

Formal and Informal Institutions Under Codecision: Continuous Constitution-Building in Europe

HENRY FARRELL* and ADRIENNE HÉRITIER**

Current approaches examining the effect of institutions on policy processes have difficulty in explaining the results of the legislative process of codecision between the European Parliament and Council within the European Union. The formal Treaty changes that gave rise to codecision have, in turn, given rise to a plethora of informal institutions, in a process that is difficult to understand using dominant modes of analysis. This article provides a framework for analyzing the relationship between formal and informal institutions, showing how the two may be recursively related. Formal institutional change at a particular moment in time may give rise to informal institutions, which may, in turn, affect the negotiation of future formal institutions. The article applies this framework to the codecision process, showing how the codecision procedure has led to the creation of informal institutions and modes of decision-making, which have affected subsequent Treaty negotiations. Through strategic use of the relationship between formal and informal institutions, the European Parliament has been successful in advancing its interests over time and increasing its role in the legislative process.

INTRODUCTION

The codecision process, in which the European Parliament (EP) and Council work together in the legislative process, poses important puzzles for political scientists.¹ On the one hand, codecision is the subject of a burgeoning body of theoretical literature, which seeks to analyze the effects of the Treaty articles governing codecision from the perspective of game theory (see, in particular, Crombez 1997, 2000; Moser; Tsebelis; Tsebelis and Garrett 2000). On the other hand, the empirical literature and accounts by practitioners (Corbett 2000, 2001; Shackleton 2000, 2001) provide a picture of the codecision process that bears little resemblance to the assumptions or conclusions of formal modelers. Empirical evidence suggests that the Treaty articles governing codecision and other legislative procedures provide only a beginning point for interactions between the EP and Council. A profusion of semiformal, quasiformal, and infor-

*University of Toronto

**European University Institute Florence

mal procedures has sprung up around the codecision process that seem to have important effects on the behavior of these collective actors and their relationships (Shackleton 2000).

In this article, we seek to understand the dynamic interaction between formal and informal institutions that has led to this and that, we argue, has important consequences for legislative outcomes and the relative decision-making power of European political actors. These developments not only are of considerable empirical and practical relevance, but also throw new light on theoretical debates about European integration. In recent years, there has been an important shift in the center of gravity of European Union (EU) studies from a debate between intergovernmentalists and neofunctionalists to one between rational-choice scholars and constructivists (Jupille and Caporaso 1999) and/or historical institutionalists (Pierson). This realignment is only partial, but it has led to the creation of theoretically distinct approaches to the study of the EU.

Scholars from different perspectives have created competing frameworks to explain the workings of the EU's institutions. Rational-choice scholars have turned to the explanatory power of noncooperative game theory and have sought to explore how particular institutional structures may consistently produce certain equilibria in one-shot games (the structure-induced equilibrium approach). Constructivists, for their part, have sought to examine the importance of identity as a factor affecting institutional change (Checkel and Moravcsik 2001) and the longer-term, reflexive processes in which intergovernmental negotiations are embedded (Christiansen, Falkner, and Jørgensen; Christiansen and Jørgensen). Finally, historical institutionalists have sought to borrow from both approaches (Hall and Taylor) to explore the evolution of specific aspects of the EU over time. They have emphasized the extent to which decisions taken at time t may have unforeseen consequences in $t + 1$ and later (Pierson).

In this article, we seek to build upon important assumptions and claims of game theory, but come to rather different conclusions than those of the prevalent approach. We suggest that the relationship between formal rules and informal institutions seen in the codecision process cannot properly be understood through a focus on one-shot interactions. Instead, it is necessary to turn to "folk theorem" results and mechanisms of equilibrium selection such as bargaining power (Knight 1992) to explain how the formal rules governing the codecision process have led to the creation of informal institutions, and how these, in turn, have affected the course of constitutional change. We argue that this may offer important insights about integration in the EU, which has been undergoing a process of "continuous constitution-building" since its inception, gaining momentum since the Single European Act. Formal institutional changes made at the Treaty level lead to processes of informal institution-building among legislative actors, which may, in turn, affect future formal Treaty changes. In this article, we seek to provide specific examples of this happening in EP-Council relations. We discuss how this may lead to a more important role

for the EP than one-shot examinations of EP-Council relations would suggest, and to an increase in this role over time. While we build up from the basic concepts of rational choice in this paper, we seek to incorporate historical institutionalism's insistence that actors may not take account of the long-term consequences of their actions,² as well as constructivism's emphasis on reflexivity. Specifically, we seek to show how institutional change is not driven by the preferences of actors who remain off stage, but rather results from a dynamic process of bargaining in which the creation of formal institutions cannot be examined in isolation from a continuous process of reiterated social interaction between the relevant actors.

We begin this paper by providing an account of our theoretical framework. We seek both to show how informal institutions may affect outcomes and to provide a more general account of institutional change, illustrating a mechanism that links formal and informal levels of institutionalization together. We then seek to test our theory against empirical evidence. In particular, we examine whether our hypotheses are supported or disconfirmed by evidence from the introduction and subsequent evolution of codecision. We note that codecision is almost certainly the area of EU decision-making most frequently studied by proponents of the one-shot game approach. While their claims have already been subjected to vigorous criticism (Corbett 2000, 2001; Rittberger), we seek to advance on the work of these critics by applying an alternative model, with testable implications, to the available empirical information on the consequences of the codecision procedure for the legislative process. Insofar as the mechanisms we identify give a more complete account of the consequences and evolution of the codecision procedure than the competing approach and further incorporate a dynamic element, our model advances the debate. We briefly outline the codecision procedure and its evolution over time. We then seek to evaluate the empirical evidence in light of our hypotheses and of hypotheses derived from the competing approach. We conclude by addressing the more general implications of our model.

THEORETICAL BEGINNINGS

As stated in the introduction, we adhere to the basic microfoundations of rational-actor theory in this paper. Thus, we share a key set of assumptions with the one-shot game approach about the nature of human action. While we recognize that these assumptions are restrictive and sometimes inaccurate, we contend that they may still provide useful insights about social behavior.

Where we differ is in our account of the specifics of the strategic setting within the EU: in contrast to the vast majority of game-theoretic work on the subject, we suggest that this setting is better considered as a set of infinitely iterated games than as a set of disconnected one-shot interactions. Most game theoretic accounts assume that interactions in codecision are one-shot games so that they can derive clear hypotheses as to the effects of institutional structures on actors' behavior. However, as Keith

Dowding (131) notes, actors “play the codecision game repeatedly, . . . so backwards induction in a one-shot game does not represent the reality of bargaining between them in any single legislative debate.” In such situations, “folk theorem” results, which suggest that virtually any “reasonable” equilibrium is possible in infinitely repeated games with sufficiently low discount rates, provide a better picture of social interaction (Osborne and Rubinstein). The problem with these results is their indeterminacy: it is not possible to discern the same precise relationship between institutional structure and outcomes that is present in many one-shot games. As R. O. Keohane pithily describes it, equilibria multiply like rabbits in Australia, and are about as useful.³

Thus, we suggest that it is necessary to go outside game theory proper in order to discover mechanisms of equilibrium selection that would allow falsifiable predictions to be made about outcomes. There are many such mechanisms in the literature, including power (Knight 1992), cultural beliefs (Greif), “fuzzy” commitments (Kreps 1990b; Miller), and focal points (Schelling; Sugden). In this article, we focus on one of these mechanisms—power—and seek to explore how it affects institutional evolution and, thus, outcomes.

INSTITUTIONAL CHANGE IN THE EUROPEAN UNION

Building from the foundations described above, we seek to make two key arguments about institutional change. First, we argue that *informal institutions* may emerge from repeated interactions and may have an important impact on institutional outcomes. These informal institutions may be influenced by the formal framework in which actors operate, but they will not be determined by this framework. This means, inter alia, that it will be extremely difficult for actors (in the EU context, the member states) to predict *ex ante* the *ex post* effects of formal institutional changes they introduce.

Second, we argue that under certain circumstances, one can identify a *recursive relationship* between formal and informal institutions. When informal institutions come into being, they represent a new status quo, which affects subsequent Treaty negotiations. Actors that have relatively little direct influence over formal Treaty negotiations, such as the EP, may thus have an important indirect influence insofar as Treaty changes reflect informal institutions over which the EP has bargained. Linkages of this sort are more likely in polities such as the EU in which the constitutional dispensation (the Treaties) are subject to frequent revision (Héritier 2001a). The process of continuous constitution-building in which the Treaties have been revised every few years by member states in inter-governmental conferences (IGCs) gives actors that are formally excluded from the interstate bargaining process incentives and opportunities to shape the constitution of Europe through informal institutional bargaining on the ground.

To develop these points, we seek to define more clearly what we mean by formal institutions and informal institutions. We adhere to the frequently stated distinction between organizational actors (sets of actors united in pursuit of a common goal) and institutions (sets of rules that structure social interaction) (North).⁴ In the European context, the European Commission, the EP, and the Council of Ministers may, for our analytical purposes, be seen as organizational actors, and the rules that structure their interactions as institutions. One may further distinguish between formal institutions, written rules enforced by a third party, and informal institutions, which are enforced by the actors themselves (Knight 1992).

In the context of the EU, as in many national legal systems, ultimate legal authority descends from a constitutional document—the Treaty of Rome, in this case—and the interpretation of this constitution by specialized judges (Moral Soriano; Stone-Sweet). Thus, there is a body of law—or formal institutions—that provides a basic starting point for interaction between parties. In particular, the Treaty texts lay down the specific responsibilities of the various actors—the European Commission, the Council of Ministers, the EP, and the European Court of Justice—stating their specific competences. While the Court of Justice plays a vital—and often creative—role in interpreting the Treaty texts, it is the member states that are responsible for creating and revising the Treaty in IGCs, which have taken place every few years since the mid-1980s. This has led some scholars to argue that the member states are effective principals, which set the constitutional bounds within which actors such as the Commission operate and constrain them to behave as reasonably faithful (if sometimes resentful) agents on the member states' behalf (Garrett; Moravcsik).

However, basic results from social-choice theory suggest that the kinds of formal institution laid down in the titles of the Treaty or descending from them *cannot* lead to efficient outcomes reflecting the interests of the principals who have created the constitution under reasonable assumptions (Miller). As Gary Miller and Thomas Hammond (7) describe it, “[T]here [are] built-in logical contradictions which limit the ability of a constitution to reconcile the conflicting interests of political actors and economic efficiency.” Further, contracting theory suggests that it is impossible to create institutional arrangements that will provide precise guidance for all contingencies in complex social situations; this is all the more so with texts, such as the Treaties, that use relatively broad language. Insofar as power is delegated to actors with differing interests, there will necessarily be ambiguities in the constitutional framework governing these actors, which actors will seek to exploit for their own specific purposes. We predict that because of these ambiguities, the Treaties will not be “the basis of all actors' behavior,” as G. Garrett and G. Tsebelis (356) argue. Instead, the Treaties will provide an initial basis for bargaining between the Council (as the most direct representative in the policy-

making process of member-state interests) and the EP, without determining the results of the bargaining process.

As we have suggested, EP-Council interactions are best treated as infinitely repeated games, which actors will perceive as being linked to each other. The bargaining processes within these games are likely to give rise over time to informal norms and rules of procedure, as repeated interactions lead to expected regularities in behavior.⁵ How do these informal rules come into being? In this article, we follow Jack Knight (1992, 1995; see also Farrell and Knight) in arguing that power differentials may have a decisive impact on the shaping of those informal institutions that have distributional consequences.⁶ In the specific context of the EU, several important factors may affect the relative power of actors to achieve the institutional outcomes that they prefer. These factors all affect the ability of actors to make credible threats of action that others will find deleterious to their interests (primarily threats to block or slow legislation). As we illustrate, apart from the formal institutional framework, there is *prima facie* reason to believe that these factors work in favor of the EP in bargaining situations.

1. The formal institutional framework. While formal institutions (and in particular the Treaties) do not decisively determine the relative power positions of actors, they may have an important influence upon them. Formal institutions grant general competences to actors and have a substantial effect on their ability credibly to threaten specific kinds of action. Formal institutions' actual effects do not necessarily reflect the intentions of their designers, both because it is impossible to predict all contingencies that these institutions must deal with in advance⁷ and because the Court of Justice, which provides definitive interpretations of these institutions when they come into dispute, has considerable autonomy from the member states (Moral Soriano; Stone-Sweet).⁸ Further, particular formal institutions—such as the unanimity rule, which gives the right of veto to every single decision-making participant—invite the emergence of informal institutions to avoid deadlock situations (Goodin; Héritier 1999).
2. Differing time horizons. Different actors have different priorities over legislation; some actors take a longer view than others (Pierson). The rotation of the chair of the Council of Ministers every six months may mean that Council chairs have shorter time horizons than other legislative actors such as the Commission or the EP; much of the chair's prestige is vested in its ability to bring legislation through successfully in the six month period of office. Shorter time horizons may make actors vulnerable to pressure; other actors may be willing to delay legislation for long periods, or to threaten such delay, if this serves their particular interests.
3. Differing sensitivity to failure. Some actors may be less affected by failure to reach agreement on a specific item of legislation (or legis-

lation in general) than others because of their relative indifference. These actors will be better able to make credible threats with regard to this item (or items) of legislation in order to enhance their overall position in the legislative process. Parliamentary elections are second-order elections (Hix), so members of the EP (MEPs) face less pressure from their electorates than do the national governments of member states, and the EP is less vulnerable to many policy failures than are the member states.

4. Differing levels of resources. Some actors are less well endowed with organizational capacity (specialized staff and other resources) than others. These actors will be more vulnerable to threats to draw out legislative negotiations insofar as they may find themselves without the organizational means to cope with lengthy discussions. The Committee of Permanent Representatives (COREPER) represents the Council in many aspects of negotiations—a subdivision of COREPER, COREPER I, is responsible for most of the policy areas subject to codecision. Under the new codecision procedure, the chairman of the COREPER has to deal with a wide range of codecision issues with relatively limited specialized staff, while COREPER's negotiating partner in the EP, the relevant committee, can concentrate on one area. This means that COREPER prefers to avoid long, drawn-out negotiations, where it has to expend substantial organizational resources.

These four factors are likely to have important—and differential—affects on the ability of actors to shape terms of interaction that are favorable to them. Over time, a basic *modus vivendi* is likely to be hammered out, consisting of informal rules that provide a basic structure to interactions between actors by coordinating expectations. These rules will reflect the differential power of actors to make credible threats of which other actors must take account. This process of informal institutionalization is likely to affect outcomes in two main ways: (1) informal institutions may modify or even supersede formal procedures; (2) substantive issues may be instrumentalized to establish informal institutional gains. First, when informal institutions have arisen, they will structure the legislative process. They may have implications for legislative procedures, affecting the practices through which legislation is drafted and amended, effectively modifying—or, in extreme cases, replacing—the formal institutions governing interinstitutional relations. Second, while actors struggle over informal rules, they may seek to demonstrate their power by delaying or blocking individual items of legislation that are important to others, so as to demonstrate that they are willing to endure breakdown, and thus increase their perceived bargaining strength.

Not only may formal institution-building affect informal institution creation, but informal institutions may recursively lead to changes in formal institutions in subsequent time periods. The main processes of formal institution creation (IGCs) take place, not in a vacuum, but in the

context of an iterated relationship, in which member states know that Treaty rules will have to be applied in the context of their relationship with other actors in the legislative process. Thus, member states are likely to take account of the interaction between the formal Treaty changes that they propose and the informal institutional rules that have come into being as a result of previous Treaty changes. First, we predict the *confirmation of informal institutions*: member states will sometimes wish to formalize bargains that have been made at the informal level in order to give them increased certainty, thus improving their ability to coordinate action (Carey). Second, Treaty change may consist of *closing loopholes*; in some instances, member states will seek to redress the balance of bargaining through foreclosing possibilities that allowed unexpected results (“closing loopholes”).⁹ However, their power to do this is limited by the unanimity requirement for treaty changes and the virtual impossibility of ever developing a “complete contract.” Third—and most interestingly, perhaps—formal institutional change may seek to *extend upon informal institutions*: member states may bring through changes in the Treaty that are intended to respond positively to the cooperative opportunities arising from informal institutionalization, even if this implies a redistribution of competences. As previously stated, even when they shift the balance of power away from member states, informal institutions may also carry considerable efficiency gains, insofar as they stabilize cooperation between the EP and Council and thus mitigate the risk of opportunistic blockages in the legislative process, speeding it up. Once informal institutions have become established, member states may be prepared to make Treaty changes that are intended to develop these processes of informal institutionalization even more, even if these changes further shift the balance of power away from the Council and toward other actors.¹⁰ The secondary processes of informal institutionalization that these give rise to may, in turn, lead to yet further Treaty changes, in a recursive process.

Thus, our argument offers an account of the recursive relationship between formal and informal institutions which seeks, in contrast to the more prevalent one-shot game approach, to understand how formal institutional change may become imbricated with processes of informal institutionalization. For convenience, we seek to derive four hypotheses from our approach:

1. Actors (the Council and the EP) will behave as if different instances of the codecision process are linked, conditioning their cooperation on their past experience of or future expectations regarding the behavior of others in codecision as well as—or even instead of—the specific issues involved in any item of legislation. Specifically, actors will be prepared to forego short-term gains in a specific instance of codecision in order to “threaten” or “punish” other actors and so achieve more attractive payoffs over the long run.

2. As actors interact in iterated rounds of the codecision process and bargain with each other over the terms under which the legislative process is conducted, informal institutions will be likely to come into being that affect actors' behavior independently of the formal institutional framework and, indeed, will likely modify the effects of this framework.
3. Informal institutions will reflect the relative bargaining power of actors, which, in turn, is a function of their power to make credible threats to block or retard the legislative process. Their relative power will be determined by formal institutions, time horizons, sensitivity to failure, and differential levels of resources.
4. Informal institutions that arise from a given set of Treaty changes may affect subsequent rounds of Treaty negotiations in which (1) member states seek to formalize informal bargains to improve their coordinative capacity, (2) member states seek with more or less success to block loopholes that have increased the informal bargaining power of other actors, or (3) member states wish to take advantage of the improved possibilities for cooperation offered by informal cooperation by introducing new formal institutions. Where (3) is true, member states may be prepared to trade power in the decision-making process against improvements in efficiency.

ASSESSING THE CASE FOR INFORMAL INSTITUTIONALIZATION

In this section, we seek to assess the theoretical arguments made above. Were legislative actions linked together by actors in the policy-making process? Did bargaining give rise over time to informal institutions? Did such informal institutions reflect the bargaining power of actors over multiple iterations? How do formal institutional rules, time horizons, sensitivity to failure, and differential levels of resources affect the outcomes in terms of informal institutions? Or, alternatively, were principals (member states) effectively able to use intergovernmental negotiations to control outcomes? We seek to examine these questions in light of the evidence provided by the codecision procedure. We begin by giving a brief outline of the codecision procedure under both Maastricht and Amsterdam. We then go on to examine the impact of the introduction of codecision and show that it gave rise to bargaining processes, which in turn led to informal institutional rules that structure the interaction between the Council and the EP. We conclude by discussing the current wave of informal institutionalization and its likely results.

The legislative codecision procedure was introduced in the Treaty of the European Union (TEU) (Article 189b; now Article 251) in 1993. In its first incarnation, it applied to fifteen policy areas, including the free movement of workers, the freedom of establishment, services, the harmonization of the common market, mutual recognition in the common market,

education, trans-European networks, public health, culture, consumer protection, research and technology, and the environment. The formal procedures of codecision are well documented in the literature (see, e.g., Corbett, Jacobs, and Shackleton). Under this procedure, the EP delivered its opinion on the Commission proposal before the Council adopted a common position. In a second reading, the EP could then amend the common position of the Council. If the Council did not approve all of the EP's amendments, a conciliation committee (CC), comprised of fifteen members of the Council and the EP, was convened (EP 1999, 3–4). The CC had six weeks to draw up a "joint text," which was then submitted to the EP and the Council. If this failed to meet approval, the act was not adopted. If the CC failed to reach an agreement, the Council could confirm its common position, and the EP could then reject the act in plenary with an absolute majority (EP 1999). In the first five years of application of the codecision procedure, there were 165 codecision procedures, of which 66 (40 percent) were subject to conciliation procedures. In three cases, no agreement was reached (EP 1999, 4).

The Amsterdam Treaty has changed the codecision procedure in important ways. It makes "early agreement" possible in codecision: the EP and the Council can conclude the decision-making process at first reading without the Council having to adopt a common position. Furthermore, where no agreement was reached in the CC, the draft act fell and the Council could not reintroduce a common position. The Amsterdam Treaty also more than doubled the number of areas subject to codecision, from fifteen to thirty-eight. Aside from the first reading in the EP, every phase—from adoption of the common position by the Council to approval of an agreement in conciliation—is subject to a time limit.

Bargaining and the Formation of Informal Institutions after Maastricht

While codecision as it was introduced in Maastricht clearly aimed to give the EP a new say in the legislative process, the extent of the EP's new role and the implications for the EP's relations with the Council and Commission were left undefined in important respects. Initially, the Council saw the EP's new role as primarily consultative, a cosmetic enhancement of the EP's previously somewhat exiguous role in the legislative procedure (interview with Council Officials A and B, October 2001). COREPER functionaries sought to maintain an effective veto over the legislative process, refusing to engage in bargaining and merely indicating to the EP those amendments that it was prepared to accept and those amendments that it would reject (the latter naturally being rather more substantial than the former) (Shackleton 2000; interview with Commission Official, September 2001). On one reading, the treaty articles describing codecision would have allowed the Council to do this, effectively maintaining its dominant role in the legislative process. For its part, the EP interpreted the provisions governing codecision in a maximalist fashion. It perceived codecision as

just that: decisions taken jointly by two coequal legislative actors. It further sought to extend the lessons of codecision into the vexed area of comitology (the complex system overseeing the implementation of legislation), where the Council predominated. The EP held that the introduction of codecision meant that it should enjoy an equal role in comitology; after all, it was supposedly just as much a principal as the Council.

The profound differences in interpretation of what Maastricht actually meant led to tensions between the Council and the EP (EP 1999, 5). The Council refused to engage in substantive negotiations with the EP and thus sought to keep the EP's role at a minimum, while the EP, for its part, sought to use the threat of blocking or slowing legislation to win concessions. The EP threatened to hamper the legislative process as much as possible in order to win concessions, and to a very great extent it carried through its threat (Bergström 2003). In the words of one MEP: "I warn the Council that . . . if the [Council] working group continues to be so restrictive on Parliament's rights to intervene [in matters where comitology impinges upon the legislative sphere], then there will be no agreement and we will . . .—codecision procedure after codecision procedure—. . . go all the way to conciliation" (Richard Corbett, quoted in Bergström 2003, 69).

This resulted in deadlock. The EP, however, had less reason to cave in than the Council and COREPER and carried through on its threat to impede legislation. Despite its nominal role as the "democratic" element of the EU, it faced less pressure than did the member-state governments—especially the Council presidency—to legislate on key issues and was demonstrably quite willing to obstruct specific items of legislation in order to assert principles.¹¹ The EP clearly established linkages between nominally unrelated items of legislation, insofar as these items and the Council's handling of them had negative implications for the EP's role in the decision-making process.

This culminated in the Open Network Provision Directive on Voice Telephony in 1994, the first (and, to date, only) instance in which the Council reintroduced its common position after a failure to reach agreement in conciliation. While it would not have been difficult to negotiate a compromise on the issues at hand (Corbett, quoted in Bergström 2003), the EP voted down the directive. This had two aims. First, it demonstrated the EP's ability to block legislation and thus to render the Council's formal power to reintroduce a common position ineffective (Hix). The EP had introduced an internal rule of procedure, Rule 78 (Corbett 2000; Hix), which was designed specifically to back up the EP's threat to vote down the Council's common position if it were ever reintroduced. As it has transpired, the Council has not attempted to reintroduce a common position since then. Second, the EP sought to underline its demand to share the "powers of political supervision" in comitology, launching "an offensive which was to lead to a more than one-year-long breakdown in institutional co-operation" (Bergström, 33).¹³

The result of this first stage of bargaining after Maastricht was a gradual recognition on the part of the Council, that the successful opera-

tion of the codecision procedure required the EP's cooperation. Over the 1994–1995 period, the Council gradually came to accept the EP's role in the process and to seek common ground with the EP on how the legislative process should operate, so that sensitive items of legislation could go through with a reasonable degree of speed and certainty (EP 1999; interview with Council Officials A and B). Increasingly, informal meetings were held between the vice presidents of the EP, the Council presidency, the rapporteur, the chairpersons of the committee concerned, the EP delegation, and the Council working party in order to mitigate conflicts and negotiate compromises. These meetings, called trialogues or trilogues, were originally introduced after the second reading but before conciliation, so as to allow negotiation outside the (unwieldy) CC structure.

[After] the rather dramatic first conciliations we had... COREPER and Council had to recognize that Parliament had the role of copartner in legislation. The confidence-building really started with the introduction of the informal trialogues, because the informal trialogues enabled both sides to speak more frankly, and to explain more in detail what the underlying reasons are. (interview with Council Official B)

The negotiating members of the trialogues had explicit mandates from the EP and COREPER delegations. Step by step, the trialogues became established as normal practice, so that they were sometimes even initiated before the second reading (EP 1999, 6). "Apart from a few extremely formal encounters, we have reached the point of almost weekly informal meetings" (EP 1999, 7–8). Joint working documents for the informal meetings and EP committees were drawn up alternately by the EP and the Council (EP 1999, 7).

As described by an official of the EP, "This institutional innovation has . . . served to generate a variety of procedural norms and shared beliefs about how the parties should behave which can be described as 'rules of engagement.' By the end of the Maastricht era, they had become so self-evident that no one contested them" (Shackleton 2000, 334). These norms involve the expectation that trialogues themselves should take place, the rules under which both sides seek agreement on points of contention, and the willingness of negotiators on each side to seek to make deals stick with the bodies that they represent. At a semiformal level, the Council and EP have negotiated six important new interinstitutional agreements involving new procedural rules (Stacey, 39, 47), along with less important rules that are necessary to add specificity to vague provisions (Stacey, 37). These clearly represent a concession by the Council to the need to involve the EP in direct, informal negotiations in which the Council may have to modify its negotiating stance substantially to reach agreement.

From Informal Institutions to Treaty Changes in Amsterdam

The initial phase of informal institutionalization had important consequences for the formal changes to the codecision procedure that were

made in the Treaty of Amsterdam. As we have stated, two important changes were made to the procedure. First, the Council's ability to reintroduce its common position was removed. Second, the possibility of early agreement between the Council and the EP was introduced. Both of these changes can be traced back to the bargaining and informal institutions that emerged after Maastricht.

The first of these effects has been well documented in recent scholarly discussions of codecision. The EP's credible threat to vote against common positions when reintroduced, as manifested in the ONP Directive on Voice Telephony, established an informal expectation that the Council would not seek to use its formal third-reading ability to reintroduce a common position after conciliation had failed; it knew that any common positions thus introduced were likely to be voted down. The effects of this threat on the subsequent Amsterdam negotiations have been the subject of considerable recent discussion (Corbett 2000, 2001; Garrett and Tsebelis; Hix). Garrett and Tsebelis (356) argue, following A. Moravcsik and K. Nicolaidis, that member states' decision to increase the powers of the EP was largely a consequence of left-wing victories in France and Germany. Thus, they imply, the EP's efforts to remove from the path of play the Council's right to reintroduce its common position was irrelevant to the later decision by the member states at Amsterdam formally to remove it. However, in making this argument they appear to be in a minority of two. Richard Corbett (2000, 2001) finds that the EP's success in changing everyday practice "paved the way" for the subsequent Treaty revision. In a detailed analysis, S. Hix (2002) treats the EP's success in altering the application of rules on the ground as clear evidence of how the EP may successfully affect IGC negotiations.¹⁴ In its submission to the Amsterdam IGC, the EP argued that the provision had only been used once, unsuccessfully, so that formally removing the possibility would not affect the balance of power between legislative actors. Further, the EP argued that removing the procedure would improve the efficiency of decision-making. While some figures on the Council secretariat were opposed to change (interview with COREPER representative, October 2001), member states, after some initial reluctance, were persuaded formally to remove the possibility. Hix interprets the decision to change the third reading procedure in the light of one-shot games played by the EP and Council and points to member-state revisions at Amsterdam that sought to forestall future creative interpretations by the EP of treaty rules.¹⁵ However, this may more readily be seen as evidence of an *iterated* process of constitutional change in which the original Maastricht provisions on codecision were themselves, in part, the product of previous rounds of informal rule-making.¹⁶

Second, the informal institutional arrangements created around the conciliation procedure under Maastricht, the dialogues, and informal rules covering relations between the EP and Council had an important influence on negotiations at Amsterdam. Here, it was not the EP so much

as the Council secretariat that pushed for formal changes on the basis of informal institutions that had been hammered out between Council staff and the EP. The creation and success of the dialogues had fostered the perception among influential members of the Council secretariat that new modes of interaction with the EP were possible. However, the emphasis on conciliation and on formal, frequently cumbersome procedures meant that decision-making was still awkward in many instances. The Council, which was relatively understaffed, anticipated increasing difficulties in dealing with codecision, especially in a context in which the number of areas covered by the procedure was expanding considerably (Shackleton 2000). Consequently, they were prepared to trade off a faster and more effective decision-making process against increased reliance on informal modes of decision-making and, by extension, a greater role for the EP in setting the legislative agenda. Accordingly, staff on the Council Secretariat proposed to the IGC that the Treaty provisions covering codecision be amended to allow a legislative “fast track.”

As conciliation rather prolonged the procedure, this was the compensating measure, and introduc[ed] the possibility of a first reading agreement. This was a proposal that came initially from the Secretariat in the Council. (interview with Council Official B)

Early agreement, if it was to work, clearly required the kinds of informal cooperation that had come into being under the process of informal institutionalization following upon Maastricht (interview with Council Official B). Council officials anticipated this in their original proposal; indeed, without such informal links, early agreements would have been impossible. They would require early and continual contacts between the Council and the EP in which the Council clearly made important long-term concessions (interview with EP Official, March 2001; with Council Officials A, B; with COREPER representative), insofar as involved MEPs could exercise a new and sometimes decisive role influencing discussions within the Council before the Council had adopted a common position (interview with MEP A).¹⁷ In the words of a Council Official:

[I]n former times, we practically always had our common position ready when Parliament finished its first reading. And . . . it was politically too complicated to change this . . . almost existing political agreement, so nothing of Parliament’s amendments was taken on board. And then Parliament reconfirmed most of the amendments in second reading, and we had most of the amendments in conciliation. So this was the usual, this comes from the old times when Council could always overrule Parliament. Since the new procedure, since the Amsterdam Treaty, since we had this possibility to come to agreement on the first reading, . . . the Council is respecting this very thoroughly. (interview with Council Official B)

Bargaining Over Informal Institutions After Amsterdam

The changes to the formal rules of codecision made in Amsterdam led to a second round of adaptation by the EP and Council. Amsterdam both

expanded the number of procedures subject to codecision and shortened the legislative timetable (EP 1999). A new joint statement by the EP, the Council, and the Commission on practical arrangements for the new codecision procedures of 1999 (replacing the 1993 agreement) declared that “[T]he institutions shall cooperate in good faith with a view to reconciling their positions as far as possible so that wherever possible acts can be adopted at first reading” (European Council/European Commission). As a result, between August 2000 and July 2001, 19 (or 29 percent) of the 66 codecision dossiers were concluded at first reading and 27 or (41 percent) at second reading, while 20 or (30 percent) went to conciliation. The respective figures for the period between 1999 and 2000 were 13 (20 percent), 35 (54 percent), and 17 (26 percent) (EP 2001/1:8/52).

Amsterdam spurred the Council to press for an extension of trialogues so as to make the early agreement system workable. Immediately after the Amsterdam revisions were introduced, the Council sought to extend the dialogue system “backward” to the first and second readings.

Under the last Spanish presidency, . . . we developed the method of informal trialogues. This informal dialogue system then made its proofs, and when the Amsterdam Treaty entered into force, from the Council side, we immediately saw the chance to extend it to the first and second reading. (interview with Council Official B)

Immediately after Amsterdam, the Finnish presidency went to see the committee chairmen of the EP to propose informal meetings. While the issues involved were “very delicate,” the chairmen “were very flattered, too” (interview with Council Official B). Now the presidencies regularly draw up a calendar categorizing the sequence and urgency of codecision files and exchange views with the EP on whether first-reading agreements seem feasible (interview with Council Official B). Commission proposals are discussed on a parallel basis in the two institutions and are accompanied by regular contacts and negotiations in order to develop early agreements. This enables the EP to produce amendments at first reading that take into account the “revealed preferences” of member states before the Council has formulated a common position (Cortes, 2).¹⁸ And vice versa:

Since the Amsterdam Treaty we look at what Parliament thinks and try to incorporate this. We [delay] political agreements if Parliament is not ready. (interview with Council Official B)

As a member of the Council Secretariat describes it, “When it comes closer to voting in the EP committee, we exchange possible compromise texts to test them in the EP Committee and the Council working group and subsequently in COREPER” (interview with Council Official B). To this end, the Council carefully develops contact networks in the EP:

You need to know your Parliament. . . . You have to develop your contacts with key persons and big groups . . . such as the spokespersons of the Socialists and the Christian Democrats. You have to have them on your side. . . . [T]hey are the people with the numbers. (interview with Council Official A)

The Council has thus increasingly come to rely on informal relationships with actors within the EP in order to avoid the prospect of conciliation, which would overstrain its resources (Shackleton 2001; interview with Council Official B). While COREPER I has to deal with all codecision matters, its decision-making counterpart in the EP, the rapporteur(s) and chairperson(s) of the competent committee(s), are engaged with only a limited range of issues. "Here, MEPs have built up an expertise which is quite formidable . . . and was quite unexpected by the Council" (interview with Commission Official). Further, the possibility of concluding legislation at first reading offers the Council presidency (as distinct from the Council as a whole) an opportunity to set the political agenda. It can more easily influence the progress of a dossier and seek to accelerate proposals that it would like to see enacted during its six months in office (Shackleton 2001, 7).

Nonetheless, disagreements between the Council and the EP over the status of these new modes of informal cooperation are leading to a new round of bargaining over Council-EP relations, which may, over time, be expected to lead to a new round of informal-institution creation.¹⁹ The Council has pushed for a further multiplication and intensification of trilogues and technical meetings. It argues that it is easier for COREPER to be open about the range of views in the Council in negotiations when it deals with a small number of people in informal meetings (Shackleton 2001, 13). While it wishes to exchange information with key figures in the EP in order to facilitate decision-making and ensure that the EP does not vote down items of legislation, it wishes to do so in a fashion that has minimal impact on its own internal (consensual) forms of decision-making and does not create any precedent for EP-Council relations at the broader level.

The EP, in contrast, has a much more ambivalent view of the proliferation of dialogues and informal contacts in the early stages. On the one hand, it perceives that these create new and important agenda-setting powers for the EP in the early stages of decision-making, before the Council has reached a common position. On the other hand, this increase in influence carries a price in terms of democratic legitimacy and openness (Héritier 2001b), and may exclude smaller parties from the decision-making process. Perhaps even more pertinently, the Council's need to engage more directly with the EP in early decision-making creates new political possibilities of which the EP seeks to take advantage. Most particularly, the EP sees this as an opportunity to make the Council more directly accountable to the EP by obliging Council representatives (ministers, if possible) to come to Parliamentary committee meetings in order to present the Council's case and to negotiate concessions on behalf of the Council. As described by a Council official, senior figures in the EP acknowledge,

[Y]es, we have this strategy: we want Council to come before Parliament and answer to Parliament. That's their legitimate political aim. And we're finding

it quite difficult to battle against this, because the battleground is in Parliament, and that's where the public arena is . . . If I had to make a prediction, I would say that we will lose out over time. (interview with Council Official A)

In a recent report, the EP clearly sets out its strategy: "The Parliament should not develop informal contacts unless the Council is first prepared to make a greater effort to explain its views in committee" (EP 2001/1:29/52). And, "[O]n the basis of active Council participation in committee meetings, committees should decide what kind of contacts they are willing to agree to outside this framework e.g. trialogues" (EP 2001, Appendix V). Thus, the EP seeks to build upon the Council's increased need for informal contacts with MEPs in the legislative process by making such cooperation conditional on the Council effectively acknowledging that it is answerable to the EP. If the EP is successful in bringing the Council to do this, it will establish a far-reaching precedent for the more general relationship between the Council and the EP, which can then be formally consolidated in a future round of Treaty revision.

Actors within the EP have also sought more subtly to leverage the informal institutions established under codecision to extend the reach of codecision procedures beyond those policy areas for which it is formally reserved. Perhaps the most prominent example of this phenomenon may be seen in the area of agricultural policy. In a detailed examination of the Amsterdam negotiations, Falkner and Nentwich (2000) discuss the efforts of EP representatives to persuade member states to extend codecision to certain areas of agricultural policy. The representatives' efforts were unsuccessful: the majority of decision-making in agriculture takes place only under the consultation procedure. However, on the ground, EP decision-makers have been successful in reshaping the policy process so that decisions in this field and others are increasingly taking place "as if" under codecision, according to the informal rules of decision-making and discussion that have come to structure codecision interactions. As described by a senior Council Official, codecision

doesn't apply in agriculture or in a couple of other sectors. But Parliament's presentation now of their views on everything, follows . . . the presentation patterns that you have in codecision. And their line of dialogue with Council follows the lines that you have in codecision. . . . They are using all the practices and the procedures on the codecision side, and in that way, pushing that door open a bit further. . . . What you have from the Council's side is ministers and officials engaging in regular discussions with members of Parliament on codecision dossiers. In another dossier, which is, shall we say, somewhat similar but not under the codecision procedure . . . the same people are involved, . . . and you'd automatically engage in the other dialogue mode. (interview with Council Official A)

In short, MEPs are establishing procedures on the ground that they failed to win at the Amsterdam IGC level.

Insofar as new, informal modes of decision-making become established, EP decision-makers may, in their interactions with Council

officials, increasingly blur the formal Treaty bases on which formal EP-Council relations are supposed to operate. As previously stated, these new, less formal modes of interaction require close personal contact between sets of actors in both the EP and Council who deal with each other on a repeated basis and who trade favors in order to get legislation through. This reliance on personal contacts and "deformalization" of relations has clear implications for the policy process. It also potentially facilitates new Treaty revisions in the future: as policy areas now under consultation become increasingly treated in practice "as if" they were under codecision, it will become increasingly easier for the EP to persuade member states of the benefits of formal Treaty revisions that recognize the *de facto* state of affairs.

CONCLUSIONS

In the preceding discussion, we have sought to detail the rich web of informal institutionalization that has sprung up around the codecision process, and the complex relationships between formal and informal institutions that have been created in this process. We suggest that these processes provide support for our main hypotheses. The introduction of codecision in Maastricht had complex rather than predetermined results in terms of its effects on the respective roles of the Council and the EP in the legislative process. This led to a phase of bargaining, as our theory would have predicted, in which each side sought to ensure that the resulting dispensation favored its interests. The bargaining strengths of actors were not fully determined by existing formal institutions. Indeed, the formally "weaker" body, the EP, succeeded in getting important concessions. It did so by linking together legislative actions and by demonstrating its willingness to bring down specific items of legislation that were important to the member states in order to secure its overall institutional position. The EP won most of the concessions that it sought; its bargaining position was enhanced by its relative insensitivity to failure (its willingness to bring down items of legislation or block them), its different time horizons (it was more prepared to delay legislation than was the Council) and its possession of strategic resources (MEPs were better able than the understaffed Council to deal with tortuous conciliation procedures).

These processes of informal institutionalization support our claims. The EP and the Council did not treat each piece of legislation as a one-shot game, as standard accounts suggest. Instead, individual items of legislation were linked together through a protracted bargaining phase in which both the EP and the Council struggled over the general terms under which they would interact in the legislative process.

Further, the bargaining phase gave rise to informal institutions, trialogues and associated sets of rules, which reflected the EP's success in securing a say in decision-making and which have provided a *modus vivendi* for the two bodies in the legislative process. These institutions have had direct effects both on the possibility of cooperation in the leg-

islative process and on the division of the benefits of that cooperation. Under the trialogues, the EP receives a much greater role in the legislative process than the Council was initially prepared to grant it. These informal institutions, in turn, led to important changes in the codecision procedure in the Amsterdam Treaty. Not only was the Council's ability to reintroduce a common position removed (Hix), but a new set of arrangements designed to facilitate "early agreements" was introduced, in large part because of the kinds of informal agreement that had proved possible under trialogues and the wish of the Council to extend these informal agreements to earlier stages of the codecision process.

A new phase of bargaining has begun in the wake of the Amsterdam changes to the codecision procedure, one in which the Council and the EP are again struggling over the terms under which they should work together. While the Council wishes to limit its direct cooperation with the EP to informal forms of dialogue, the EP is eager to use these new forms of decision-making as the basis for a redefined relationship between the Council and the EP in which Council representatives are obliged to come to EP committees. While it is too early to discern the likely final outcome, Council officials are clearly pessimistic about their ability to prevent the EP further increasing its powers vis-à-vis the Council. As one official describes it,

Parliament wants to be "top dog." They are constantly building, piece by piece, brick by brick, and the trend has been over recent Treaties to give them more powers, to give them a greater role. (interview with Council Official A)

This is the result of deliberate strategic action on the part of the EP, which seeks to establish informal institutions and then leverage them into formal change. "When you get an informal procedure established with Parliament, they want to concretize it in the Treaty, or in an interinstitutional agreement" (interview with Council Official A).

Finally, we note that insofar as our model has empirical bearing, it potentially provides important insights into the European integration process by illustrating a new set of mechanisms whereby European integration may take place. Our account has some similarities with recent work from neofunctionalist (see especially Stone-Sweet, Fligstein, and Sandholtz)²⁰ and historical institutionalist (Pierson) perspectives. However, by more precisely setting out the relationship between informal institutions and formal institutions, it provides new insights into the circumstances under which supranational actors such as the EP may come to play an increasingly important role in the EU legislative arena. As relations between the EP and the Council become more and more dominated by informal, rather than formal, arrangements, the bargaining weight of the EP naturally becomes greater than it would have been in a political process entirely dominated by the member states. This is not to say that informal institutions will benefit the EP (or other supranational actors) under all circumstances. One may imagine circumstances under which member states manage to seize back decision-making powers that they

have lost over time through seeking to change the terms of informal bargaining.²¹ However, we predict that as long as those factors we have identified as affecting bargaining power tend to prevail in the direction of the EP, one may expect that informal arrangements will tend to favor the EP more than the Council. Continuous constitution-building, when it is considered in terms of the iterative relationship between formal and informal institutions, may favor actors such as the EP that are relatively weak in the formal Treaty negotiations over the longer term.

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NOTES

1. The European Commission also plays a role in the codecision process. For purposes of simplicity, we provide only a cursory discussion of the Commission in this article.
2. Insofar as rational-choice accounts that take account of these factors may be considered to fall under the rubric of historical institutionalism (Pierson), our account may be identified as a variant of historical institutionalism.
3. Efforts to create more refined equilibrium concepts that would narrow down the field of possible outcomes have borne little fruit (Kreps 1990a).
4. While this distinction is commonly made in the theoretical literature, it is less common in the literature on the EU, in which bodies such as the Commission are often referred to as institutions (Héritier 1999). Given our specific goals in this article, we feel it appropriate to draw a clear distinction between the two concepts and to state this in order to avoid confusion.
5. Indeed, there is already substantial empirical evidence that such informal institutions have an important effect on interactions between the EP, the Commission, and the Council (Héritier 1999, 2001b; Stacey).
6. Rules that simply serve to lubricate decision-making without implications for the balance of power between actors (see also the distinction made by Stacey) are of no interest to us here. Knight (1992) suggests that the problem of equilibrium selection in infinitely repeated games, where different equilibria have different distributional consequences, may itself be treated as a mixed-motive coordination game in which power differentials are likely to dictate the equilibrium chosen.
7. One of the basic claims of the literature on contracting is that it is impossible to write "complete contracts" that specify every contingency in advance for reasonably complex social relationships.
8. There is evidence of legislative actors strategically referring issues to the Court of Justice in order to obtain interpretations of the Treaty that suit their interests. See for example, the discussion in Corbett, Jacobs, and Shackleton of how the EP chose to go to the Court of Justice with the Isoglucose case in order (successfully) to secure a ruling that would affirm its ability to delay legislation indefinitely (and thus win concessions) under the consultation procedure. The Council, in its turn, strategically chose a case that would

- allow it partially to reverse the effects of the Isoglucose ruling and successfully brought this to court (Interview with Council Official A, October 2001).
9. Simon Hix gives the example of the so-called "Ken Collins" amendment, intended to block a tactic frequently employed in codecision by the chairman of the Environment Committee.
 10. Here our predictions are at variance with those of Hix, who argues on the basis of one-shot games that member states will only formalize informal gains at the Treaty level when two conditions are fulfilled: (1) there are efficiency gains to so doing; and (2) there are no implications for the distributional balance of power. If, in fact, member states and other actors (in our example, the EP) are engaged in an iterated relationship, this simple result does not necessarily hold. Instead, member states may *have* to make concessions to other actors in order to achieve efficiency, insofar as efficiency involves the EP refraining from blocking the legislative process. See below.
 11. The need of member-state governments to see legislation on key issues has worked to the EP's advantage in many instances. Member-state governments are more directly exposed to electoral pressures, and thus more sensitive to failure. Furthermore, differing time horizons have played a role: individual council presidencies have typically adopted legislative priorities for their six months in office, which has had the effect of weakening their bargaining power. Clearly, this has varied over issues, but in many issues, the EP has been able to use the time-sensitivity of member-state governments to extract concessions. For example, in the Local Loop Directive (Com (2000) 394; 2000/0185 [COD]), the perceived urgency of the matter allowed the EP's negotiators to extract important concessions in the teeth of opposition from powerful member states such as Germany (interview with MEP A, October 2001).
 12. The EP has blocked or explicitly sought to block legislation under codecision only in a relatively small number of instances, in nearly every instance in order to protect perceived institutional prerogatives (EP Activities Report, 1999). The main exceptions are the Biotechnology Directive, which failed in plenary because of ethical worries among many MEPs, and the Takeovers Directive of this year.
 13. We note that the EP was only partially successful in its demands; we intend to address the complex saga of comitology in future joint work with Fredrick Bergström.
 14. The following discussion is primarily based on Hix (2002).
 15. Hix's example of such a rule, the "Ken Collins" amendment, is, like the removal of the third reading, a formalization of an informal rule of practice that the EP and Council had worked out at a previous juncture (interview with Commission Official, September 2001).
 16. Conciliation itself, as set out in the Maastricht Treaty, is based on an earlier quasiformal agreement between legislative actors—the 1975 conciliation procedure, introduced primarily to mitigate budgetary conflict. See Corbett, Jacobs, and Shackleton.
 17. This was particularly true in briefs with a high degree of time urgency, in which the Council was especially concerned with bringing agreement through in the first reading. As another MEP describes it, under these new procedures it "is not as open . . . to the national delegates of Council to play their preferences in the way they might have done" (interview with MEP B). We note, however, that while this increases the agenda-setting power of the EP, it also presents problems for the EP in terms of democratic legitimacy. See below.
 18. An MEP prominent in interinstitutional discussions also describes how the Council has to disclose its "set of revealed preferences" in order to facilitate decision-making under the new rules (interview with MEP B, March 2001).

19. These bargaining processes are taking place within the Council and the EP, as well as between them. We will discuss the interaction between intra-Council/EP and inter-Council/EP bargaining processes in a forthcoming work.
20. Our work provides a practical example of the "institutionalization of European space" that has many features in common with that of Stone-Sweet, Fligstein, and Sandholtz, although it emphasizes dyadic disputes rather than triadic dispute resolution (Stone-Sweet) as a causal factor.
21. Alternatively, the Council may ask the Court of Justice to specify what constitutes nonessential features of legislation, thus removing issues from the codecision procedure and hence from the EP's reach (Bergström).

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