Informal Governance in the European Union
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CONCLUSION AND EXTENSION

Why do governments carefully design formal rules only to depart from them repeatedly? What makes the EU and other international organizations work in reality?

The central argument of this book is that informal governance is critical for understanding not just how institutions work day to day, but, crucially, why they work and persist at all. Informal governance is the result of an informal norm of discretion among governments that prescribes that governments facing unmanageable domestic pressure to defy the rules should be accommodated. The resulting practices of informal governance, therefore, add a flexibility to the formal rules that permits the member states to keep the EU embedded in the societal interests it is based on.

Formal rules bolster states’ commitments to cooperation by signaling their willingness to pursue the EU treaty’s objective of deep economic integration. However, the patterns of societal interdependence that underpin the European institutions inevitably change in ways that were not foreseen. Situations are bound to arise where following the rules, although beneficial for a country as a whole, imposes concentrated adjustment costs on a group at the domestic level. A group thus affected will then mobilize against cooperation and pressure its government to renege on its commitment. We referred to this problem as political uncertainty.

Crucially, the defiance of an institutionalized commitment, whether in the form of obstruction or outright defection, harms all governments at once, even those whose interest groups are not suffering, because it creates doubts about the
commitment’s credibility and, therefore, about one another’s future cooperative behavior. For this reason, all governments prefer rules with added flexibility that avert the possibility of their institution’s sustaining damage.

Political uncertainty, therefore, gives rise to an informal norm of discretion that prescribes that governments under unmanageable domestic pressure ought to be accommodated. It manifests itself in informal governance as states collectively depart from the rules in order to exercise discretion. However, the norm is vague and prone to abuse when the conditions that justify the accommodation of another government are not easily observable. Departures from what the rules stipulate, therefore, risk undermining the rules’ credibility when there remain doubts about the legitimacy of the use of informal governance. To resolve this tension between formal commitments and informal flexibility, the member states consequently delegate the decision to adjudicate on demands for the accommodation of domestic pressures to a trustworthy government.

As a result, formal and informal institutional elements complement each other and sustain a deep level of integration that neither formal rules nor informal norms alone permit. This implies substantively that the European Union has been able to achieve and maintain the depth of economic integration not only because of its intrusive supranational institutions but also because informal governance allows the member states to flexibly tailor the costs of economic integration to what the domestic level is capable of bearing. Because the theory emphasizes what has been called the “liberal” insight in International Relations—that for international institutions to be effective, they constantly have to be reembedded in the changing interests and values of their members—we referred to it as Liberal Regime Theory.

Four tasks remain for this concluding chapter. The first is to summarize and evaluate the empirical evidence for and against Liberal Regime Theory and its main rivals. The second is to evaluate the theory’s implications for the scholarship on European integration. The third task is to discuss the implications of this theory for the study of international organization more broadly. Finally, we finish by discussing the normative implications of our findings for European and global governance.

Summary and Discussion of the Findings
Although informal in nature, the norm of discretion has two distinct implications that can be observed. First, informal governance practices vary systematically over time and across issue areas with the extent of political uncertainty. Second, states delegate the authority to adjudicate on ambiguous demands for discretion
to a trustworthy political body. We then specified these general predictions for
the context of EU decision making, multiplied their testable implications, and
evaluated them in light of rival theories.

The evidence presented in this book largely confirms Liberal Regime Theory.
Chapters 2 through 5 demonstrated that informal governance is not just ran-
dom but varies systematically with the extent of political uncertainty across issue
areas. Thus, informal governance is less notable in an issue area with exception-
ally low political uncertainty—namely, the Common Agricultural Policy, which
is deliberately designed to protect farmers from excessive adjustments. Since this
exceptional level of protection makes the timing and extent of domestic pressure
far more predictable than elsewhere, there is less demand for flexibility and, thus,
less informal governance. In all other issue areas of economic integration, mem-
ber states adopt practices that allow them to flexibly gain collective control of the
agenda, accommodate governments facing excessive political pressure at home,
and control the implementation of legal acts. As expected, the emergence and use
of these practices is most often accompanied by conflicts between supranational
actors, on one side, and the member states, on the other side, rather than among
the member states themselves.

Chapters 6 through 8 evaluated the second hypothesis, which states that gov-
ernments delegate the authority to adjudicate on ambiguous demands for dis-
cretion to a trustworthy agent. Applied to the context of the European Union,
we expected that governments would delegate this task to the country holding
the Council presidency and then compel it to drop legislative dossiers from the
Council’s agenda where this government’s judgment cannot be trusted.

Once again, the findings largely support Liberal Regime Theory. We first dem-
onstrated that the country holding the Council presidency is invested with several
adjudicatory prerogatives as a direct result of the informal governance practices
described earlier in the book. The negotiation of the Working Time Directive
then illustrated how governments in charge of the presidency assess ambiguous
demands for discretion. In this case, the member states were, in principle, ready
to accommodate the British government when a Commission proposal threat-
ened to impose high adjustment costs on British employers. Yet the cacophony of
recalcitrant voices in the United Kingdom made it difficult to determine whether
and to what extent special accommodation was necessary. As predicted, the
member states refused to defer to the Portuguese presidency’s assessment of the
matter, because this government shared some of Britain’s views and, therefore,
faced an incentive to exaggerate its need for accommodation. Countries holding
the presidency with no such conflict of interest, however, faced no difficulty in
wielding adjudicatory authority in the Council. In short, the collective evidence
suggests that the European member states have found a way to add flexibility to
the formal rules without undermining the credibility of the commitment that these rules embody.

To be sure, Liberal Regime Theory is not deterministic, and there are various phenomena that are difficult to square with its predictions. First of all, only a few observations concerning the implementation of EU laws, discussed in chapter 5, corroborate the theory. Contrary to the expectations of Liberal Regime Theory, the comitology system, which initially allowed the Council to flexibly determine the scope of delegation and the Commission’s discretion, was increasingly codified to the extent that the member states started looking for other, more flexible ways to implement EU policies through agencies or national administrations. By distinguishing more clearly between legislation and implementation, this codification curtailed the member states’ ability to flexibly alter measures that threaten to breed strong conflict at the domestic level. These developments are probably best explained by the European Parliament’s capacity to twist the Council’s arm by withholding their agreement to parts of the budget or to the extension of important EU laws.

In fact, the European Parliament quite often frustrated the member states’ attempts to gain flexibility. This was most obviously the case in the implementation of policies, but it also occasionally managed to seize control of the timing of decisions as well of the Council’s attempt to reduce the salience of an issue. Given that the recent Lisbon Treaty extended parliamentary involvement in legislation, the European Parliament is likely to continue to challenge the member states’ quest for informal flexibility.

Finally, the evidence regarding the European Council is more in line with the predictions of Classical Regime Theory instead of Liberal Regime Theory. Although this extralegal institution allowed the chiefs of government to narrow the Commission’s discretion by presetting the legislative agenda, they did so across the board and not, as predicted by Liberal Regime Theory, only in issue areas of high political uncertainty.

All things considered, however, the theory performs well. The member states’ drive for informal flexibility in areas of political uncertainty turns out to be a very important factor in the EU’s institutional development through the years.

**Implications for the Study of European Integration**

The book’s findings have a number of implications for the study of European integration. As mentioned in the introduction, this book contributes to a debate between intergovernmentalists and neofunctionalists about supranational
autonomy. This debate has gone around in circles. Scholars in the neofunctionalist tradition, which sees supranational actors as the driving force behind continuous integration, cite various examples from the history of European integration, such as the rise in power of the European Court of Justice and the European Parliament, to demonstrate that supranational actors exploit control gaps to enhance their autonomy at the member states’ expense. Intergovernmentalists, in turn, point to the fact that, given that the member states are the masters of the treaty, there are ultimately limits to supranational autonomy. Yet, while neofunctionalists have had difficulties generalizing from these cases, intergovernmentalists have failed to clearly specify where the limits of supranational autonomy lie.

This book seeks to reinvigorate the debate by providing a testable argument about the absolute limits of supranational autonomy. The member states assume collective informal control of the organization when supranational action threatens to generate unmanageable domestic pressure for the defiance of economic integration, which would ultimately prove disruptive for the EU as such. In testing this argument, this book demonstrates the pervasive nature of informal governance practices, most of which grant the member states far more collective control of the legislative process than the treaty provisions alone.

Against this backdrop, it seems necessary to reevaluate what we know about the EU’s formal institutional development. The member states’ institutional choices in the various treaty revisions can be properly understood only against the background of the existing mix of formal rules and informal governance. Thus, it seems probable that some member states were willing to extend the use of majority voting knowing that they would not be brought into situations in which EU laws would generate domestic conflicts. Similarly, some states’ support of the European Parliament’s empowerment may be due in part to its readiness to participate in informal trilogues with the Council and the Commission.

The insight about the pervasiveness of informal governance also has implications for debates about legislative bargaining in the EU. A large number of studies of EU politics approach the EU as a political system similar to that of its member states—namely, based on a stable set of formal rules that are constant constraints on the legislative actors’ interaction. On that basis, so-called procedural models investigate how these rules affect who gets what out of the legislative bargaining. For that purpose, these models assume that the legislative actors consider only one another’s actions and what they can achieve within these procedures. By implication, they ignore that each actor could, in principle, take actions outside the procedures by obstructing, delaying, or openly defying a decision, and that these actors, therefore, care about how such outside actions affect the value of their institution. Consequently, if we allow for the EU’s legislative actors to take actions outside the formal rules, decision outcomes can no longer be predicted
merely from knowledge of those procedures and the legislative actors’ preferences (similarly, McKeown 2009, 288). The analogy of the EU as a political system ceases to be useful in the analysis of EU politics.

The book’s argument about the problem of political uncertainty points exactly to the limits of this analogy. The member states deal with the repercussions of political uncertainty by assuming informal control of the EU institutions in order to prevent the formal rules from creating disturbances in the domestic politics of collective action. Thus, to understand EU politics, it is necessary to look beyond official procedures to the member states’ incentives to mitigate their effects on the domestic level. This argument is in line with the results of empirical tests of various formal models of legislative bargaining, in which procedural models perform quite poorly. The results suggest, as Chris Achen concludes, that “[however] decision-making is carried out, it does not seem well described solely by the formal rules. Informal norms and procedures appear to play a more central role” (Achen 2006a, 295; see also Steuenberg 2000, 370).

Against this backdrop, it is easy to see why, despite all progress in the field, the scholarship has such a hard time detecting traces of stable patterns in preference, cleavages, and coalitions within the Council and the European Parliament. This book takes the difficulty of predicting preferences as its starting point, arguing that, in a dynamic environment like this, situations are bound to arise where economic integration generates potentially disruptive conflicts at the domestic level. In order to relieve a government from unmanageable domestic pressure against the EU, the member states mitigate the formal rules’ effect through informal governance. To be perfectly clear, this does not imply that these rules are not effective. On the contrary: precisely because the formal rules are so effective, they also harbor the potential of concentrating the necessary adjustments on a single group. And precisely because the rules’ effectiveness is so beneficial to all the member states, they have an incentive to prevent one another from withholding compliance with them.

Having said that, this book does not pretend to be the final word on the topic of informal governance. I probably have only scratched the surface. Since the lack of systematic data is endemic to the study of informal governance, new material and refined measures of the variables of interest promise to offer further important insights. For example, a closer look at the Commission reveals that national influences on its internal politics are more important than one might have expected. This finding casts doubt on some prominent models of agenda setting, which assume that the Commission holds invariably strong preferences for high levels of integration (Garrett and Tsebelis 1996, 280). It seems fruitful to relax this assumption to investigate further the conditions under which the Commission acts independently of the member states, reacts
to national ad hoc influences of individual member states, or is responsive to collective demands on the part of the Council. As discussed below, research like this also promises to shed new light on debates about the so-called democratic deficit of the EU.

For reasons of scope and feasibility, this book also confined its focus to the lawmaking stage, thus neglecting the enforcement of EU laws through the European Court of Justice and domestic courts. As argued in the introduction, the fact that the EU’s legal system is based on a general consensus on its extraordinary usefulness, and not on a central monopoly of violence, makes it even more necessary for the member states to sustain this belief and eliminate any reason for noncompliance at the earlier stage, when laws are being made. Still, the practices surrounding the EU’s legal system are another promising path of research, not the least because some of the European Court’s judgments that curtailed the power of trade unions or opened collective goods such as the national education system to other EU citizens have been highly controversial and raised doubts about this system’s democratic legitimacy (Scharpf 1999, 61).

Imlications for the Study of International Organizations

The theory of informal governance is not limited to the European Union. Certainly, the European Union is an international organization unlike any other. There is hardly another organization in the world with an equally rigid legislative process and legal system. However, these are differences in degree, not nature. The European Union, just like any other international organization, is based on a set of international treaties. It can persist only when the effects of EU laws constantly regenerate the member states’ interests in adhering to them. This book, therefore, proposes a new way of thinking about how international organizations work and why they persist in a dynamic environment.

Three aspects of Liberal Regime Theory determine its generalizability: patterns of interdependence, rigid formal institutions, and governments’ vulnerability to domestic pressure.

The situation described in this book is one of high interdependence where all states depend on one another’s cooperation in the pursuit of their interests. Their cooperation, however, depends on the EU’s capacity to induce compliance with its rules. Consequently, all member states have a strong incentive to prevent one another from weakening this capacity by withholding compliance. If the gains that the institution helps states to reap were negligible, they would not be ready to accommodate one another in order to maintain the institution’s strength.
A first empirical proposition that follows is that, everything else being equal, high interdependence that entails great benefits from cooperation is conducive to the development of a norm of discretion among the members of an international organization.

This discussion about patterns of interdependence raises the question of how the theory relates to power. One might object that the member states’ interdependence in the EU is not very symmetric in the sense that small states are more dependent on the cooperation of large states than the other way round. In monetary policy, for example, most Eurozone members depend far more on Germany’s willingness to participate in the system than Germany depends on the participation of others in the Eurozone. Under these circumstances, Randy Stone (2011, 118–20) argues, Germany as the dominant state with viable outside options to the Eurozone may use informal governance procedures to assume control of this policy. This is certainly true in monetary policy, but less so in other issue areas. In most other policy areas, especially those related to the Single Market, staying outside is not a viable option for any member state, not even for Germany, and the threat to leave the Single Market is hardly viable. Put differently, political uncertainty in situations characterized by asymmetric interdependence stems from the uncertainty about a large state’s true commitment to an international organization. In situations characterized by more symmetric interdependence, however, political uncertainty stems from uncertainty about each state’s vulnerability to domestic pressure. In both cases, states will use informal governance in order to accommodate the disruptive force before it damages their cooperation.

Political uncertainty is consequently the second aspect that defines Liberal Regime Theory. As we defined it, political uncertainty, which gives rise to the norm of discretion, describes the unpredictability of governments’ time-inconsistent preferences. For example, the “apple wine” case in the introduction to this book illustrated how a localized distributional shock in a remote German region suddenly turned into excessive domestic pressure to defy an imminent EU law. Because it is determined by groups’ capacity for collective action as well as governments’ susceptibility to domestic pressure, factors that alter these variables and consequently reduce political uncertainty, everything else being equal, should also alter the demand for a norm of discretion. This book took advantage of the fact that the Common Agricultural Policy to some extent operates like social insurance mechanisms: it shelters farmers from unexpected adjustment costs and consequently reduces this group’s incentives to mobilize in response to a distributional shock. It seems worthwhile to assess whether member states with generous welfare systems, all else being equal, are less likely to be accommodated through informal governance than those without.
The third and final aspect that determines Liberal Regime Theory’s generalizability is institutional rigidity. Recall that in the case under study, rigid rules enable a level of economic integration that bestows tremendous benefits on the member states so that all of them have an incentive to preserve the rules’ effectiveness. An empirical proposition that follows is that a strengthening of formal commitments, everything else being equal, increases the value of the institution and, therefore, the demand for a norm of discretion that protects it. One case in point is arguably the Dispute Settlement Understanding of the World Trade Organization. It has undeniably more teeth than its predecessor, yet about two-thirds of all initiated disputes are settled informally “out of court” (Busch and Reinhardt 2000–2001). From the perspective of Liberal Regime Theory, this informal governance is due to an implicit understanding among governments that it is in everyone’s long-term interest to accommodate a member under intense pressure for protection where a panel, bound by the principles of legal reasoning, is unable to authorize such concessions for domestic political reasons.

In addition to predicting patterns of informal governance, the theory also offered insights about how states determine the limits of their formal commitments. To determine whether formal rules apply or whether informal governance is pertinent in a specific situation, the member states delegate the authority to adjudicate on demands for informal governance to a government they can all trust (Kleine 2013). This second implication of Liberal Regime theory sheds new light on the information-providing role of institutions. Students of (international) cooperation typically analyze whether and how institutions enable cooperation by increasing the level of information about actors’ prospective or current rule-following behavior (Weingast 2002, 673; Keohane 1984). In more dynamic settings, however, where it is sometimes necessary to depart from the official procedures in order to sustain cooperation, actors also require “extra-model” information (Svensson 2002, 23) that permits them to assess whether a rule departure is justified in a specific context. Yet how states elicit that kind of contextual information is a question that has so far received surprisingly little attention (Tomz 2007, 30; Pelc 2009, 350). Against this background, it would be interesting to investigate the role of rotating presidencies in other international forums, such as the G-20 or the United Nations Security Council, looking at whether and how they determine and signal the need to accommodate a particular state through informal governance.

More generally, this book has sought to go beyond the static character of many institutional analyses to offer a dynamic theory of cooperation, which takes as its starting point that the societal patterns that underpin an institution often change in unpredictable ways. For an institution to remain effective under these conditions, states constantly have to adapt it to its changing environment.
Consider how a dynamic perspective reveals a new layer of delegation problems. In the standard view, the act of delegation defines states and international organizations as parties in a principal-agent relationship. The major problem is then for the principal to prevent the agent fromtransgressing its preset discretion. However, if we consider the environment of this relationship to be inherently dynamic, there emerges another, potentially more severe problem. Rather than preventing a “runaway” international organization from overstepping its discretion, there will be situations in which states need to prevent the organization from doing exactly what it is supposed to do. In other words, states need to make international organizations responsive to their changing collective interest without compromising the organizations’ credibility. This brings us to the book’s normative implications.

### Normative Implications for European and Global Governance

The informal governance practices described in this book may confirm some suspicions that European integration, and global governance more broadly, are secretive and elitist projects. Governments adhere to norms that are not put into writing, and unelected officials prepare decisions in informal committees that accompany every stage of the EU’s legislative process. International organizations, skeptics charge, exclude the public and lack the transparency necessary to hold decision makers accountable. Similar charges can be heard in the very advanced debate about Europe’s “democratic deficit.” Somewhat counterintuitively, this book argues that informal governance, on the contrary, enhances the EU’s legitimacy by incorporating important interests into the legislative process that would otherwise be ignored.

Let us briefly review the state of the debate. At least since the rejection of the Treaty of Maastricht in a Danish referendum in 1992, it has become a commonplace to say that the European Union suffers from a “democratic deficit”—a term that has become a placeholder for a variety of factors that alienate citizens from EU politics.

In a widely cited article, Andrew Moravcsik defends the EU’s “democratic deficit” as necessary for the EU to work. If judged according to reasonable standards for democratic governance, and not abstract normative criteria, he maintains, the EU is not less democratic than its member states (Moravcsik 2002, 605). Yes, the member states deliberately remove decisions from participation by delegating decisions to nonmajoritarian institutions. However, there is nothing special
about this. The delegation of authority to unelected bureaucrats is a common practice in member states as well, because it facilitates the production of public goods by enabling governments to commit credibly to a certain policy and to elicit policy-relevant expertise (similarly, Majone 1994). According to Moravcsik, the member states delegated authority to the EU in precisely those areas where citizens want the EU to have authority and where many advanced industrialized states, including the EU member states, typically insulate decision making from direct political contestation anyway (Moravcsik 2002, 613).

Andreas Follesdal and Simon Hix disagree. The European Union, they surmise, could still be more legitimate and efficient if it allowed for more democratic contestation. According to them, the lack of contestation is, therefore, the root of the “democratic deficit.” In domestic political systems, elections provide opportunities for the public to signal their preferences to politicians, and to oust politicians from office who do not act in the public interest (Fearon 1999). The election mechanism renders politics more representative of the general public, since it allows citizens to signal their will, and a responsive government will implement their instructions to generate outcomes that are closer to what the public wants (Manin, Przeworski, and Stokes 1999, 10–12). Against this backdrop, Follesdal and Hix argue that more opportunities for political contestation at the EU level promise to draw citizens’ attention to the EU’s hidden distributive effects and, as a consequence, make currently apathetic voters aware of the EU’s significance for their everyday life. Having come to this realization, citizens will form meaningful views about the EU’s general direction, to which politicians will become more sensitive (Follesdal and Hix 2006, 546). Put differently, democratic contestation promises to make the EU more responsive to, and therefore more representative of, citizens’ interests (Hix 2008, chap. 3).

The main bone of contention between Moravcsik, on one side, and Follesdal and Hix, on the other side, concerns the question whether the EU meets the conditions for meaningful participation in democratic contestation (Moravcsik 2008). The EU, Moravcsik contends, deals mainly with issue areas such as consumer protection and environmental regulation that are plainly boring in the eyes of the public. In these issue areas of low saliency citizens are rationally ignorant, which means that they cannot be expected to make the effort to reach an informed decision and deliberate in a meaningful way (Moravcsik 2002, 615). Follesdal and Hix, however, find that there is nothing inherently “boring” about EU politics. Its low saliency in the eyes of EU citizens is merely a function of the EU’s political process that denies citizens the opportunity to become interested in these matters.

I agree with Follesdal and Hix that responsiveness is a key issue in the debate about the EU’s democratic deficit. For international institutions to remain
legitimate they constantly have to be reembedded in its context, which consists of the interests and values of the member states' societies; thus, when an institution's context changes, the institution has, to some extent, to adapt with it. I also agree that the low saliency is largely the result of the EU’s political process, especially its informal governance, which effectively depoliticizes EU politics when it threatens to generate strong distributive conflicts at home.

I disagree, however, with the diagnosis of the EU’s democratic deficit and Hix and Follesdal’s remedy for it. Even if Hix and Follesdal were correct in their analysis and the EU lacked responsiveness, it is not guaranteed that democratic contestation would render the EU or any other international organization more responsive. Democratic elections put a majority in power and, conversely, skew politics for the duration of a legislative period systematically against a minority of the population. In national political systems based on a thick common identity and a central monopoly of force, minorities accept this temporary bias knowing that they might get the chance to wield power after the next election. In the EU, however, it is far-fetched to believe that a substantial part of the population would put up with an EU that is systematically biased against it, even if the next election might turn this bias in their favor. Is it conceivable that, for example, a British Conservative government would continually defer to the decisions of a socialist EU leadership? Would it not systematically obstruct decisions and compliance with EU laws, if not leave the European Union completely? In other words, instead of making it more responsive, democratic contestation is likely to render the EU inherently unstable.

Yet, and more important for the purpose of this book, I disagree with the diagnosis and contend that the EU is already far more responsive than Follesdal and Hix suggest it is. Recall that the member states collectively accommodate governments that are under intense pressure by domestic groups facing immense adjustment costs from economic integration. This implies that, while the EU’s legislative process commits its member states to the deepening of economic integration, informal governance brings into the EU’s legislative process those who are most immediately affected by EU politics. The EU is therefore responsive to important voices that would otherwise be ignored. Thus, the argument can be made that informal governance has so far allowed the EU to maintain a level of legitimacy that is necessary for it to continue to exist.