No longer, it would seem, can the Parliament be maligned as the Don Quixote of European integration.

Not only are current rules extended, but new rules are created. The 1975 Joint Declaration in the budgetary sphere achieved this by obliging the two institutions to sit down with each other in a conciliation committee specifically designed to facilitate direct negotiation over their budgetary differences. Although the Council is still not under a formal obligation to agree to the Parliament's terms, the two sides have proved generally able to reach consensus in this forum. Another salient example involves the 1994 Comitology IIA under the provisions of which the Parliament garnered a legitimate legislative power, viz. consultation, which it lacked prior to the agreement.

IIAs have also effected shifts in policy frameworks, though only in the case of Category III agreements, i.e. the most formal type of IIA; still, this is notable. The Parliament has utilized these agreements to reframe the context in which specific policy outcomes are pursued. This means of augmenting its authority is more indirect than gaining new powers, but no less important. The Parliament has found that one of the best ways to win at the policy game, which is what the shift in the EU institutional balance is ultimately about—achieving greater powers in order to pursue its policy

objectives—is to frame an issue or a scenario to its advantage. This is precisely what the Parliament has achieved in recasting the EU's budgetary framework and elsewhere.

As a result, because it is achieving more of its policy objectives, the Parliament occupies a better position vis-a-vis the Council in the altered framework than it did in the previous framework. In other words, relative to where it was in the 1970s, notwithstanding its newer formal powers the balance between the two institutions has shifted slightly in the Parliament's favor. Hence, although the Parliament has gained only four new advantages from IIAs—to force the Commission to withdraw proposals it rejects under co-decision, to offer its opinion for all comitology committees under Article 189b, to compel the Council to engage in budgetary conciliations, and to convene budgetary trialogues—it has modestly augmented its influence in the policy-making process.⁵²

Influence is by nature a difficult phenomenon to measure, partly because it can be gained and exercised gradually and partly because it can take any of several forms. Influence can be the direct consequence of a particular structure of formal power; a political actor can force or compel another political actor to do something it otherwise would not; and a political actor can set the agenda in such a way that its own preferences tend to emerge on top without explicit coercion taking place. Each of these is an example of the operation of influence.

Informal interinstitutional dynamics in the EU appear to exemplify the third of these scenarios. Short of a major transfer of power from the Council to the Parliament or the Commission, IIAs give rise to institutional displacement, a subtler dynamic which shifts relations between the institutions more by altering the policy framework than by redistributing legislative powers. They have resulted in tilting the institutional balance slightly toward the Parliament and have re-engineered the 'constitution' of the EU—entirely by informal means.

⁵²These newly acquired advantages/powers for the Parliament stem primarily from the IIAs brokered in the budgetary sphere, which I have not analyzed here. See my mimeo, "The Impact of Informal Interinstitutional Dynamics on European Union Policy-making."