

Trapped in ideology? The law and what judges bring to the table

Reading questions: week 3

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To prepare for class, please familiarize with the assigned readings. The reading questions are intended to help you in your preparations. If you want to prepare in groups, you may reach out to the students you do your presentation with. The supplementary readings are useful to situate the readings in the broader debate and/or provide alternative texts that cover the same ideas.

To what extent can we discern an ideological direction in the Court's case law? And what might explain this drift? The two first readings focus on the output of rulings from the perspective of the Court's effort to embed markets in society. They seem to agree on its role, but disagree on the content and consequences of the Court's case law. Both have in common that they treat the Court as a unitary actor, that it has produced policies that were not

initially spelled out by the legislator, but they ignore *why* judges would react in such a way.

The third reading seeks to explain the variation in the Court's decisions, i.e. why the Court's case law is seemingly inconsistent. In doing so, it "opens the black box of judicial decision making" to consider what individual judges bring to the table; their legal and political perspectives. The third article also bridges this lecture with the topic for next week.

Readings

- Caporaso and Tarrow (2009) argue that the Court has leveraged its case law on free movement of workers to embed the market in European society.
- Höpner and Schäfer (2012) counter-argue that this is only part of the Court's case law, and – when successful – it runs the risk of popular backlash.
- Zhang, Liu, and Garoupa (2018) consider how the legal culture and ideology of judges influence court decisions.

Reading questions:

- Scharpf (1988) has written extensively on the "joint decision making trap" and "positive" vs. "negative" integration. What do these three concepts mean? While reading, can you find how Caporaso and Tarrow

(2009) and Höpner and Schäfer (2012) relate to political division and the role of courts in EU policy making?

- What is “embedded liberalism” and who coined the term? Ask Chat GPT to provide you with a definition and – while reading Caporaso and Tarrow (2009) – look for how the authors apply the concept.
- Consider how Caporaso and Tarrow (2009) justify the application of the “embedded liberalism” framework to the ECJ. How does this fit with our argument of why high courts should be considered as political actors? (We will see more of Cichowski in our session on legal mobilization)
- According to Caporaso and Tarrow (2009), what kind of “social policy” has the ECJ spearheaded? An why did this come from the Court rather than the political branch? What concepts have the authors borrowed from Majone and Scharpf to make their argument?
- What are the three phases of the Court’s case law on free movement of workers? And how do Caporaso and Tarrow (2009) link it to the “embedding of markets”?
- What are the “varieties of capitalism” and who coined the term? Ask Chat GPT to provide you with a definition and – while reading Höpner and Schäfer (2012) – look for how the authors apply the concept.
- What is, according to Hayek, the definition of an “interstate union”, and how does, according tot Höpner and Schäfer (2012), the EU fit this description? (see also Weingast (1995) from DAK2).

- What are the three dimensions of social and economic integration according to Höpner and Schäfer (2012)? Where do they situate Caporaso and Tarrow (2009)'s contribution?
- What is “market-shaping” and “market-making” integration? What is the role and policy content of the Court’s case law in these two dimensions?
- Where do Caporaso and Tarrow (2009) and Höpner and Schäfer (2012) agree? And where do they diverge? Höpner and Schäfer (2012) claim to take Caporaso and Tarrow (2009)'s claim to its logical conclusion. What is it and why? In general, what is the policy content (ideological direction) of the Court’s case law in these two accounts?
- Höpner and Schäfer (2012) issue a warning to the CJEU. If you were to relate this to Posner (2010)'s different approaches to judicial behavior, which one is the most relevant?
- According to Zhang, Liu, and Garoupa (2018), what are the different legal traditions in Europe and what are their main differences?
- Why do the authors control for judges’ ideology with respect to left-right policies and European integration?
- If you were to draw on Posner (2010)'s overview of different approaches to judicial politics, where would you place Zhang, Liu, and Garoupa (2018)?
- What are the different delegation decisions internal to the General

Court, and – according to Zhang, Liu, and Garoupa (2018) – why do they matter?

- What is the effect of French legal background of different judges on the Court’s propensity to rule in competition cases brought against the Commission? What is the authors’ argument for why this is?
- According to Zhang, Liu, and Garoupa (2018), what explains the variation in the Court’s case law on competition?

Supplementary readings

- Scharpf (1988) on the joint decision making trap and how member states made it all the way to tearing down barriers to trade (through negative integration), but couldn’t quite reregulate according to their plans (through positive integration).
- Stone Sweet and Caporaso (1998) present their theory of how European integration came about, provide empirical evidence and situate themselves according to intergovernmentalists and other functionalists.
- Höpner and Schäfer (2010) is a more hands-on account of their argument about the role of the CJEU in the development of a “social” Europe.
- Larsson and Naurin (2019) take issue with Höpner and Schäfer (2010)’s claim that some countries (with certain varieties of capitalism) are more often targeted by CJEU interference in government economic policies.

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